STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2016
v	No. 331060 Tuscola Circuit Court
JUSTIN WARREN WITHERS, Defendant-Appellant.	LC No. 11-012098-FH

Before: M. J. KELLY, P.J., and MURRAY and BORRELLO, JJ.

PER CURIAM.

Defendant Justin Withers appeals by delayed leave granted[1] the amended judgment of sentence revoking his probation and sentencing him as a third-habitual offender, MCL 769.11, to serve 9 to 40 years imprisonment with credit for 796 days served on his first-degree home invasion conviction, MCL 750.110a(2). As part of the amended judgment of sentence, Withers was also ordered to pay $1,630 in restitution. We affirm in part, reverse in part, and remand to the trial court for further proceedings.

I. BASIC FACTS

In October 2011, Withers entered his ex-girlfriend's home, woke her up while she was sleeping on her couch next to her one-year old daughter, argued with her, and then slammed her face against the corner of a wall before leaving. In exchange for a sentencing agreement, Withers pleaded no contest to one count of first-degree home invasion and one count of assault and battery, MCL 750.81. On the assault and battery conviction, Withers was sentenced to serve 93 days in jail. On the first-degree home invasion conviction, he was sentenced to 365 days in

[1] *People v Withers*, unpublished order of the Court of Appeals, entered February 12, 2016 (Docket No. 331060).

jail with the last 30 days on electronic tether and five years of probation. Withers finished his jail sentence in early October 2012.[2]

On October 14, 2012, he was incarcerated for violating probation and remained incarcerated until April 22, 2013. At that time, he pleaded guilty to violating his probation and was sentenced to time served.

On June 9, 2014, Withers was arraigned on another probation violation. He pleaded no contest to allegations that he violated his probation by stealing items from Sabrina Wilke's vehicle, i.e., by committing theft from a motor vehicle, and by making unauthorized charges on John Wright's credit card, i.e., by committing identity theft. Withers agreed to pay restitution to Wilke and Wright and the prosecutor agreed to dismiss the underlying charges.

At the October 15, 2014 probation violation sentencing, Withers argued that several statements in his presentence investigative report were inaccurate. He also objected to the amount of restitution and the amount of jail credit that he was given. The trial court stated that it would take Withers's "position as to those factual issues into account" and added that it would not take anything into account outside of the allegations to which Withers pleaded. The trial court held that Withers was not entitled to jail credit for good-time credit earned while he was in jail. The court scheduled a hearing on the issue of restitution.

At the restitution hearing, Wright testified that around the time that Withers was using his credit card without authorization, Withers also used his truck without authorization and got into an accident requiring Wright to pay a $500 insurance deductible. Wright also stated that several tools, a propane tank, a chop saw, and a barrel of copper wire went missing around the same time. Wright asserted that Withers stole these items and requested restitution for them. Although Withers objected, the trial court awarded Wright the full amount of restitution requested.

Withers filed a motion for resentencing, arguing that the trial court misscored Offense Variables (OV) 10 and 19. At the motion hearing, the prosecutor argued in response that OV 9 was misscored. The trial court determined that OVs 10 and 19 should have been scored at zero points, but that OV 9 should have been scored at 10 points. The court therefore granted Withers's motion for resentencing.

At resentencing, Withers noted his objection to the score for OV 9, again objected to the alleged factual inaccuracies in the presentence report, and again argued that his jail credit was miscalculated. The trial court imposed the same sentence of 9 to 40 years' imprisonment, denied Withers's request to change the amount of jail credit, and again stated that it would not consider the challenged facts in the presentence report in its sentencing decision.

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[2] While the record does not explicitly state why Withers's 335-day jail sentence ended in October, well short of 335 days, the parties' arguments on appeal indicate that it was due to good-time credit that he earned while serving the sentence.

II. SENTENCING

A. STANDARD OF REVIEW

Withers argues that the trial court erred in scoring OV 9, in calculating the amount of jail credit, in awarding restitution, and in not striking the challenged statements from the presentence report. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993) (opinion by GRIFFIN, J). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute . . . is a question of statutory interpretation" that is reviewed de novo. *Hardy*, 494 Mich at 438. Whether a defendant was appropriately granted credit for time served in jail is a question of law that is reviewed de novo. *People v Filip*, 278 Mich App 635, 640; 754 NW2d 660 (2008). A trial court's response to claims of inaccuracies in a defendant's presentence report is reviewed for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). "A court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes." *People v Waclawski*, 286 Mich App 634, 645; 780 NW2d 321 (2009).

B. OV 9

OV 9 addresses the number of victims. MCL 777.39. The trial court must score ten points if there are "2 to 9 victims who were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c). The trial court must "[c]ount each person who was placed in danger of physical injury or loss of life . . . as a victim." MCL 777.39(2)(a). We have upheld a score of ten points where a victim's mother jumped between the defendant and the victim while the defendant was pointing a gun at the victim's face because "[p]ointing a gun at multiple individuals clearly places them in danger of injury or loss of life." *People v Haverson*, 291 Mich App 171, 181; 804 NW2d 757 (2010). Similarly, we have upheld a score of ten points when the defendant shot the victim through the windshield of her car while her fiancé and child were also inside the car. *People v Kimble*, 252 Mich App 269, 274; 651 NW2d 798 (2002). We did not, however, uphold a score of ten points when the defendant sexually assaulted a victim while her friends were in the same room because there was no evidence that the friends were placed in danger of physical injury. *People v Phelps*, 288 Mich App 123; 791 NW2d 732 (2010), overruled on other ground by *Hardy*, 494 Mich at 438 n 18.[3] Here, unlike the victim's friends in *Phelps*, the child was in danger of physical injury because of her close proximity to her mother when Withers broke into the house and physically assaulted her by slamming her head into the corner of a wall. Given her close proximity to Withers when he assaulted her mother, the trial court properly counted her as a victim when scoring OV 9 at ten points. See *Kimble*, 252 Mich App at 274; *Haverson*, 291 Mich App at 181.

[3] In *Hardy*, the Supreme Court overturned several decisions of this Court that had stated that scoring decisions would be upheld if there was "any evidence in support." 494 Mich at 438 n 18.

C. CREDIT

Withers plainly earned some form of good-time credit while incarcerated because he was initially sentenced on March 26, 2012 and completed that sentence in early October 2012, well short of the 335 days he was supposed to serve in jail. Withers argues that the trial court erred in only crediting him for the actual time he served in jail and not for the good-time credit he earned while serving that sentence. The prosecutor argues that Withers is not entitled to have any good-time credit added to his jail credit because, had he initially been sentenced to a prison term instead of a 335-day jail term with probation, he would not have been eligible for the equivalent of good-time credit from the Department of Corrections.

In *People v Resler*, 210 Mich App 24, 27-28; 532 NW2d 907 (1995), we held that in the absence of a statutory provision allowing for the revocation of good-time credit earned during a jail sentence, the revocation of good-time credit violated the Double Jeopardy Clause. Because the defendant in *Resler* had received sixty days of good time and because there was no statutory provision allowing for its revocation, we ordered that his sentence "be amended to reflect an additional credit for sixty days against his sentence for probation violation." *Id*. We reached a different result in *People v Tyrpin*, 268 Mich App 368; 710 NW2d 260 (2005). In that case, the trial court's original sentence of one year in jail was a downward departure. *Id*. at 370. The prosecutor appealed the sentence to this Court, and we determined that the sentence was invalid and remanded for resentencing. *Id*. On resentencing, the trial court refused to give the defendant credit for 61 days of good time he had earned while serving the original invalid sentence. *Id*. at 370-371. The defendant appealed and we held that because the original sentence was invalid and because the defendant would not have been entitled to good-time credit had a valid sentence been imposed at the outset, the defendant was not entitled to "benefit from a sentence credit that would not exist but for an error of law in [his] original sentencing." *Id.* at 373-374.

The rule drawn from *Resler* and *Tyrpin* is clear: if a defendant earns good-time credit while serving a valid jail sentence, then he or she is entitled to credit for the earned good-time credit; however, if a defendant earns good-time credit while serving an invalid jail sentence, then he or she is not entitled to credit for the earned good-time credit. Here, there is no indication that the original jail sentence, imposed as part of a plea bargain, was invalid. Accordingly, Withers is entitled to credit for his earned good time. We remand to the trial court for a recalculation of Withers's jail credit, including any good-time credit he earned while in jail. Upon recalculation, the trial court shall amend the judgment of sentence to provide for the proper credit and forward a copy of the amended judgment of sentence to the Department of Corrections.

D. RESTITUTION

Withers next challenges the order of restitution. "[W]hen sentencing a defendant convicted of a crime, the court shall order . . . that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction . . . ." MCL 780.766(2). In *People v McKinley*, 496 Mich 410, 419-420; 852 NW2d 770 (2014) (alterations in original), our Supreme Court stated:

> The plain language of the statute authorizes the assessment of full restitution only for "any victim of the defendant's course of conduct *that gives rise to the conviction* . . . ." The statute does not define "gives rise to," but a lay dictionary defines the term as "to produce or cause." *Random House Webster's College Dictionary* (2000), p 1139. Only crimes for which a defendant is charged "cause" or "give rise to" the conviction. Thus, the statute ties "the defendant's course of conduct" to the convicted offenses and requires a causal link between them. It follows directly from this premise that any course of conduct that does not give rise to a conviction may not be relied on as a basis for assessing restitution against a defendant. Stated differently, while conduct for which a defendant is criminally charged and convicted is necessarily part of the "course of conduct that gives rise to the conviction," the opposite is also true; conduct for which a defendant is *not* criminally charged and convicted is necessarily *not* part of the course of conduct that gives rise to the conviction.

The restitution award included damages from Withers's alleged theft of several items from Wright. It also included the $500 insurance deductible that Wright had to pay after Withers allegedly got in an accident in Wright's truck while using it without authorization. The charged conduct, however, was identity theft stemming from Withers's unauthorized use of Wright's credit card. Thus, because Withers was not criminally charged or convicted of stealing items from Wright or using and damaging his vehicle, it was improper to award restitution for those items. Accordingly, we reverse the trial court's restitution order and remand to the trial court for it to adjust the restitution to reflect only those damages that were caused by Withers's course of conduct that produced the identity theft charge.[4]

E. PRESENTENCE REPORT

Withers finally argues that the trial court erred when it did not strike challenged statements from his presentence report. Pursuant to MCR 6.425(E)(1)(b), Withers had to be given an opportunity "to explain, or challenge the accuracy or relevancy of, any information in the presentence report[.]" Further, "[i]f any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing." MCR 6.425(E)(2). If the court either finds that the challenge has merit or "determines that it will not take the challenged information into account in sentencing," the court must order the probation officer to "correct or delete the challenged information in the report," MCR 6.425(E)(2)(a), before the report is sent to the Department of Corrections, *Spanke*, 254 Mich App at 649.

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[4] Withers was not convicted of identity theft. Instead, in exchange for the prosecutor dismissing the identity theft charge (and another charge in a different case), Withers agreed to (1) plead no contest to a probation violation in this case, and (2) pay restitution on the dismissed charges. Thus, the trial court properly awarded restitution based on the identity theft charge.

Withers raised numerous challenges to information in his presentence report, and the trial court stated that it would not take anything into account outside of the allegations to which Withers pleaded. However, contrary to MCR 6.425(E)(2)(a), the challenged information was not deleted from the report. Accordingly, on remand the trial court shall order the challenged information deleted from the presentence report and that the corrected report be sent to the Department of Corrections.

IV. CONCLUSION

We affirm Withers's sentence of 9 to 40 years imprisonment for the first-degree home invasion conviction. We reverse the trial court's calculation of jail credit and remand for recalculation of Withers's jail credit that takes into account his earned good-time credit. We also reverse the trial court's restitution award and remand for recalculation of the amount owed that only takes into account damages that were caused by Withers's course of conduct that resulted in the identity theft charge. Finally, we reverse the trial court's decision to not strike the challenged information in the presentence report. On remand, the court shall order that the challenged information be stricken and that a corrected copy of the report be forwarded to the Department of Corrections.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Stephen L. Borrello