# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARNEST LEE ROBINSON,

Defendant-Appellant.

UNPUBLISHED
September 29, 2009

No. 286555
Wayne Circuit Court
LC No. 07-009901

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from his sentences in connection with his plea-based convictions of two counts of receiving or concealing a stolen motor vehicle, MCL 750.535(7). We affirm.

In exchange for dismissal of several other charges, and a downgrade of his habitual offender status, defendant pleaded no contest to the two charges underlying this case. Without defense objection, the prosecuting attorney reported that, on May 17, 2007, in a parking lot in Dearborn, defendant had possession of a Dodge Ram truck and also a Dodge van, knowing at the time that those vehicles were stolen and that he did not have the true owners' permission to possess them. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to serve concurrent terms of imprisonment of two to ten years, as agreed in exchange for the plea. The trial court specified that because defendant was on parole at the time of the instant offenses, he would receive no credit for time he spent incarcerated before sentencing.

On appeal, defendant argues that the trial court erred in not awarding jail credit, and in scoring one of the offense variables under the sentencing guidelines.

## I. Jail Credit

Defendant reports that he was incarcerated for 56 days leading up to the date of sentencing in the instant case. Defendant, acting *in propria persona*, filed a postsentencing motion with the trial court to have that time applied to his instant sentences, which resulted in a letter from the court's clerk advising defendant that the 56 days of jail time had been credited against the sentence from which he had been on parole at the time. Defendant now asks this Court to have those 56 days applied or credited against the instant sentences.

MCL 769.11b provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

In *People v Idziak*, __ Mich __; __ NW2d __, issued July 31, 2009 (Docket No. 137301), slip op at 1-2, our Supreme Court addressed the issue of jail credit, stating and holding:

> In this case, we consider whether a parolee who is convicted and sentenced to a term of imprisonment for a felony committed while on parole is entitled, under Michigan's jail credit statute, MCL 769.11b, to credit for time served in jail after his arrest on the new offense and before sentencing for that offense. We hold that, under MCL 791.238(2), the parolee resumes serving his earlier sentence on the date he is arrested for the new criminal offense. As long as time remains on the parolee's earlier sentence, he remains incarcerated, regardless of his eligibility for bond or his ability to furnish it. Since the parolee is not being held in jail "because of being denied or unable to furnish bond," the jail credit statute does not apply.
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> Further, a sentencing court lacks common law discretion to grant credit against a parolee's new minimum sentence in contravention of the statutory scheme. Finally, the denial of credit against a new minimum sentence does not violate the double jeopardy clauses or the equal protection clauses of the United States or Michigan constitutions. US Const, Am V and XIV; Const 1963, art 1, §§ 2 and 15.

With respect to a parolee's earlier sentence and its impact on applying and calculating jail credit, the *Idziak* Court further elaborated:

> In sum, under MCL 791.238(2), the parolee is "liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment" and actually resumes serving that term of imprisonment on the date of his availability for return to the DOC, which in this case is synonymous with the date of his arrest. The parolee is not incarcerated "because of being denied or unable to furnish bond for the offense of which he is convicted . . . ." MCL 769.11b. Because the parolee is required to remain in jail pending the resolution of the new criminal charge for reasons independent of his eligibility for or ability to furnish bond for the new offense, the jail credit statute does not apply. [*Idziak, supra*, slip op at 17-18 (omission in original).]

The Supreme Court did caution that, for a parolee who has reached his maximum discharge date while being held in jail, the independent reason for keeping him or her jailed, i.e., being a parolee who was arrested on a new crime, would be removed. *Id.*, slip op at 18 n 17. Therefore, "[i]f the parolee was then 'denied or unable to furnish bond,' the sentencing court would be required to grant jail credit under MCL 769.11b." *Id.*

Here, there is no dispute that defendant was on parole at the time of the instant offenses; defendant himself acknowledged that fact when his no-contest plea was taken. The presentence investigation report (PSIR) indicates:

> The instant offenses represent the defendant's 12th and 13th felony convictions: At the time of the instant offenses, the defendant was serving a parole term . . . for Police Officer – Assault/Resist/Obstruct and Receiving Stolen Property less than $200.00, docket #05-1692FH. The defendant was sentenced to 1 year 6 months – 3 years in 16th Circuit Court on 8/16/05. Additionally, the defendant was on parole for Receiving Stolen Property 1M less than 20M, docket #05-5163. The defendant was sentenced on 8/19/05 to 1 year – 10 years incarceration. He was paroled on 10/17/06.

The instant offenses occurred on May 17, 2007, and, according to the PSIR, he was also arrested for those crimes on that date. The PSIR shows that 56 days of jail time were served by defendant from the date of arrest to the date of sentencing; the date of sentencing was July 12, 2007. Given the maximum sentences for the crimes upon which defendant had been on parole (three and ten years), the dates that he was sentenced on those crimes (August 16 and 19, 2005), the date of the instant offenses and arrest (May 17, 2007), and given the date of his sentencing for the instant offenses (July 12, 2007), the full 56 days spent in jail could only be credited against his earlier 2005 sentences upon which he had been granted parole. Defendant, as a parolee, never reached his maximum discharge dates on the earlier sentences while being housed in jail for the 56 days between arrest and sentencing.[1] Accordingly, the trial court did not err in refusing to give defendant jail credit against the sentences on the instant convictions.

## II. Guidelines Scoring

Review of the PSIR reveals that the recommended range for defendant's minimum sentence came to 12 to 24 months' imprisonment, putting the minimum actually imposed within that range, albeit at the high end.[2] Offense Variable (OV) 16, MCL 777.46, was scored at ten points. MCL 777.46 pertains to property obtained, damaged, lost, or destroyed. Ten points are

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[1] This is true even considering that the time defendant spent on parole until the time of the instant offenses and arrest, approximately 7 months, is counted as time served against the earlier maximum sentences. *Idziak, supra*, slip op at 16 and 18 n 16 (a paroled prisoner is considered to be serving his or her sentence as long as the prisoner remains in compliance with parole terms; "each day on parole counts toward the service of the maximum sentence").

[2] We note that the scoring calculation sheet indicates that there was no enhancement whatsoever for habitual offender status, even though the judgment of sentence, consistent with the no-contest plea, reflects that defendant was treated as and guilty of being a third-habitual offender, which fact defendant himself acknowledges in his brief. If one considers defendant a third-habitual offender, the correct sentencing guidelines range becomes 12 to 36 months. MCL 777.66; MCL 777.21(3)(b). It is apparent from the record that the court and parties were not focused on the scoring given the specific sentence agreement.

to be scored where "[w]anton or malicious damage occurred beyond that necessary to commit the crime for which the offender is not charged and will not be charged[,]" or where "[t]he property had a value of more than $20,000.00 or had significant historical, social, or sentimental value." MCL 777.46(1)(a) and (b). Defendant argues that the trial court lacked a sufficient evidentiary basis for scoring ten points on OV 16.

Defendant presents this argument for the first time on appeal. If OV 16 was scored at any amount of points less than the ten points actually scored, the OV level would change and the appropriate guidelines range, treating defendant as a third-habitual offender, would be 9 to 34 months. MCL 777.66; MCL 777.21(3)(b).[3] Despite the change in the guidelines range relative to a presumed error, the minimum sentence imposed here, 24 months, would still fall within this range. In *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004), our Supreme Court, citing MCL 769.34(10), ruled that, "if [a] sentence is within the appropriate guidelines sentence range, it is only *appealable* if there was a scoring error . . . *and* the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." (Emphasis added.)[4] The issue was not so raised here.[5]

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[3] If habitual-offender status was not considered, the guidelines range would be 9 to 23 months. MCL 777.66.

[4] In *Kimble*, the guidelines range used at sentencing was 225 to 375 months, the minimum sentence imposed was 360 months (within range), and the appropriate guidelines range was actually 180 to 300 months (pushing minimum sentence outside the range), after the Supreme Court concluded that OV 16 had been scored incorrectly. The Court held, "Because defendant's sentence is outside the appropriate guidelines sentence range, his sentence *is appealable* under § 34(10), even though his attorney failed to raise the precise issue at sentencing, in a motion for resentencing, or in a motion to remand." *Kimble*, *supra* at 312 (emphasis added). However, even though the scoring challenge was appealable, because the defendant had not properly preserved the issue, the Court reviewed the scoring challenge under the plain-error standard. *Id.*

[5] In *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006), our Supreme Court, finding a scoring error, remanded for resentencing where it addressed a *properly preserved* scoring error that altered the guidelines range, even though the minimum sentence imposed fell within both the range used below *and* the appropriately scored range. Consistent with *Kimble*, the *Francisco* Court stated:

> Where a scoring error does not alter the appropriate guidelines range, resentencing is not required. Resentencing is also not required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range. Finally, if the defendant *failed* to raise the scoring error at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals, and the defendant's sentence is within the appropriate guidelines range, the defendant cannot raise the error on appeal except where otherwise appropriate, as in a claim of ineffective assistance of counsel. [*Francisco, supra* at 89-90 n 8 (citations omitted; emphasis added).]

Regardless, because defendant's minimum sentence is precisely what he bargained for in negotiating his plea, and is valid on its face, it is not subject to appellate review. Defendant specifically agreed to a sentence of two to ten years' imprisonment. Our Supreme Court has held that, "a defendant waives appellate review of a sentence that exceeds the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence." *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005). Logic dictates that this principle is all the more applicable when, as in this case, the challenged sentence in fact falls within the appropriate sentencing guidelines range. And assuming that the guidelines range was 9 to 23 months, on the basis of a presumed error in scoring OV 16 at ten points and a decision not to consider defendant's status as a third-habitual offender, thereby placing the two-year minimum sentence imposed outside of the guidelines, *Wiley* dictates that any challenge is waived given the sentencing agreement. As this Court put it earlier, "where the prosecution and defendant agreed to the minimum sentence imposed, what are we to review and what are we to demand of the trial court?" *People v Vitale*, 179 Mich App 420, 422; 446 NW2d 504 (1989).

Moreover, the issue of defendant's minimum sentence would appear to have become moot, considering that the Michigan Department of Correction's Offender Tracking Information System (OTIS) indicates that defendant was paroled on July 14, 2009. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994) (where a subsequent event renders it impossible for this Court to fashion a remedy, an issue becomes moot). Remand is simply unwarranted in the case at bar.[6]

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering

[6] We decline to accept the prosecution's invitation to engage in speculation regarding the value of the property at issue; it is unnecessary for us to do so given our ruling.