

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 19, 2011

v

MARQUIS DEANGELO NELSON,
Defendant-Appellant.

No. 296932
Calhoun Circuit Court
LC No. 2009-001269-FH

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I concur in the majority’s affirmance of defendant’s conviction. I respectfully dissent, however, from its affirmance of the scoring of Offense Variables (OV) 1 and 13. Since the combined effect of rescoring these variables results in a change in guideline range, I would remand for resentencing.

On June 16, 2006, the police discovered approximately 15 grams of cocaine inside one of the wheels on a television stand in a bedroom at 12 First Street. In searching the bedroom, the police also found a handgun *concealed under the bedcovers*. Found with the handgun was defendant’s driver’s license, listing a different address, as well as his car registration and insurance. At the time of the search, defendant was not present in the house. Five months later, defendant, who had been detained on unrelated charges, was questioned about the incident and, ultimately, was convicted of both drug and firearm charges.

Defendant’s sentencing guidelines were scored at 5 points for OV 1. This offense variable is captioned “aggravated use of a weapon” and 5 points are to be scored where “a weapon was displayed or implied.” MCL 777.31(1)(e). In this case, a weapon was located in the same room as the drugs. However, it was hidden, not displayed. Its display was also not “implied”; indeed, defendant was not present and so could not take any action to “imply” the use of a weapon. Accordingly, it was error to score this variable.

As to OV 13, it is captioned “continuing pattern of criminal behavior” and was scored at 25 points based on a finding that “the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(c). However, the crime for which defendant was charged and convicted was not a “crime against a person” under the guidelines, but rather a “crime involving a controlled substance.” Thus, the crime for which he was convicted could not have been part of a *pattern* of crimes against persons. While there do not

appear to be any published cases dealing precisely with this question, the language of the statute and the Supreme Court decision in *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006) strongly suggest this view. In *Francisco*, the Court concluded that the relevant five year period to be considered under OV 13 must include the sentencing offense since “in order for the sentencing offense to constitute a part of the pattern it must be encompassed by the same five-year period as the other crimes constituting the pattern.” *Id.* at 86-87. By the same logic, in order for the sentencing offense to be part of a pattern of crimes against persons, it must itself be a crime against a person.

/s/ Douglas B. Shapiro