

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 27, 2018

v

LARRY NEWBY,

Defendant-Appellant.

No. 339699
Wayne Circuit Court
LC No. 15-003085-01-FH

Before: SHAPIRO, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 40 to 60 months' imprisonment for the felon-in-possession conviction, and five years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions, but vacate defendant's felon-in-possession sentence and remand for resentencing on that conviction only.

This case arises out of a shooting that took place at a bar in Detroit. Defendant, who was employed as a bouncer, was confronted by the victim outside the bar. The victim was looking for his sister, who had gone to the bar after she and the victim got into a heated argument. Prior to arriving at the bar, the victim had informed his sister that he was going to kill her and shoot up the bar. Defendant and the victim engaged in a physical altercation. During the fight, the victim reached around defendant and attempted to open the door to the bar. Defendant slammed the door shut and the victim punched him in the side of the head. Defendant pushed the victim away from the door. As the victim stumbled backward, defendant saw him reach for what appeared to be a gun in his right pocket. Defendant pulled out a handgun and fired one bullet, which struck the victim in the stomach. The victim later died from his injuries.

Defendant argues that he was denied the effective assistance of counsel where counsel conceded that defendant was guilty of felon-in-possession and felony-firearm, and failed to object to the scoring of prior record variable (PRV) 2. We conclude that counsel was not ineffective for conceding that defendant could be found guilty of felon-in-possession and felony-firearm, but was ineffective for failing to object to the scoring of PRV 2. Because defendant

failed to move for a new trial or *Ginther*¹ hearing in the trial court, our review is for errors apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

To establish a claim of ineffective assistance of counsel, a defendant is required to demonstrate “that (1) counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different.” *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Defense counsel is presumed to be effective, *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), and “the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy,” *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

Defendant first argues that defense counsel was ineffective for conceding that defendant was guilty of felon-in-possession and felony-firearm. We disagree.

In support of his argument, defendant refers to defense counsel’s opening statement, in which defense counsel stated:

[Y]ou can find [defendant] guilty of possession of a firearm by a felon[,] he did do that.

You can find him guilty of felony[-]firearm because he was not suppose[d]to have a gun. That’s not even in dispute here.

* * *

But . . . did [defendant] act in self-defense? That’s the main issue here.

* * *

[Defendant] is saying it was self[-]defense and I’m going to tell you it was self[-]defense.

And at the end of the day I’m sure that will come back with a verdict of not guilty on the murder. [We’ve] got to swallow our medicine on the possession and felony[-]firearm.

But [defendant] is not guilty of second[-]degree murder.

Defendant directs this Court to *People v Dupree*, 486 Mich 693; 788 NW2d 399 (2010), in support of his claim. In *Dupree*, our Supreme Court held that “the traditional common law affirmative defense of self-defense may be interposed to a charge of being a felon in possession of a firearm” where the defendant temporarily possessed a firearm in violation of the felon-in-possession statute. *Id.* at 696. Defendant also notes that this Court agreed with the *Dupree*

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

holding and applied it to the defendant's felony-firearm conviction in *People v Goree*, 296 Mich App 293; 819 NW2d 82 (2012).

With regard to defendant's felon-in-possession conviction, the prosecution correctly argues that a defendant may only claim self-defense as an affirmative defense to a felon-in-possession charge where "the felon's temporary possession of a firearm was the result of an attempt to repel an imminent threat." *People v Triplett*, 499 Mich 52, 57; 878 NW2d 811 (2016). The defendant in *Dupree* was able to argue that he acted in self-defense because he wrested a gun away from his attacker temporarily. *Dupree*, 486 Mich at 698-699. Defendant's possession of a handgun in this case, however, was not the result of his attempt to prevent or deter an imminent threat by the victim. Rather, defendant possessed the handgun in the course of his employment, well before he was aware that the victim could pose a danger to defendant or others. Because defendant's possession of the handgun was not a temporary result of his attempt to "repel an imminent threat," defendant was not entitled to claim self-defense as an affirmative defense to the felon-in-possession charge.

In *Goree*, this Court did not limit claims of self-defense with regard to the crime of felony-firearm to only those cases where the defendant's possession of a firearm was temporary, as the *Dupree* Supreme Court did in relation to the charge of felon-in-possession. *Goree*, 296 Mich App at 294. Instead, this Court merely held that self-defense is an applicable defense to a felony-firearm charge. *Id.* at 304. Thus, there may be at least some merit to defendant's claim that defense counsel was ineffective for stating that defendant was guilty of felony-firearm. However, admitting that a defendant is guilty of a lesser offense can oftentimes lend credibility to a defense argument that a defendant is not guilty of a greater offense. In such cases, the fact that defense counsel admits to the defendant's guilt is viewed as a matter of trial strategy and is not necessarily considered ineffective assistance of counsel. *People v Urban*, 321 Mich App 198, 209; 908 NW2d 564 (2017). If the evidence in a particular case supports a guilty verdict on a lesser charge, "it can be better tactically to . . . admit to guilt on some charges but maintain innocence on others." *Id.*; see *People v Matuszak*, 263 Mich App 42, 60-61; 687 NW2d 342 (2004).

In general, "[t]his Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Defense counsel's opening statement indicates that his trial strategy was to admit that defendant was guilty of the lesser charges of felon-in-possession and felony-firearm, while contesting defendant's guilt on the more severe charge of second-degree murder by arguing that defendant could not be found guilty of second-degree murder because he acted in self-defense. Defendant's acquittal of second-degree murder is an apparent result of this strategy, and thus, defense counsel's performance did not fall below an objective standard of reasonableness. Accordingly, defendant was not denied the effective assistance of counsel based on defense counsel's decision to admit that defendant was guilty of felon-in-possession and felony-firearm.

Defendant also argues that trial counsel was ineffective for failing to object to the scoring of PRV 2 with regard to his conviction of felon-in-possession. We agree.

Under MCL 777.52(1), points are assessed for PRV 2 based on a defendant's prior low severity felony convictions. MCL 777.52(2), which governs the assessment of points under PRV 2, defines low severity felonies as follows:

- (a) A crime listed in offense class E, F, G, or H.
- (b) A felony under a law of the United States or another state that corresponds to a crime listed in offense class E, F, G, or H.
- (c) A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.
- (d) A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.

Defendant's presentence investigation report (PSIR) indicates that he was previously convicted of unlawful driving away of an automobile (UDAA), MCL 750.413, assault with intent to commit great bodily harm less than murder (AWIGBH), MCL 750.84, felony-firearm, MCL 750.227b, and escape from jail through violence, MCL 750.197c.

UDAA is a Class E offense, which indicates that it is a low severity felony conviction. MCL 777.16u. AWIGBH is a Class D felony, which indicates that it is a high severity felony that should not be considered in assessing points under PRV 2. MCL 777.16d; MCL 777.51(2). Felony-firearm is not listed in offense classes M2 through H, and the maximum term of imprisonment is less than 10 years; thus, it is also categorized as a low severity felony conviction. MCL 750.227b; MCL 777.52(2)(c). Additionally, the crime of escape from jail through violence is a Class E offense, and is categorized as a low severity felony conviction. MCL 777.16j.

At sentencing, the prosecution noted that there were two corrections to be made to the PRVs on defendant's sentencing information report ("SIR"):

Ms. Tusar [the prosecution]: Your Honor[,], as it refers to the sentencing guideline PRV 1 should be scored at 25[,], not 50.

Mr. Woodards [defense counsel]: No objection.

Ms. Tusar: PRV 2 should be scored at 30 points[,], not 5 points.

Mr. Woodards: No objection.

The prosecution's proposed changes were intended to reflect the fact that defendant had one prior high severity felony conviction, for which 25 points are assessed under PRV 1, and three prior low severity felony convictions, which are assessed under PRV 2. MCL 777.51; MCL 777.52. However, the prosecution's proposed correction to PRV 2 was incorrect. The prosecution misspoke, and stated that 30 points should be assessed under PRV 2. As MCL 777.52(1)(b) states, 20 points are assessed under PRV 2 if a defendant has three prior low

severity convictions. Defendant only had three low severity felony convictions. Nevertheless, the trial court agreed with the prosecution's proposed changes. And defense counsel failed to object to the error.

Defendant was originally assessed a total of 55 PRV points and 125 offense variable (OV) points, placing him in PRV Level E and OV Level VI, and his minimum sentencing guidelines range was calculated at 22 to 76 months. See MCL 777.16m; MCL 777.21(3)(a); MCL 777.66. However, if PRV 2 was properly scored, his PRV points would be reduced from 55 to 45, which would place him in PRV Level D, resulting in a minimum sentencing guidelines range of 19 to 76 months. See MCL 777.66.

A reasonably competent attorney should have noticed that PRV 2 was incorrectly assessed, and defense counsel's failure to discover the error and object to the prosecution's misstatement constituted performance that fell below an objective standard of reasonableness. Defendant's minimum sentencing guidelines range should have been 19 to 76 months, not 22 to 76 months. Although this is a small discrepancy, "[a] sentence is invalid when a sentencing court relies on an inappropriate guidelines range." *People v McGraw*, 484 Mich 120, 131; 771 NW2d 655 (2009). "A defendant is entitled to be sentenced according to accurately scored guidelines and on the basis of accurate information." *Id.* Defendant was prejudiced by defense counsel's failure to object to the assessment of 30 points under PRV 2 because defense counsel's mistake resulted in the trial court sentencing defendant based on inaccurately scored guidelines. *Id.*; see *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

"The remedy for deprivation of the Sixth Amendment right to counsel must be tailored to the injury suffered." *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995). Because defendant's claim of ineffective assistance of counsel is based on an error in the scoring of the sentencing guidelines, the appropriate remedy is to remand for resentencing based on the correct minimum sentencing guidelines range. *Id.* Defendant's sentence did not depart from the minimum sentencing guidelines range, and it is possible that the trial court may choose to render the same sentence on remand. Regardless, "'[i]f the range the court used resulted from an incorrect application of the guidelines, an after-the-fact determination that the sentence actually imposed happened to be within the proper range'" will not ultimately cure the error. *Francisco*, 474 Mich at 90 n 9 (citation omitted). Accordingly, defendant is entitled to a remand for resentencing.

This Court also observes that the SIR presented on appeal does not reflect any of the scoring changes made at sentencing. The SIR currently states that 50 points were assessed under PRV 1, and five points were assessed under PRV 2. The SIR should indicate that PRVs 1 and 2 were assessed at 25 and 20 points, respectively. Also, the SIR currently states that five points were assessed under OV 12, but the parties agreed at sentencing that zero points should be assessed under OV 12. Finally, the trial court stated at sentencing that defendant was to be sentenced as a fourth habitual offender. The SIR states that defendant was not a habitual offender, and that the high end of defendant's minimum sentencing guidelines range is 38 months. However, because defendant was sentenced as a fourth habitual offender, the high end of his minimum sentencing guidelines range is 76 months. Thus, the minimum sentencing guidelines range should be 19 to 76 months. On remand, the trial court should correct the SIR to reflect these changes. Additionally, the judgment of sentence does not indicate that defendant

was sentenced as a fourth habitual offender. The judgment of sentence should be corrected to reflect that defendant was sentenced as a fourth habitual offender.

We affirm defendant's convictions and his felony-firearm sentence, but vacate defendant's sentence for the felon-in-possession conviction, and remand for resentencing on that conviction only. On remand, the trial court is directed to correct the SIR and judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly