

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 17, 2017

v

KYLE BRADLEY HERZFELD,
Defendant-Appellant.

No. 334009
Wexford Circuit Court
LC No. 2016-011549-FH

Before: BOONSTRA, P.J., and METER and GADOLA, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ his plea-based conviction on two counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(a) (digital penetration of victim at least 13 years of age and under 16 years of age). Under the plea agreement, five other counts of CSC-III were dismissed. The trial court sentenced defendant to concurrent terms of 72 to 180 months in prison. We affirm, but remand for the administrative correction of the presentence investigation report (PSIR), and for the transmittal of the corrected PSIR to the Department of Corrections.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

At the plea hearing, defendant testified that he twice penetrated the victim's vagina with his hand or finger for a sexual purpose. At no time during the plea hearing or any subsequent sentencing hearings did defendant testify or admit to having engaged in sexual intercourse with the victim. However, the PSIR indicates that the victim reported that she and defendant had engaged in sexual intercourse approximately 17 times.

At sentencing, defendant raised several challenges to the PSIR. One such challenge was to portions of the PSIR that state or imply that defendant transported the victim to Traverse City, where he had sexual intercourse with her. Defendant maintained that he did not drive the victim to Traverse City; instead, her parents drove her there to babysit during the Cherry Festival. The

¹ *People v Herzfeld*, unpublished order of the Court of Appeals, entered October 3, 2016 (Docket No. 334009).

trial court stated with regard to this challenge that “it’s not a factual issue with respect to the scoring of the asportation element to the statutory guidelines; but it is a consideration for the Court in making a determination on sentence, so I think it’s a factual dispute that is worthy of resolution.” At the continued sentencing hearing, both parties agreed to strike “a discussion about being transported to Traverse City” from multiple pages of the PSIR. The trial court noted that “we will make that change” and was informed of specific entries in the PSIR that needed to be amended. However, the PSIR that has been provided to this Court does not reflect that these amendments were effectuated.

Defendant also challenged the scoring of Offense Variable (OV) 3. The trial court assessed OV 3 at 10 points based on the prosecution’s assertion that defendant had given the victim a sexually transmitted disease (STD). Defendant argued that he had “not been diagnosed with any form of STD at this time,” and maintained that the victim must have contracted it from another sexual partner. At the continued sentencing hearing, the victim affirmed that in December of 2015 she was diagnosed with vaginal venereal warts that required medical treatment. The victim initially stated that defendant was the only person with whom she had had sexual contact, but later stated that defendant was the “only guy [she had] had sex with ever” but that she had had “sexual contact with other individuals” before her diagnosis. Defendant denied having been diagnosed “with any form of an STD relating to genital warts.”

The trial court acknowledged the testimony from the victim that she had had sexual contact with someone other than defendant, but determined that it was “satisfied . . . that the Court can find that there was adequate sexual activity between the defendant and the victim in this case and that the source of the STD would be from the defendant.” The trial court noted specifically that the victim testified that “she did not engage in intercourse with the other party” and noted that “the Court can only reach the conclusion that the multiple sexual activities that occurred between this victim and the defendant led to the transmission of this disease.”

Defendant was sentenced as described. This appeal followed. On appeal, defendant does not challenge his plea, but only raises issues related to his sentencing.

II. OV 3

Defendant “poses, broadly speaking, a two-pronged attack against the sentence imposed by the trial court.” *People v Biddles*, 316 Mich App 148, 156; 896 NW2d 461 (2016). Defendant’s “evidentiary challenge” is to the adequacy of the evidence supporting the trial court’s score for OV 3. *Id.* Defendant’s “constitutional challenge,” under *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), is that the trial court “engaged in impermissible judicial fact-finding” in scoring OV 3. *Biddles* notes that when these two distinct challenges are present,

the evidentiary challenge must initially be entertained, because if it has merit and requires resentencing, the constitutional or *Lockridge* challenge becomes moot, as a defendant will receive the protections of *Lockridge* on resentencing. And if an evidentiary challenge does not succeed, then and only then should we entertain the constitutional challenge. [*Id.* at 157-158.]

Defendant first argues that OV 3 was improperly scored at 10 points based on the victim having apparently contracted an STD from defendant. Defendant denied that he was responsible and denied ever having an STD. We conclude that defendant's challenge, even if meritorious, would not require resentencing.

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. 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 Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) see also *People v Calloway*, ___ Mich ___, ___; ___ NW2d ___ (May 19, 2017), slip op at 4.]

OV 3, which addresses bodily injury to a victim, provides that 10 points should be scored if “[b]odily injury requiring medical treatment occurred to a victim.” MCL 777.33(1)(d). “[R]equiring medical treatment” refers to the necessity for treatment and not the victim's success in obtaining treatment.” MCL 777.33(3). *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011), firmly establishes that the term “bodily injury” encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence.” Bodily injury includes actually infecting someone with a sexually transmitted disease. *Id.*

Even if the trial court erred by scoring OV 3 at 10 points, correcting the scoring error would not result in an alteration of the guidelines minimum sentence range, and therefore defendant is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006). We therefore need not address defendant's argument that the trial court erred by finding that the evidence supported the scoring of OV 3.

Defendant further argues that the trial court erred by scoring OV 3 based on judge-found facts rather than on facts to which he admitted at his plea hearing. We disagree. While the sentencing guidelines are now advisory, the Michigan Supreme Court has stated that the trial court must nonetheless score them, “whether using judge-found facts or not.” *Lockridge*, 498 Mich at 391-392 n 28. A constitutional deficiency arises only where “the guidelines require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score [OVs] that mandatorily increase the floor of the guidelines minimum sentence range.” *Id.* at 364. Here, defendant was sentenced after *Lockridge* was released, and therefore after the guidelines had been deemed advisory in order to avoid the unconstitutional application of the sentencing guidelines elicited by judicial fact-finding. *Lockridge*, 498 Mich at 365. Moreover, as stated earlier, any error in the scoring of OV 3 did not increase the floor of the guidelines minimum sentence range. Because the constitutional violation was remedied by *Lockridge*'s determination that the guidelines are advisory, see *id.*, and there is no indication that the judge operated under the mistaken view that he was bound to sentence defendant under the guidelines, and the floor of the guidelines minimum sentence range would not in any event be altered even if defendant's OV 3 score was disregarded, defendant's *Lockridge* challenge lacks merit.

Accordingly, defendant is not entitled to resentencing on the basis of the trial court's scoring of OV 3.

III. CORRECTION OF THE PSIR

Defendant also argues that this case must be remanded to the trial court for the administrative task of correcting defendant's PSIR and transmitting a corrected copy to the Department of Corrections. We agree. At sentencing, defendant challenged the accuracy of information in the PSIR indicating that defendant had transported the victim to Traverse City. The parties eventually agreed that such information should be stricken from the report, and the trial court stated that the information would not affect defendant's sentence and agreed to strike it from the PSIR. However, the challenged information still appears in the copy of the PSIR that was provided to this Court. Because the parties and the trial court agreed to strike this information, we therefore remand for the administrative correction of the PSIR. See *People v Taylor*, 146 Mich App 203, 205-206; 380 NW2d 203 (1985) ("When a court, for purposes of expediency, efficiency or otherwise, disregards information challenged as inaccurate, the court in effect determines that the information is irrelevant to sentencing. The defendant is therefore entitled to have that information stricken.").

Affirmed but remanded for correction of the PSIR and transmission of the corrected report to the Department of Corrections. We do not retain jurisdiction.

/s/ Mark T. Boonstra

/s/ Patrick M. Meter

/s/ Michael F. Gadola