

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LASHAWN HILL,

Defendant-Appellant.

UNPUBLISHED

May 3, 1996

No. 181784

LC No. 94-008197

Before: Neff, P.J., and Jansen and G.C. Steeh III,* JJ.

PER CURIAM.

Defendant pleaded guilty in the Detroit Recorder's Court to delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). She was sentenced to seven to twenty years' imprisonment. She appeals as of right and we remand for resentencing.

Defendant argues that the trial court erred in scoring OV 9 and OV 16. The sentencing judge's scoring of the sentencing guidelines will be upheld on appeal if there is evidence to support the score. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). We agree with defendant that the record does not support the scores for OV 9 and OV 16.

OV 9 concerns the offender's role and was scored at ten points (leader in a multiple offender situation). At the motion for resentencing, defendant argued that she was not the leader in this case. Both the plea transcript and the presentence report indicate that defendant was approached by an undercover police officer who asked if he could buy drugs from her. The police officer handed defendant \$20 and she, in turn, gave the money to her codefendant Carlos Alejandro Pugh, who was sitting in a car. Pugh then gave defendant some cocaine, which she turned over to the undercover officer. The trial court initially stated that it would uphold the scoring of OV 9 at ten points (finding that defendant was the leader), but later stated that it would grant defendant's motion regarding the challenge to the score of OV 9, and finally stated that it would take the motion under advisement. Ultimately, the trial court denied the motion for resentencing.

* Circuit judge, sitting on the Court of Appeals by assignment.

Although the trial court's ruling is somewhat confusing, we do not find any record evidence supporting the score of OV 9 that defendant was a leader in a multiple offender situation. Here, defendant and Pugh worked together to deliver the cocaine, but there is no record evidence that defendant was the actual leader. Accordingly, OV 9 should have been scored at zero points.

Defendant also challenges the score for OV 16, which concerns aggravated controlled substance offense. OV 16 was scored at fifteen points (situations involving the sale or delivery of eleven grams or more of a compound containing heroin or cocaine; or possession of substances having such dollar value; or under circumstances as to indicate trafficking). The trial court scored OV 16 at fifteen points, finding that there was evidence that defendant was involved in drug trafficking. Trafficking is defined in the sentencing guidelines as "selling drugs on a continuing basis to the ultimate consumer; it does not include merely being reimbursed for sharing a portion of one's personal supply." According to the presentence report, a second purchase of cocaine was made involving a different undercover police officer, and the same two defendants. There, .06 grams of cocaine was involved and .10 grams of cocaine was found in Pugh's car after the arrest. At the motion for resentencing, the trial court indicated that it scored OV 16 at fifteen points because defendant stated at the plea that she delivered the cocaine because she was an addict and needed the money. Our review of the plea transcript reveals no such admission by defendant. In fact, defendant contended that she supported her addiction to crack cocaine through prostitution. There is no record evidence that defendant sold drugs on a continuing basis. Accordingly, OV 16 should have been scored at five points because cocaine was involved in this case.

Under the corrected scoring of the sentencing guidelines, defendant's range is 24 to 96 months (D - III). Because this range is significantly reduced from the prior range of 60 to 160 months and the trial court did not indicate that it wished to sentence defendant at the very top of the sentencing guidelines, we remand for resentencing for the trial court to reconsider defendant's sentence in light of the corrected guidelines range.

Remanded for resentencing. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Kathleen Jansen

/s/ George C. Steeh III