

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK SCOTT GAJOS,

Defendant-Appellant.

UNPUBLISHED

February 3, 2009

No. 281344

Oakland Circuit Court

LC No. 06-210018-FH

ON RECONSIDERATION

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant pleaded no contest to charges of breaking and entering with intent to commit a larceny or felony, MCL 750.110, and possession of marijuana, MCL 333.7403(2)(d), and was sentenced as a fourth habitual offender, MCL 769.12, to serve concurrent terms of incarceration of 19 months to 25 years for the breaking and entering conviction, and 67 days for the marijuana conviction. Defendant appeals by delayed leave granted, challenging his sentence for the breaking and entering conviction. We reverse and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises from a breaking and entering that took place at a store in Berkley in August of 2006. The presentence investigation report indicates that defendant used a screwdriver to break into the store, and was attempting to pry the cash register open when he saw the police arriving at the premises. Defendant ran out of the back of the store, stole a bicycle and rode away, saw the police, abandoned that bicycle, stole another and rode further, but then, as the police closed in on him, attempted to flee on foot. Defendant was caught, and was “arrested and booked without incident.” While at the police station, the police found a small quantity of marijuana in defendant’s possession.

The trial court’s scoring of ten points for OV 19 resulted in raising the low end of the recommended range for defendant’s minimum sentence under the sentencing guidelines to 19 months. Defendant’s sole issue on appeal is whether the trial court correctly scored the variable. We agree that it did not.

The trial court assessed ten points for OV 19, which MCL 777.49(c) prescribes where the offender “interfered with or attempted to interfere with the administration of justice.” Our Supreme Court has noted that, “[l]aw enforcement officers are an integral component in the administration of justice,” and so concluded that providing law enforcement with a false name

constitutes interference with the administration of justice. *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). In this case, however, there is no allegation that defendant provided any false information, or otherwise interfered with the police response to his crime, but for his attempt to flee in the first instance.

If merely attempting to evade discovery or capture constituted interference with the administration of justice, OV 19 would have to be scored for virtually every criminal conviction. In this case, the alternative to running away upon sighting the police would have been to stand still and await capture. We do not deem such uncharacteristic submission and surrender necessary to avoid a penalty for interfering with the administration of justice. There is no indication that, in the course of his flight from the police, defendant in fact disobeyed a command to stop. In the absence of a lawful such command, merely running from the police is no more pernicious an activity than running from anyone else, or for any other reason.

Because the evidence indicates that defendant merely ran away, without disobeying any commands to the contrary, then surrendered without incident when caught, we conclude that the trial court erred in scoring any points for OV 19.

We note that defendant has already served the 19-month minimum sentence imposed by the trial court. We conclude, however, that his request for resentencing is not moot. Scoring OV 19 at zero points moves defendant to a “straddle cell,” making him eligible to receive an intermediate sanction and immediate release at resentencing. *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007).

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis