

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
November 12, 2013

v

TYE ALAN TRIANTAFELO,  
Defendant-Appellant.

No. 313794  
Emmet Circuit Court  
LC No. 10-035084-FC

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Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

This case is before this Court for the second time. In *People v Triantafelo*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2012 (Docket No. 306782), this Court vacated defendant's 18-month to 5-year sentence imposed on his jury-trial conviction of attempted larceny in a building, MCL 750.360; MCL 750.92, and remanded for resentencing. On remand, the trial court again sentenced defendant to 18 months to 5 years' imprisonment. Because the trial court had authority to score 25 points for offense variable (OV) 19 on remand and OV 19 was properly scored, we affirm.

Defendant argues that the trial court erred by scoring 25 points for OV 19 because the original sentencing guidelines range of zero to 18 months became the law of the case following this Court's decision. The trial court upwardly departed from the sentencing guidelines when it sentenced defendant the first time, and neither party challenged the scoring of the sentencing guidelines in the first appeal. On remand, the trial court noticed that no points had been assessed for OV 19 previously, and it scored 25 points under OV 19 for threatening the security of a penal institution, MCL 777.49. The score was based on defendant's possession of a weapon while in jail awaiting sentencing in this case. He pleaded guilty to possession of a weapon in jail, MCL 801.262(2), and was sentenced to 30 months to 5 years' imprisonment.<sup>1</sup> The change in the scoring of OV 19 increased defendant's sentencing guidelines range from zero to 18 months to

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<sup>1</sup> This Court denied defendant's delayed application for leave to appeal in that case. *People v Triantafelo*, unpublished order of the Court of Appeals, entered November 27, 2012 (Docket No. 310621).

zero to 34 months. The trial court sentenced defendant to 18 months to 5 years' imprisonment within the adjusted range.

Defendant's argument that the trial court lacked authority to rescore the sentencing guidelines on remand is without merit. In the previous appeal, this Court vacated defendant's entire sentence and remanded this case for resentencing. "When a case is remanded from our Court because the entire sentence is invalid, every aspect of the sentence is before the judge de novo unless the remand indicates otherwise." *People v Williams (After Second Remand)*, 208 Mich App 60, 65; 526 NW2d 614 (1994). Because this Court's decision did not indicate otherwise, the scoring of the sentencing guidelines was before the trial court de novo and the court had authority to score 25 points for OV 19 on remand.

Defendant also argues that the trial court erred by scoring 25 points for OV 19. In applying the statutory sentencing guidelines, we review for clear error a trial court's factual determinations. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo whether the facts are sufficient to satisfy the scoring conditions prescribed by a statute. *Id.* MCL 777.49(a) directs a sentencing court to score 25 points for OV 19 if "[t]he offender by his or her conduct threatened the security of a penal institution[.]" Thus, in the context of this case, we review for clear error the trial court's factual determination that defendant's conduct threatened the security of a penal institution, and we review de novo whether defendant's conduct was sufficient to assess 25 points for OV 19. See *Hardy*, 494 Mich at 439.

Defendant does not challenge the trial court's factual determination that his conduct threatened the security of a penal institution. Rather, defendant contends that the trial court erred by relying on post-conviction conduct in scoring OV 19. Defendant's argument lacks merit. In *People v Smith*, 488 Mich 193, 195; 793 NW2d 666 (2010), our Supreme Court held that "because the circumstances described in OV 19 expressly include events occurring after the completion of the sentencing offense, scoring OV 19 necessarily is not limited to consideration of the sentencing offense." Thus, relying on a defendant's post-offense conduct is permitted when scoring OV 19. Accordingly, the trial court did not err by scoring 25 points for OV 19 based on defendant's possession of a weapon while in jail awaiting sentencing. Further, because defendant's minimum sentence was within the appropriate sentencing guidelines range, he is not entitled to resentencing. MCL 769.34(10).

Affirmed.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Mark T. Boonstra