

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANTE DESHAWN MOORE,

Defendant-Appellant.

UNPUBLISHED

May 31, 2011

No. 281046

Macomb Circuit Court

LC No. 2007-001116-FC

Before: CAVANAGH, P.J., and JANSEN and SERVITTO, JJ.

Servitto, J. (*concurring in part, dissenting in part*).

I concur in the majority's conclusions, with the exception of its determination that because defendant's sentence remains within the appropriate guideline range, the issue concerning the trial court's incorrect scoring of OV 11 is unreviewable. I respectfully dissent from that conclusion.

As briefly mentioned by the majority, the trial court did, in fact, incorrectly score OV 11 at 50 points. MCL 777.41(1)(a) provides for a score of 50 points if "two or more criminal penetrations occurred." MCL 777.41(2)(c) provides that no points should be scored for the penetration that forms the basis of a first-degree criminal sexual conduct offense. Thus, "the evidence must establish at least three sexual penetrations during the incident to support scoring OV 11 at fifty points." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

Here, there was no testimony that defendant engaged in penetration more than once during any of the four individual incidents for which defendant was charged. While there was testimony concerning other, uncharged incidents involving penetration, MCL 777.41(2)(a) expressly provides that scoring of OV 11 is limited to penetrations "arising out of the sentencing offense." Moreover, MCL 777.41(2)(b) indicates that other penetrations not arising out of the sentencing offense should be scored under OV 12 and OV 13. *People v Johnson*, 474 Mich 96, 102 n 3; 712 NW2d 703 (2006). The evidence therefore did not support scoring OV 11 at 50 points.

Defendant was apparently sentenced, based upon a guidelines score of 171-285 months, to 168 months in prison. Scoring OV 11 correctly, at 0 points, reduces defendant's minimum guidelines range to 108-180 months. Though defendant's sentence falls within the corrected guidelines range, he is still entitled to resentencing.

MCL 769.34(10) provides:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

“MCL 769.34(10) makes clear that the Legislature intended to have defendants sentenced according to accurately scored guidelines and in reliance on accurate information. . .” *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006). If defendant’s sentence, using the correct score for OV 11, is within the “appropriate” guidelines range, we are thus to affirm *unless* there was an error in the scoring of the guidelines. Here, as the majority indicates, there was an error in the scoring. Because there was an error in the scoring, we look to the next sentence of the statute to see if the issue is reviewable.

In *People v Jackson*, 487 Mich 783; 790 NW2d 340 (2010), the Supreme Court examined, in depth, the language of MCL 769.34(10) and its meaning with respect to preservation of a sentencing issue:

According to [MCL 769.34(10)], there are two ways for the defendant to make this request at the trial court level: either by making the request at sentencing or in a proper motion for resentencing. In cases on appeal, the request must be made in a *proper motion to remand filed in the Court of Appeals*. In this case, we need not address whether defendant followed the procedures to request relief in the trial court for the scoring based on the felonious-assault convictions because either procedure would have been futile until such time as the Court of Appeals affirmed or reversed the felonious-assault convictions. Nor would we expect a trial court to anticipate that its rulings might be found incorrect or force it to entertain such a motion. Accordingly, given the circumstances in this case, the only issue presented is whether defendant made a proper motion to remand in the Court of Appeals.

To determine whether defendant complied with this section of the statute, we must first determine what constitutes a *proper motion* to remand in the Court of Appeals. *Id.* at 796.

The Court then stated:

The purpose of a motion is to request a court to rule on an issue on a timely basis when the issue is ripe for adjudication. Given that defendant made

his request as part of his brief on appeal, his request served this purpose. It was presented on a timely basis and provided the Court of Appeals with all necessary information to make a decision. The only possible defect in this process is that his request was not made in a separate pleading. However, we cannot assume that the Legislature necessarily intended that a proper motion to remand be done in a separate filing. “Motion” is defined as a “written or oral application requesting a court to make a specified ruling or order.” “Application” is defined as a “request or petition.” Under this broad definition of a motion, a separate pleading was not required because defendant made a written request for the court “to make a specified ruling or order.” Nothing further was required given these circumstances. Requiring a defendant to file a separate pleading would necessitate a party to request review of an issue that is not ripe for review. We conclude that when the request to remand will not be ripe for review until after the Court of Appeals has adjudicated the merits, the mandate of a *proper motion* in MCL 769.34(10) is met when a defendant makes a request to remand for resentencing with supporting grounds within his appellate brief.

Moreover, “[i]t is difficult to imagine something more ‘inconsistent with substantial justice’ than requiring a defendant to serve a sentence that is based upon inaccurate information.” *Id.* 799-800.

In this case, there was a scoring error, the scoring error altered the appropriate guidelines range, and defendant requested a remand for resentencing, with appropriate supporting grounds. “It would be in derogation of the law, and fundamentally unfair, to deny a defendant in the instant circumstance the opportunity to be resentenced on the basis of accurate information. A defendant is entitled to be sentenced in accord with the law . . .” *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006). See also, MCR 2.613(A)(an error justifies disturbing a judgment or order when “refusal to take this action appears to the court inconsistent with substantial justice.”). Based upon the above, I would remand for resentencing.

/s/ Deborah A. Servitto