

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 21, 2013

v

TINO KAREEN THOMAS,
Defendant-Appellant.

No. 307340
Wayne Circuit Court
LC No. 11-002981-FH

Before: BORRELLO, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of felon in possession of a firearm, MCL 750.224f, and carrying or possessing a firearm when committing or attempting to commit a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to two to five years' imprisonment for felon in possession of a firearm and five years' imprisonment for a second felony-firearm offense. For the reasons set forth in this opinion, we affirm but remand for the sole purpose of correcting the PSIR to reflect the proper conviction dates.

This appeal arises from an incident that occurred on March 12, 2011 around 2:00 a.m. in Detroit, Michigan. Police responded to a call that men were trying to enter a night club with guns. The night club was located at Dover and Livernois. One of the officers who responded to the call, George Alam, testified that shortly after he arrived at scene, he saw defendant throw a gun over the fence of a house on the corner of Stroepel and Dover.

On appeal, defendant argues that he was deprived due process of law because PRV 1 was improperly scored when the trial court mistakenly believed defendant had committed two prior high severity felonies, though defendant has only committed one such felony.

“Questions [of] whether a defendant was deprived of liberty without due process of law . . .” and questions of how to interpret statutory sentencing guidelines are reviewed de novo. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). “This Court reviews a trial court’s scoring decision under the sentencing guidelines ‘to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.’” *Id.*, quoting *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (internal quotation marks omitted). If there is any evidence to support a trial court’s scoring decision, the decision will be upheld. *Id.* “An appellate court must affirm minimum sentences

that are within the recommended guidelines range, except when there is an error in scoring the sentencing guidelines or inaccurate information was relied on in determining the sentence.” *Id.*

PRV 1 pertains to “prior high severity felony convictions.” MCL 777.51(1). Pursuant to MCL 777.51(1)(b), an offender with two prior high severity felony convictions is assessed 50 points for PRV 1. Pursuant to MCL 777.51(2), a prior high severity felony *conviction* must be entered before *commission* of the sentencing offense and be:

- (a) A crime listed in offense class M2, A, B, C, or D.
- (b) A felony under a law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D.
- (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 10 years or more.
- (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 10 years or more.

It is uncontested that defendant’s January 4, 2001, conviction for assault with intent to do great bodily harm less than murder, L Ct. No. 10467-01, constitutes a Class D felony that may properly be considered under PRV 1. “Assault with intent to do great bodily harm less than murder” is a class D offense. MCL 777.16d. However, defendant argues that the trial court improperly considered defendant’s January 10, 1995, conviction for attempted delivery of a controlled substance less than 50 grams, L Ct. No, 94-013777-01, as a Class D felony that may be considered under PRV 1.

Defendant is correct that his 1995 conviction of attempted delivery of a controlled substance less than 50 grams cannot be considered under PRV 1. Pursuant to MCL 777.19(3), an attempt to commit a Class A, B, C, or D felony constitutes a Class E felony, but an attempt to commit a Class E, F, or G offense is a Class H felony. “Delivery or manufacture of less than 50 grams of certain schedule 1 or 2 controlled substances” is a class D felony. MCL 777.13m. Therefore, this offense should be classified as a class E offense and may only be considered under PRV 2. See MCL 777.52 (PRV 2 applies to “prior low severity felony convictions,” which includes “[a] crime listed in offense class E, F, G, or H”).

The remaining question is whether one of the other crimes listed in defendant’s presentence investigation report (PSIR) was a crime that could properly be considered under PRV 1.¹ First, defendant’s September 8, 1995, conviction for possession of less than 25 grams

¹ MCL 777.50 prohibits using a conviction “that precedes a period of 10 or more years between the discharge date from a conviction . . . and the defendant’s commission of the next offense resulting in a conviction” All of the convictions listed in defendant’s PSIR could potentially be considered under the PRV’s because there has not been a gap of 10 or more years

of cocaine, heroin, or another narcotic, L Ct. No. 9580031-FH, does not qualify. “Possession of less than 25 grams of certain schedule 1 or 2 controlled substances” is a class G felony. MCL 777.13m. Second, defendant’s September 28, 2011, conviction for uttering and publishing, L Ct. No. 10002366-01-FH, also does not qualify. “Uttering and publishing [of a] financial transaction device[]” is a Class F felony. MCL 777.16n.

Thus, at issue is defendant’s conviction of possession with intent to deliver under 50 grams of controlled substances, L Ct. No. 10011071-01-FH. The PSIR lists the conviction date for this offense as September 28, 2011, both under the Current Convictions and Adult History sections. However, the prosecution contends that this offense constitutes a prior high severity felony conviction, and, therefore, defendant’s understandable confusion regarding PRV 1 arises from the incorrect conviction date provided for this offense on the PSIR.

The prosecution reaches this conclusion by improperly attempting to expand the lower court record through introduction of the lower court register of actions for the L Ct. No. 100111071-01-FH offense for the first time on appeal without this Court’s permission. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). However, we need not consider this evidence because the record on appeal contains evidence that adequately supports the trial court’s scoring of PRV 1. In the same sentencing hearing on October 19, 2011, the trial court (1) closed out defendant’s probation regarding both L Ct. No. 10011071-01-FH and L Ct. No. 10002366-01-FH without improvement and sentenced defendant regarding those violations, and (2) sentenced defendant regarding the convictions at issue on appeal, felon in possession of a firearm and felony-firearm. At the sentencing hearing, the trial court asked defendant, regarding the probation violations, whether he understood “that basically the charges are—well, they’re non-payment and other charges that attach to this, that the primary charge is the fact that *you have picked up a new charge*. Do you understand that—on both cases?” Defendant responded affirmatively. After the trial court asked how defendant wished to plead regarding the two probation violations for L Ct. No. 10011071-01-FH and L Ct. No. 10002366-01-FH, the trial court asked defendant, “And is it—is it a fact, is it not, that you have been convicted now of *subsequent* criminal activities, is that correct?” To which defendant replied, “Yes, Your Honor.” Importantly, the conviction dates for (1) the current offenses on appeal, (2) L Ct. No. 10011071-01-FH, and (3) L Ct. No. 10002366-01-FH are listed in the PSIR as September 28, 2011, and the offenses are listed together in the Current Offense section. However, a previous PSIR was attached to defendant’s PSIR, and it listed the date of the uttering and publishing conviction, L Ct. No. 10002366-01-FH, as April, 2, 2010. Therefore, this older PSIR provides evidence that the conviction dates for the two offenses defendant was on probation for, L Ct. No. 10011071-01-FH and L Ct. No. 10002366-01-FH, had prior *actual* conviction dates, but were also listed with the same conviction dates as the present offenses, which are the offenses that violated defendant’s probation in the prior cases. Hence, despite the dates listed in the PSIR to the contrary, the trial court’s statements and defendant’s answers to the court’s questions constitute evidence that defendant was convicted of the L Ct. No. 10011071-01-FH offense before defendant committed the current offenses now on appeal. The verifiable error in the conviction date of the L Ct. No. 10002366-01-FH offense further supports the conclusion that the conviction

between the discharge date of any of defendant’s convictions and commission of subsequent convicted offenses. MCL 777.50.

date for the L Ct. No. 10011071-01-FH offense was incorrectly listed in the PSIR. Because the L Ct. No. 10011071-01-FH offense constitutes a Class D offense, it can be inferred that the trial court understood this offense as the second prior high severity felony conviction required under MCL 777.51(1)(b) to reach a score of 50 points for PRV 1. Therefore, the trial court's statements and defendant's answers to the court's questions constitute record evidence that adequately supports the trial court's assessment of 50 points for PRV 1. *Steele*, 283 Mich App at 490.

While neither party has requested remand for correction of the PSIR, we conclude that such action is necessary. We have previously stated, "The Department of Corrections relies on the information contained in the PSIR to make critical decisions regarding a defendant's status. Therefore, it is imperative that the PSIR accurately reflect the sentencing judge's determination regarding the information contained in the report." *Id.* (internal citation omitted). As indicated, there are strong public policy reasons for remanding this case to correct the inaccuracies in the PSIR. Therefore, pursuant to the Court's powers under MCR 7.216(A)(4), we affirm defendant's convictions but remand this case and direct the trial court to correct the PSIR so it accurately reflects the conviction dates of the L Ct. No. 10011071-01-FH and L Ct. No. 10002366-01-FH convictions.

Affirmed. We remand this case to the trial court for the sole purpose of correcting the PSIR to reflect the proper conviction dates of L Ct. No. 10011071-01-FH and L Ct. No. 10002366-01-FH. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray