STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 27, 2009
v	No. 286659 Marquette Circuit Court
DERRICK LEE PLOOF, Defendant-Appellant.	LC No. 08-045438-FH

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, possession of a short-barreled shotgun, MCL 750.224b, and domestic violence, MCL 750.81(2). Defendant was sentenced as a habitual fourth offender to 48 to 120 months for the felon in possession of a firearm and for the possession of a short-barreled shotgun convictions, and 55 days for the domestic violence conviction. This Court granted defendant's motion for a remand to the trial court for resentencing.[1] On remand, the trial court upheld its prior scoring decision and, consequently, the length of defendant's sentence. However, defendant was granted 55 days' credit for time served for each conviction and the trial court lowered the amount of court-appointed legal fees that defendant was ordered to reimburse. Defendant appeals as of right. We affirm the trial court's order requiring defendant to reimburse the county for his court-appointed legal fees, but remand for resentencing in accordance with this opinion.

Defendant first argues that the trial court improperly scored 10 points for offense variable (OV) 3 when sentencing him for the firearm related offenses. We agree. Defendant raised this issue in the motion for remand before this Court and in a motion for resentencing on remand below. Therefore, defendant preserved this issue for appeal.

The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). When calculating a defendant's sentence, the trial court must determine the offense category and the offense variables that apply,

[1] See *People v Ploof*, unpublished order of the Court of Appeals, issued March 26, 2009 (Docket No. 286659).

score those variables, total the points, and assess points for prior record variables. MCL 777.21(1)(a); MCL 777.21(1)(b); *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). The variables are determined by reference to the record, using the preponderance of the evidence standard. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). The variables must be scored according to the particular facts of the defendant's case, unless a provision of the sentencing guidelines provides otherwise. *People v Sargent*, 481 Mich 346, 348-350; 750 NW2d 161 (2008). "The sentencing offense determines which offense variables are to be scored in the first place, and then the appropriate offense variables are generally to be scored on the basis of the sentencing offense." *Id*. at 348.

As noted, when sentencing defendant for the firearm-related offenses, the trial court assessed 10 points for OV 3, degree of physical harm to the victim. To assess 10 points for OV 3, the trial court must find that the victim suffered bodily injury requiring medical treatment. MCL 777.33(1)(d). It is undisputed that the victim suffered bodily injury requiring medical treatment as a result of the domestic violence perpetrated by defendant. However, the victim did not suffer this injury as part of defendant's commission of the sentencing offense. Nor was there any evidence that defendant either threatened or attempted to use the confiscated firearms during the commission of the sentencing offense. In fact, the victim testified that she never saw defendant with a firearm. Thus, it is apparent that, to reach the conclusion that OV 3 should be scored at 10 points, the trial court adopted a transactional approach to scoring the sentencing variables. Recently, however, our Supreme Court held that this approach is inappropriate. *People v McGraw*, 484 Mich 120, 122, 124; 771 NW2d 655 (2009).

In *McGraw*, the Supreme Court held that the proper approach to scoring sentencing variables is the offense-specific approach. *McGraw*, *supra* at 122, 124. The Court reasoned that, "[i]f the Legislature had intended a court scoring the sentencing guidelines to use a transactional approach, much of the language in some of the offense variables would have been surplusage." *Id*. at 126. In other words, the Court held that, unless otherwise stated, the Legislature intended that a court scoring the sentencing variables consider only the sentencing offense. *Id*. at 126-127. Had the Legislature intended otherwise, the Court noted, the Legislature would have explicitly said so. *Id*. OV 3 does not permit consideration of conduct occurring other than during the sentencing offense. Therefore, the trial court erred by scoring OV 3 at 10 points. Because defendant's minimum sentences for his firearm-related offenses exceed the corrected guidelines range applicable to those offenses,[2] defendant is entitled to resentencing. See, *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Next, defendant argues that the trial court's failure to award him 55 days' credit for time served for his felony convictions constituted clear legal error. However, because defendant has

[2] With the trial court's erroneous scoring of OV 3, defendant's recommended minimum sentencing range was 12 to 48 months. MCL 777.67. Without the assessment of 10 points for OV 3, defendant's recommended minimum sentencing range is 10 to 46 months. *Id*. As noted above, the trial court sentenced defendant to a minimum term of 48 months, which is higher than allowed by the adjusted range without a departure from the guidelines.

already received the relief requested, this issue is moot. *People v Billings*, 283 Mich App 538, 548; 770 NW2d 893 (2009).

Lastly, defendant argues that the trial court erred in requiring him to reimburse the county for his court-appointed legal fees without first considering his ability to pay. He cites *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004). However, in by *People v Jackson*, 483 Mich 271, 290, 298; 769 NW2d 630 (2009), our Supreme Court overruled *Dunbar*'s requirement that a trial court make a presentence assessment of a defendant's ability to reimburse for his or her court-appointed legal fees. The Court held that *Dunbar*'s ability-to-pay rule "frustrates the Legislature's legitimate interest in recouping fees for court-appointed attorneys from defendants who eventually gain the ability to pay those fees." *Id*. at 289. And, the Court noted that "when considering an ability-to-pay analysis, there is a substantive difference between the imposition of a fee and the enforcement of that fee." *Jackson, supra* at 290. Thus, the Court held that a trial court is not required to consider a defendant's ability to pay until there has been an attempt to enforce imposition of the fee. *Id*. at 292, 298. Because the trial court was not required to consider defendant's ability to pay at sentencing, defendant's assertion that it was error for the trial court not to do so plainly lacks merit. *Id.*[3]

We affirm the trial court's reimbursement order, as amended on the previous remand, requiring defendant to pay his court-appointed legal fees. We remand for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto

[3] As a general rule, judicial decisions are given full retroactive effect, unless to do so would result in an injustice. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 205; 747 NW2d 811 (2008). If an injustice would occur from retroactive application of a judicial decision, then prospective application is appropriate. *Id*. Here, no injustice would occur from retroactive application of our Supreme Court's holding in *Jackson*. First, defendant does not have a constitutional right to a presentence assessment of his ability to pay. *Jackson, supra* at 290. Second, there has not yet been an attempt to enforce the order requiring defendant to pay his court-appointed legal fees. *Id*. at 290-291. Even *Dunbar* recognized that it would be premature for a court to consider a defendant's challenge to a reimbursement order where there has not been an attempt to enforce the order. *Dunbar, supra* at 256.