

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY WILLIAM GOULD,

Defendant-Appellant.

UNPUBLISHED

March 3, 2009

No. 280804

Livingston Circuit Court

LC No. 06-015655-FH

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

PER CURIAM.

Defendant Danny Gould pleaded guilty to charges of third-degree home invasion,¹ resisting and obstructing a police officer,² and possession of a controlled substance.³ He was sentenced to 30 months to seven years, six months in prison for home invasion, and terms of two to three years for the two remaining convictions. Following a remand from the Michigan Supreme Court, we consider, as on leave granted, whether the trial court erred in scoring offense variables (OV) 9 and 12 in connection with Gould’s conviction for resisting and obstructing a police officer. We decide this appeal without oral argument pursuant to MCR 7.214(E), and we affirm.

I. Basic Facts And Procedural History

At his plea hearing, Gould admitted that he entered without permission into the house where Cheryl Trovillion lived. Gould was in possession of Vicodin, which had not been prescribed for him and which he obtained from Trovillion. Gould acknowledged that he resisted when uniformed officers arrived; specifically, he refused to put the telephone down when told to do so. He was upstairs when the officers entered the house and, allegedly, at first thought they were burglars. However, he acknowledged that he continued to resist after realizing they were police officers.

¹ MCL 750.110a(4).

² MCL 750.81d(1).

³ MCL 333.7403(2)(b)(i).

At sentencing, Gould objected to the scoring of OV 9 at ten points, maintaining that a score of zero points was appropriate. Gould asserted it was not fair to say that the deputies were subjected to a threat of danger of injury or loss of life. At the prosecutor's request, the trial court allowed an amendment to the presentence investigation report (PSIR) to add language from the police report. Specifically, the agent's description of the offense in the PSIR was amended to quote one of the responding officers, Deputy Clayton, as follows:

While upstairs, I observed [Gould] walking away from us from the kitchen room area. . . . I identified myself and gave [Gould] clear, verbal commands to get on the ground. At that time, Deputy Vorhies joined me in giving clear, verbal commands to [Gould]. [Gould] stopped walking towards the door, and started walking towards us, not listening to commands, and verbally challenging us. Deputy Vorhies' Tazer had a misfire, then I deployed my Tazer, and [Gould] collapsed to the floor. . . .

The trial court then found that there were two to nine victims, justifying a score of ten points,⁴ as "[e]ach person was placed in danger of injury as a consequence of the failure of [Gould] to follow the lawful commands of the officers that were present."

Gould also objected to the score of five points for OV 12, contemporaneous criminal acts. Gould argued that even if he could be charged with two counts of resisting and obstructing, he committed only one criminal act. The trial court found the score appropriate, noting that Gould first failed to respond to the commands of Deputy Clayton, and then failed to respond to the commands of Deputy Vorhies. The trial court concluded that these were two separate acts.

II. Scoring Offense Variables

A. Standard Of Review

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score."⁵ "Scoring decisions for which there is any evidence in support will be upheld."⁶

B. "Unproven Facts"

Gould argues that it was improper to score these offense variables based on unproved facts to which he did not admit. Although this was deemed improper with respect to ascertaining a defendant's maximum sentence in *Blakely v Washington*,⁷ it is permissible with respect to

⁴ See MCL 777.39(1)(c).

⁵ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

⁶ *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

⁷ *Blakely v Washington*, 542 US 296, 301; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

computing the minimum sentencing range consistent with Michigan's indeterminate sentencing scheme.⁸

C. OV 9

Gould argues that the trial court improperly scored OV 9 at ten points. He maintains there was no factual basis for finding that two officers were placed in danger, as the record established only his verbal challenge. The trial court had discretion in determining the number of points to be scored, and we will uphold its decision if there was any evidence of record to support it.⁹ MCL 777.39(1)(c) provides that OV 9 should be scored 10 points if “[t]here were 2 to 9 victims who were placed in danger of physical injury or death” Here, the “verbal challenge” gave rise to a potential threat of physical altercation. Once challenged, the officers had little choice but to subdue Gould. In the course of subduing an uncooperative defendant, an officer is placed in danger of physical injury. Accordingly, the trial court properly scored this variable.

Gould further asserts, however, that *People v Chesebro*,¹⁰ compels a finding that OV 9 was improperly scored. *Chesebro* dealt with the judicial sentencing guidelines. In that case, this Court held that the calculation of victims under the similarly worded OV 6 was limited to the victims involved in the specific transaction that gave rise to the particular conviction for which the sentence was being imposed.¹¹ In *People v Gullett*,¹² this Court applied this holding to OV 9, concluding that victims in related but uncharged offenses could not be counted and that where no other children were present when the defendant committed the charged criminal sexual conduct, no other victims could be counted.

The present case is distinguishable. Here, although Gould was convicted of only one count of resisting and obstructing, two officers were present during the crime and both were put in danger by his actions. Thus, even if the crime could be parsed such that Gould could be viewed as having resisted and obstructed only one officer based on the single charge, both officers were placed in danger. The score was therefore proper.¹³

Gould also argues that the trial court's assessment of the crime for purposes of OV 9 was inconsistent with its assessment for purposes of OV 12.¹⁴ Specifically, OV 9 involved a score

⁸ See *People v Drohan*, 475 Mich 140, 160, 164; 715 NW2d 778 (2006).

⁹ *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

¹⁰ *People v Chesebro*, 206 Mich App 468; 522 NW2d 677 (1994).

¹¹ *Id.* at 476.

¹² *People v Gullett*, 277 Mich App 214, 217-218; 744 NW2d 200 (2007).

¹³ Cf. *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004) (although only one person was the victim of an armed robbery, OV 9 was properly scored at 10 points where another individual was present and responded to a call for help).

¹⁴ MCL 777.42.

based on a determination that there were two victims of the one resisting and obstructing charge, whereas OV 12 was scored based on the determination that two resisting and obstructing charges could have been brought since the evidence showed that Gould failed to heed the commands of first one and then another officer. Five points can be scored for OV 12 when there is “[o]ne contemporaneous felonious criminal act involving a crime against a person”¹⁵ OV 9 focuses on the number of people placed in danger of injury by the charged criminal act, whereas OV 12 focuses on the number of criminal acts. Two people were placed in danger by the charged criminal act but the trial court properly concluded that two criminal acts occurred. Thus, the score was proper.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O’Connell
/s/ Donald S. Owens

¹⁵ MCL 777.42(1)(d).