

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVLIN OMAR BROWN,

Defendant-Appellant.

UNPUBLISHED

July 28, 2011

No. 297770

Oakland Circuit Court

LC No. 2009-229410-FH

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted at a bench trial of failure to pay child support, MCL 750.165, and was sentenced as a habitual offender, third offense, MCL 769.11, to three years of probation, with 270 days to be served in jail. He appeals as of right. We affirm.

Defendant's sole claim on appeal is that the trial court erred in scoring ten points for offense variable 16 of the sentencing guidelines, MCL 777.46, and that defense counsel was ineffective for failing to object.

Pursuant to MCR 769.34(10), "[a] party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals." Here, defendant concedes that the alleged scoring error was not brought up at sentencing, the lower court record contains no motion for resentencing, and defendant filed no motion for remand with this Court.¹ Thus, defendant may only raise this issue in the context of ineffective assistance of counsel. *People v Francisco*, 474 Mich 82, 90 n 8; 711 NW2d 44 (2006).

¹ Although defendant's brief contends otherwise, a review of our record revealed no such motion.

“To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted.” *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

Assuming, without deciding, that OV 16 was improperly scored, defendant's guidelines range would change from D-II (5 to 23 months) to D-I (2 to 17 months). MCL 777.67. Defendant points out that D-I is an intermediate sanction cell. Nevertheless, we find no evidence that, had defense counsel objected, a different sentence “reasonably would have resulted.” *Harmon*, 248 Mich App at 531. Here, defendant was sentenced to three years' probation including 9 months (270 days) in jail. An intermediate sanction includes probation with jail. *People v Harper*, 479 Mich 599, 618; 739 NW2d 523 (2007). Thus, defendant's sentence falls not only within the appropriate guidelines range, but was an intermediate sanction to which defendant asserts he was entitled. Defendant has failed to show ineffective assistance of counsel.

Affirmed.

/s/ Stephen L. Borrello

/s/ Patrick M. Meter

/s/ Douglas B. Shapiro