

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

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
September 15, 2016

v

ANGELO GUTIERREZ,

No. 328634  
Leelanau Circuit Court  
LC No. 15-001871-FH

Defendant-Appellant.

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Before: MURRAY, P.J., AND HOEKSTRA AND BECKERING, JJ.

PER CURIAM.

Defendant appeals by leave granted his April 27, 2015<sup>1</sup> guilty plea convictions of two counts of delivery of a controlled substance, and one count maintaining a drug house, MCL 333.7401(2)(a)(iv), MCL 333.7405(1)(d). Defendant was sentenced on April 27, 2015 to 48-240 months in prison for the two counts of delivery of a controlled substance, and 16-24 months for using his dwelling for maintaining a drug house. We affirm defendant's convictions but vacate his sentences and remand for resentencing.

I. INTRODUCTION

This case involves whether an offense variable can be scored based on crimes dismissed as a result of a plea bargain. The trial court opined that Offense Variable (OV) 15 could be scored based on crimes defendant was charged with, but were ultimately dismissed, as a result of the plea bargain. For the reasons set forth below, we disagree.

II. FACTUAL BACKGROUND

The Traverse Narcotics Team (TNT) received multiple tips in relation to the defendant and his brother Salvador Gutierrez. As a result, the TNT began making controlled purchases with undercover officers from the defendant. Defendant sold cocaine to an undercover police officer on December 11, 2014, and January 14, 2015. Subsequently, a search warrant was

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<sup>1</sup> *People v Gutierrez*, unpublished order of the Court of Appeals, entered October 1, 2015 (Docket No. 328634).

carried out and on January 22, 2015, both 8359 Bent Pine, Lake Ann, MI, and 6405 Allgaier Road, Traverse City, MI, were searched. Officers at the Bent Pine residence where Salvador was present seized 109.4 grams of cocaine, packaging material and guns located in close proximity to the cocaine. At the Allgaier residence detectives, discovered defendant and 16 grams of cocaine.

Defendant plead guilty to two counts of delivery of a controlled substance and one count of controlled substance – maintaining a drug house contrary to MCL 333.7401(2)(a)(iv) and MCL 333.7405(1)(d). As a result of this plea bargain, one count of delivery of less than 50 grams of cocaine, conspiracy to deliver less than 50 grams of cocaine, computers used to commit crime, and felony firearm were all dismissed.

After his plea, defendant appeared for sentencing. In sentencing defendant, the trial court used the alleged conspiracy to commit controlled substance delivery charge, a charge that was dropped in the plea bargain, while calculating the score of OV 15. The trial court specifically ruled regarding OV 15 as follows: “I have no doubt at all these brothers were working together. I already found Salvador to be a wholesaler, you are the retailer.” Defendant was then sentenced on April 27, 2015, to 48-240 months in prison for the two counts in relation to controlled substance delivery and 16-24 months for using his dwelling for maintaining a drug house. From the judgment of sentence defendant appeals by leave granted.

### III. ANALYSIS

If “a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing or in a motion to remand the sentencing issue is preserved.” *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). The issue was preserved when defendant raised the issue at sentencing.

Factual determinations made by the trial court need to be supported by a preponderance of the evidence and are reviewed for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). As such, “whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *People v Gloster*, 499 Mich 199, 204; 880 NW2d 776 (2016).

In *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), the Court held that offense variables are to be scored only by reference to the sentencing offense, unless the statute states otherwise. If the legislature intends for one to be sentenced for an entire criminal transaction, then generally that will be outlined in the statute. In OV 14, for example, it states that “the entire criminal transaction should be considered.” *Id* at 125. Nowhere in OV 15 does it state that behavior outside the conviction should be considered when scoring that offense variable.

This was precisely the conclusion of this Court in *People v Gray*, 297 Mich App 22, 31; 824 NW2d 213 (2012), where we held that behavior outside the conviction cannot be considered when scoring OV 15. As the *Gray* Court concluded, “OV 15 expressly references the ‘offense,’ which would be the ‘sentencing offense’ under the *McGraw* analysis given that OV 15 does not specifically provide otherwise, before alluding to the amount of controlled substances involved with said offense.” *Gray*, 297 Mich App at 31. Because the language of the statute is clear and

unambiguous, we assume that the legislature intended its plain meaning and we enforce the statute as written. *Hardy*, 494 Mich at 439. According to OV 15, defendant cannot be scored based on conduct resulting from the dismissed charges that are not part of this sentencing offense. As a result, we conclude that the trial court erred when it used a dismissed offense to calculate the score in relation to OV 15.

Plaintiff argues that in *People v Nix*, 301 Mich App 195, 206; 836 NW2d 224 (2013), the trial court had properly considered the charge of felonious assault during the sentencing even though defendant had plead guilty to different offenses. However, plaintiff fails to take into account that in *Nix* the Court was dealing with OV 13, and OV 13 states in plain language that, “all crimes within a five-year period . . . regardless of whether the offense resulted in a conviction” shall be counted. *Id.* at 197. In our case, OV 15 has no such language and thus does not allow for such an interpretation.

Defendant’s convictions are affirmed, but his sentences are vacated and the matter is remanded for resentencing. We do not retain jurisdiction.

/s/ Christopher M. Murray  
/s/ Joel P. Hoekstra  
/s/ Jane M. Beckering