

Court of Appeals, State of Michigan

ORDER

People of MI v Brien Michael Sullivan

Docket No. 313258

LC No. 12-003579-FH

Michael J. Talbot
Presiding Judge

Kirsten Frank Kelly

Michael J. Riordan
Judges

On order of the Court, the application for leave to appeal defendant's September 10, 2012, judgment of sentence is considered and, pursuant to MCR 7.205(D)(2), in lieu of granting leave to appeal, we VACATE defendant's sentence and remand for resentencing. The trial court erred when it scored offense variable 13. For a sentencing offense to constitute a part of a pattern of felonious criminal activity under OV 13, the sentencing offense "must be encompassed by the same five-year period as the other crimes constituting the pattern." *People v Francisco*, 474 Mich 82, 86-87; 711 NW2d 44 (2006). Moreover, in order for the sentencing offense to be part of a pattern, the other offenses counted towards the scoring of the offense variable must also be of the same category of crime. *People v Nelson*, 491 Mich 869, 870; 809 NW2d 564 (2012). "[T]he six named offense categories in MCL 777.5 are statutorily defined phrases that encompass only those specific crimes designated as such by the Legislature in MCL 777.11 through 777.19." *People v Bonilla-Machado*, 489 Mich 412, 425-426; 803 NW2d 217 (2011). A court cannot "consider crimes falling within other designated offense categories to establish a continuing pattern of criminal behavior." *Id.* at 427.

Defendant's sentencing offense, obtaining a controlled substance by fraud, is a crime involving a controlled substance, not a crime against a person or property. MCL 777.13m. Therefore, the sentencing offense cannot be considered part of a pattern of felonious criminal activity involving "three or more crimes against a person or property[.]" MCL 777.43(1)(d). Furthermore, MCL 333.7407(1)(d) is not listed as one of the enumerated controlled substances offenses which can be considered for scoring OV 13. MCL 777.43(1)(d). Accordingly, since the sentencing offense itself is not part of any pattern for which OV 13 can be scored, any score other than zero points is improper. *See Bonilla-Machado*, 489 Mich at 427. The reduction in scoring would change defendant's overall OV score to one point, and change the sentencing guidelines from 5 to 23 months to 2 to 17 months. MCL 777.68. Accordingly, defendant is entitled to be resentenced. *Francisco*, 474 Mich at 88.

We do not retain jurisdiction.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG 16 2013

Date

A handwritten signature in dark ink, appearing to read "Jerome W. Zimmer Jr.", is written over a horizontal line. Below the line, the words "Chief Clerk" are printed.

Chief Clerk