

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONI RENE PLOUHAR,

Defendant-Appellant.

UNPUBLISHED

March 19, 2013

No. 308538

Oakland Circuit Court

LC No. 2011-238503-FC

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, and unarmed robbery, MCL 750.530. The trial court sentenced her to concurrent prison terms of 51 months to 20 years for the armed robbery conviction and 3 to 15 years for the unarmed robbery conviction. Defendant appeals as of right. We affirm.

Defendant argues that she is entitled to resentencing because five points were erroneously scored for prior record variable (PRV) 6, MCL 777.56, of the sentencing guidelines, and that the scoring error affects the appropriate guidelines range. Although defense counsel's agreement at sentencing that the guidelines were properly scored waived any error, *People v Carter*, 462 Mich 206, 219-220; 612 NW2d 144 (2000); *People v Witherspoon*, 257 Mich App 329, 333-334; 670 NW2d 434 (2003), defendant also argues that defense counsel was ineffective for not challenging the scoring of PRV 6 at sentencing. A claim of ineffective assistance of counsel is reviewed to determine whether defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and, if so, whether there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008).

PRV 6 takes into account the defendant's "relationship to the criminal justice system." MCL 777.56(1). Five points are to be scored if the defendant "is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor." MCL 777.56(1)(d).

According to defendant's presentence report, the accuracy of which was not challenged at sentencing, defendant was sentenced to two years' probation in late 2002. Although defendant's probationary term was scheduled to expire by the end of 2004, she was charged with violating her probation and a bench warrant was issued in 2003. The record contains a transcript from

defendant's violation of probation hearing, which shows that she was charged with failing to report, among other violations. "[T]he period of probation ceases to run from the time a warrant is issued until the time the defendant is returned to the court's supervision." *People v Ritter*, 186 Mich App 701, 711; 464 NW2d 919 (1991). Defendant apparently did not return to court to answer the bench warrant until after she was arrested for the instant offenses. Therefore, defendant was still on probation when she committed the robberies.

Defendant contends that her probationary status should not be considered, and thus PRV 6 should not have been scored, because she had a valid defense to the violation of probation charge. This Court has held that once a warrant for probation violation has been issued, the probation authorities must exercise due diligence in executing it, and "[i]f there is a determination that the probation authorities did not act with reasonable dispatch under all the circumstances, then there is a waiver of the probation violation." *People v Ortman*, 209 Mich App 251, 254; 530 NW2d 161 (1995). In this case, the record shows only that a bench warrant was issued in 2003 and that defendant was not arrested on the warrant until 2011. There is nothing in the record to explain the reason for the delay in its execution or to show that any court determined that there was a lack of due diligence in executing the warrant. At best, the record shows that defendant had a potential defense to the violation of probation charge, but that does not negate the fact that she was on probation when she committed the instant offenses. Moreover, defendant ultimately pleaded guilty to violating her probation. Therefore, PRV 6 was properly scored at five points. Because there was no error in the scoring of PRV 6, defense counsel was not ineffective for failing to object. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ David H. Sawyer

/s/ Karen M. Fort Hood