

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ANTOINE RAY THOMAS,

Defendant-Appellee.

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UNPUBLISHED  
February 24, 2009

No. 279702  
Ottawa Circuit Court  
LC Nos. 01-025254-FC  
01-025255-FC

Before: Whitbeck, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the sentences imposed on his plea-based convictions of two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, in two combined lower court cases (Docket Nos. 01-025254-FC, 01-025255-FC). Defendant was sentenced to 96 to 300 months in prison for the robbery convictions, to be served consecutively to a two-year prison term for felony-firearm. Defendant was also ordered to pay \$881 in restitution for both cases. We affirm defendant's convictions and sentences, but remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court misscored offense variables (OV) 14 (offender's role), 16 (degree of property damage), and previous record variable (PRV) 7 (concurrent felony convictions). He asserts that PRV 14 and 16 should be scored at zero points, and that PRV 7 should be scored at ten points.

We note, however, that defendant raised these issues below at sentencing and in his motion for resentencing. The prosecutor agreed with defendant's objections, as did the trial court. In its opinion and order following defendant's motion for resentencing, the trial court held that, despite the corrections made as a result of defendant's objections, the resulting OV and PRV scores still placed defendant into a D-II scoring grid. For defendant's class A crime, this resulted in a minimum sentence range of 81 to 135 months. See MCL 777.62. The trial court noted that this was the range used during defendant's initial sentencing, a finding that is supported by the record and by defendant's assertions in his motion for resentencing. Defendant's minimum sentences for his robbery convictions fell within this range. Defendant's arguments appear to be moot. We find that defendant has not shown that any error occurred below, or that he is entitled to further relief.

Defendant also argues that the trial court erred by ordering him to pay restitution without considering his ability to pay. Because defendant failed to challenge the restitution award, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Defendant's claim is without merit. The plea agreement required defendant to pay restitution to all victims, even in the cases in which he was not charged. The Crime Victim's Rights Act, MCL 780.766(2), requires a defendant to "make full restitution to any victim of the defendant's course of conduct . . . ." The restitution statute, MCL 780.767(1), provides that "[i]n determining the amount of restitution . . . the court shall consider the amount of the loss sustained by any victim as a result of the offense." The 1997 amendment to MCL 780.767 struck all references to ability to pay as a factor to be considered when determining the amount of restitution. *People v Crigler*, 244 Mich App 420, 428; 625 NW2d 424 (2001). Under the amended statute, the "'amount of the loss sustained' is now the only factor to be considered." *People v Gubachy*, 272 Mich App 706, 711; 728 NW2d 891 (2006). Defendant's reliance on *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), is misplaced. *Dunbar* involved the imposition of attorney fees, not restitution. *Id.* at 251-256. The trial court did not plainly err when it ordered restitution without considering defendant's ability to pay.

Defendant also argues that the trial court erred when it failed to amend defendant's presentence information report to reflect the fact that counts 2, 4, and 5 were dismissed in Docket No. 01-025254-FC.<sup>1</sup> Initially, defendant was charged in that case with two counts of armed robbery (counts 1 and 2), one count of felony-firearm (count 3), and two counts of felonious assault (counts 4 and 5). Additionally, in Docket No. 01-025255-FC, defendant was charged with armed robbery (count 1), felonious assault (count 2), and felony-firearm (count 3). Pursuant to his initial plea bargain, defendant pleaded guilty to one count of armed robbery, one count of felonious assault, and felony-firearm in Docket No. 01-025254-FC, and to armed robbery and felonious assault in Docket No. 01-025255-FC. The prosecutor agreed to not charge defendant with other armed robberies or felonious assaults he had committed.

However, during sentencing, the trial court, apparently with the agreement of the prosecutor, decided that all the felonious assault charges, at least those in Docket No. 01-025254-FC,<sup>2</sup> were to be dismissed. Defendant was subsequently sentenced on the robbery and felony-firearm charges in Docket No. 01-025254-FC. These sentences were reflected in the judgment of sentences for both dockets. However, while the judgments reflect the dismissal of the remaining charges, they do not reference the felonious assault charges.<sup>3</sup>

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<sup>1</sup> The PSIR indicates that counts 2 and 3 were dismissed.

<sup>2</sup> The trial court did not reference the felonious assault charge in Docket No. 01-025255-FC.

<sup>3</sup> We also note that, in its subsequent opinion concerning defendant's motion for resentencing, the trial court acknowledged that defendant pleaded guilty to two of the felonious assault convictions. It then states, however, that the prosecutor subsequently agreed to withdraw the felonious assault charges, which led to a reduction of the scoring of OV 7 above.

Defendant's assertion appears to be correct. However, given the discrepancies in the record below, including the notations in defendant's judgments of sentence, we remand to the trial court for further clarification. If the felonious assault charges were dismissed, the trial court should amend defendant's presentence investigation report and the judgments of sentence to reflect the correct information.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Donald S. Owens