STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 12, 2013
v	No. 311569 Cass Circuit Court
ERICA LYNE THOMAS, Defendant-Appellant.	LC No. 11-010164-FH

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by leave granted the sentences imposed for her plea-based convictions of owning or possessing laboratory equipment that she knew or had reason to know would be used for manufacturing methamphetamine, MCL 333.7401c(2)(f); possession of methamphetamine, MCL 333.7403(2)(b)(*i*); and maintaining a drug house, MCL 333.7405(1)(d). The trial court downwardly departed six months from the sentencing guidelines as scored and sentenced defendant to 51 months to 20 years' imprisonment for maintaining or operating a methamphetamine lab, 136 days in jail for possession of methamphetamine, and 136 days in jail for maintaining a drug house. We vacate defendant's sentences and remand for resentencing.

On July 6, 2011, defendant and Christopher Ruth were arrested when a methamphetamine lab and associated components were discovered in a Cass County home. At some earlier point that day, defendant had traded a box of pseudoephedrine pills and two marijuana cigarettes for a half-gram of methamphetamine. While being interviewed, she received a text message from "Sweet Mindy" that stated "Any white today?" Defendant admitted that this message was sent by her girlfriend Melinda and that it was a request for methamphetamine. Defendant sometimes gave or shared methamphetamine with Melinda. Police found a bag in the attic, which contained an active methamphetamine laboratory, along with various methamphetamine lab equipment and ingredients. Ruth claimed defendant directed him to hide the lab, and thought that defendant brought the one-pot laboratory into the house. On September 16, 2011, defendant pled guilty to the three charges noted above, and admitted possessing an unspecified amount of methamphetamine and "[e]quipment" that could be used to manufacture methamphetamine on July 6, 2011. Counts of manufacturing methamphetamine and possession with intent to deliver methamphetamine, MCL 333.7401(b)(2)(*i*), were dismissed by the prosecutor.

At sentencing, the prosecution requested that OV 12 be scored at 10 points. Defense counsel objected to any score in OV 12, arguing there was no factual basis for any conspiracy, nor possession with intent to deliver, but the trial court ruled that the PSIR provided sufficient evidence of three contemporaneous felonious criminal acts, "[m]anufacturing methamphetamine, possession with intent to deliver and conspiracy" and 10 points in OV 12 was justified. Defense counsel did not object to scoring 5 points in OV 15, but did tell the trial court, "that if you give [defendant] more than three years, when she gets down to that three-year period, then I believe she would be eligible for bootcamp treatment." The trial court noted that the minimum sentencing guideline range for operating or maintaining a methamphetamine laboratory as scored was 57 to 95 months. The court made a six-month downward departure based on defendant's cooperation with the prosecutor's office, and sentenced her to 51 months to 20 years' imprisonment. Defendant moved to correct her sentence on May 7, 2012, arguing that OV 12 was misscored, OV 15 was misscored, and that trial counsel was ineffective for failing to properly object to these scores and for providing incorrect information to the trial court regarding defendant's eligibility for a "boot camp" program. The trial court found OV 12 and OV 15 to have been properly scored, and ruled that trial counsel was not ineffective because the court was never willing to depart from the sentencing guideline range in order to qualify defendant for the "boot camp" program. It merely noted that if defendant became eligible for this program in the future, the trial court would not object to defendant's participation. Defendant now appeals.

"Scoring decisions for which there is any evidence in support will be upheld." *People v Phelps*, 288 Mich App 123, 135; 791 NW2d 732 (2010), quoting *See People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006). However, "[t]he proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). A defendant is entitled to resentencing on the basis of a scoring error if the error changes the recommended minimum sentence range under the legislative guidelines. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

MCL 777.42(1)(c) directs a trial court to score 10 points in OV 12 if "[t]hree or more contemporaneous felonious criminal acts involving other crimes were committed[.]" A felonious criminal act is contemporaneous if [it] . . .'occurred within 24 hours of the sentencing offense'" and "[t]he act has not and will not result in a separate conviction." MCL 777.42(2)(a)(*i*) and (*ii*); *People v Light*, 290 Mich App 717; 803 NW2d 720 (2010). "Therefore, when scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense." *Light*, 290 Mich App at 723. In this case, at sentencing the trial court found that "[m]anufacturing methamphetamine, possession with intent to deliver and conspiracy" were established by the presentence investigation report (PSIR) and supported scoring 10 points in OV 12. There was evidence of a separate act of manufacturing methamphetamine. However, there was no evidence of an act of possession with intent to deliver within 24 hours of the sentencing offense, which was separate from the act that supported defendant's conviction for possession of methamphetamine. And, we disagree with plaintiff that the trial court could have found three additional conspiracy charges to support scoring 10 points in OV 12. Conspiracy is complete when two or more people agree to commit a criminal act, with the intent to accomplish the illegal objective. See *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). If all of the charged misconduct is germane to one course of wrongdoing, there is only one conspiracy. *People v Tenerowicz*, 266

Mich 276, 282; 253 NW 296 (1934); *People v Chambers*, 279 Mich 73, 77; 271 NW 556 (1937). In this case, the evidence in the record could support only a single conspiracy charge. See *People v Porterfield*, 128 Mich App 35, 41; 339 NW2d 683 (1983). Thus, while there was some evidence of two contemporaneous felonious acts, which may support a 5 point score, MCL 777.42(1)(e), OV 12 was misscored at 10 points.

OV 15 may be scored at five points when "[t]he offense involved the delivery or possession with intent to deliver marihuana or any other controlled substance or a counterfeit controlled substance or possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking . . . ." MCL 777.45(1)(g). Plaintiff concedes, and we agree, that there was no evidence of trafficking in this case. "'Deliver' means the actual or constructive transfer of a controlled substance from one individual to another regardless of remuneration[.]" MCL 777.45(2)(a).

In *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009), the Michigan Supreme Court held that "[o]ffense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." OV 15 does not so specify. See MCL 777.45; *People v Gray*, 297 Mich App 22; 824 NW2d 213 (2012). Though defendant pled guilty to possession of methamphetamine, a charge of possession with intent to deliver methamphetamine was dismissed, and the sentencing offense was operating/maintaining a methamphetamine lab, not delivery of methamphetamine. The trial court's decision to score five points in OV 15 was thus error. See *McGraw*, 484 Mich at 135; *Gray*, 297 Mich App at 24.

Plaintiff nevertheless argues that *Gray* should not apply retroactively to the present case. Even if *Gray* was not published, however, the same result would be demanded in this case based on *McGraw*. The omission of any indication to the contrary in MCL 777.45 mandates scoring OV 15 limited to the sentencing offense. Delivery was not part of the sentencing offense in this case and the pending charge of possession with intent to deliver was dismissed pursuant to a plea agreement. Scoring OV 15 was inappropriate. See *McGraw*, 484 Mich at 134 ("[i]t would be fundamentally unfair to allow the prosecution to drop . . . [a] charge while brokering a plea bargain, then resurrect it at sentencing in another form."). Because correcting these OV scores reduces defendant's OV level and guideline range, MCL 777.63, defendant is entitled to resentencing. See *Francisco*, 474 Mich at 88-90.

Finally, whether a person has been denied the effective assistance of counsel is a mixed question of fact and law. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010), citing *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

As noted, OV 12 and OV 15 were improperly scored. Because correcting them requires remanding this case for resentencing, however, defendant cannot show that she was prejudiced by counsel's failure to object at sentencing. Trial counsel's assertion that defendant might

become eligible for "Boot Camp" (a type of special alternative incarceration) fell below an objective standard of reasonableness. See MCL 791.234a. However, a substantial downward departure would have been required to qualify defendant for this program, and in ruling on defendant's motion to correct her invalid sentence, the trial court clearly stated that it never entertained a downward departure of sufficient magnitude at sentencing. It merely indicated that it would not object if informed that defendant qualified for Boot Camp at some point in the future. On this record, defendant has failed to show that but for trial counsel's misstatement regarding boot camp, the outcome at sentencing would have been different. See *Swain*, 288 Mich App at 643.

Vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens