

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 15, 2013

v

JERMAINE LEE PEARSON,
Defendant-Appellant.

No. 310898
Kent Circuit Court
LC No. 09-001904-FC

Before: WHITBECK, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

A jury convicted defendant Jermaine Lee Pearson of armed robbery, MCL 750.529; unlawful imprisonment, MCL 750.349b; felony-firearm, MCL 750.227b; carrying a concealed weapon, MCL 750.227; possession of a firearm by a felon, MCL 750.224f; and conspiracy to commit armed robbery, MCL 750.157a. The trial court initially sentenced him in December 2009, as a habitual offender, MCL 769.10, to serve 30 to 45 years in prison for the armed robbery and conspiracy to commit armed robbery convictions, to serve 180 to 270 months in prison for the unlawful imprisonment conviction, to serve two years in prison for the felony-firearm conviction, and to serve 60 to 90 months in prison for the concealed weapon and felon-in-possession convictions.

On appeal, this Court affirmed his convictions and sentence. *People v Pearson*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2011 (Docket No. 296252). However, our Supreme Court determined that the trial court should have scored Offense Variable (OV) 13, MCL 777.43, at zero points. *People v Pearson*, 490 Mich 984, 984-985; 807 NW2d 45 (2012). For that reason, the Supreme Court reversed this Court in part and remanded the case to the trial court for resentencing. *Id.*

On remand, the trial court ordered Pearson to serve the same sentences. Pearson now appeals by right the trial court's decision to order the same sentence. Because the trial court ordered Pearson to serve sentences that amounted to a departure from the sentencing guidelines without following the procedures for a departure, we vacate Pearson's sentence and remand for resentencing.

Pearson argues that the trial court improperly departed from his recommended minimum sentence range under the legislative guidelines. Although Pearson did not raise this issue before the trial court, there is no preservation requirement for review of a sentence that departs from the legislative guidelines. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008), citing MCL 769.34(7). This Court reviews de novo whether the trial court properly interpreted and applied the sentencing guidelines. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

At Pearson's first sentencing hearing, the trial court scored a total of 70 points for the prior record variables (PRV) and a total of 120 points for the OV's, which corresponds to the E-VI bracket for a class A offense. MCL 777.62. Because the trial court sentenced Pearson as a second felony offender, his recommended minimum sentence range under the guidelines was 225 to 468 months. See MCL 777.62; MCL 777.21(3)(a). The trial court sentenced Pearson to serve a minimum of 30 years in prison (360 months) for his armed robbery conviction, which was within the recommended minimum sentence range.

At Pearson's resentencing hearing, the trial court acknowledged that the Supreme Court had ordered it to resentence Pearson with OV 13 scored at zero points. With that variable scored at zero, Pearson's sentencing bracket changed to E-V for a class A offense and the resulting sentencing range for a second habitual offender was 171 to 356 months. MCL 777.62; MCL 777.21(3)(a). Despite this, the trial court again sentenced Pearson to serve a minimum of 360 months in prison.

It appears from the record that the trial court inadvertently sentenced Pearson to serve a minimum sentence that, in effect, amounted to a departure from the sentencing guidelines. Although the trial court has the discretion to depart from the guidelines, it must comply with the requirements for a departure and must state its findings sufficient to allow for effective appellate review. MCL 769.34(3); *Smith*, 482 Mich at 304. Because the trial court did not comply with those requirements, we conclude that Pearson is entitled to again be resentenced. See *People v Babcock*, 469 Mich 247, 266-267; 666 NW2d 231 (2003). Therefore, we vacate Pearson's sentences and remand for resentencing.

Given our resolution of this issue, it is unnecessary to consider whether Pearson's trial lawyer rendered ineffective assistance by failing to object to the departure. We also decline to address his claim that the trial court erred when it denied him an opportunity to allocute because that claim is moot. *People v Claypool*, 470 Mich 715, 723 n 8; 684 NW2d 278 (2004) (noting that an issue is moot if the appellant court is unable to grant relief).

We vacate Pearson's sentences and remand for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Michael J. Kelly