

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE SIPE,

Defendant-Appellant.

UNPUBLISHED

May 28, 1996

No. 174386

LC No. 93-2753-FH

Before: Young, P.J., and Holbrook, Jr., and J. Richard Ernst,* JJ.

PER CURIAM.

Defendant pleaded guilty of embezzlement by an agent over \$100, MCL 750.174; MSA 28.371, and was sentenced to serve 80 to 120 months in prison and to provide restitution to the victim. He appeals as of right, alleging several reasons why he is entitled to resentencing.

Defendant first argues that the trial court failed to resolve a dispute regarding the amount of restitution due the victim. We disagree. Although defendant is correct that this issue was the subject of much discussion at the sentencing hearing, we find that the court adequately resolved the issue by ordering defendant to provide restitution to the victim “of \$850 less whatever is recovered of the cash that Mr. Sipe indicates was taken into custody by the police.” See MCR 6.425(D)(3). Moreover, the record indicates that defendant was eventually given credit for \$770 that was seized by the police. Accordingly, defendant has not established entitlement to resentencing on this basis.

Defendant next argues that OV-9 was improperly scored at ten points on the basis that defendant was the “leader in a multiple offender situation.” The trial court raised the issue of rescoreing OV-9 sua sponte, noting that “the woman [defendant] sent over to pick up the money I suppose is an offender, too.” The prosecutor then noted that a person named Robert Hall had cashed the first check, “so there’s at least two other persons involved in this scheme, whether they were knowingly involved, or unknowingly involved, which is an issue we were never able to resolve.” Defense counsel objected to the rescoreing of this variable, arguing that there was no evidence that the other persons knowingly

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

participated in the embezzlement. Because OV-9 implicitly requires that the defendant lead other knowing participants in the commission of an offense (i.e., leader in multiple *offender* situation), and the prosecutor conceded that he had not been able to establish that the other persons were knowing offenders, we remand so that the lower court can re-evaluate the scoring of this variable in accordance with the standard enunciated in *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993):

A sentencing court may consider all record evidence before it when calculating the sentence guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial. The contents of the presentence report are presumptively accurate if unchallenged by the defendant. However, once a defendant has effectively challenged an adverse factual assertion contained in the presentence report or any other controverted issues of fact relevant to the sentencing decision, the prosecution must prove by a preponderance of the evidence that the facts are as asserted. If the record provides insufficient evidence upon which to base the decision supporting or opposing the scoring, the court in its discretion may order the presentment of further proofs. This Court will affirm a sentencing court's scoring decision where there is evidence to support the score.

See also *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993).

Defendant next argues that offense variables 8 and 25 were misscored on the SIR and that he was denied effective assistance of counsel at sentencing because of counsel's failure to object to the scoring. Because these issues were not raised below, the available record is insufficient to support a finding either that the scoring was improper or that counsel's failure to object resulted in prejudice to defendant. Therefore, because we are remanding for further factual development regarding OV-9, defendant also shall be permitted to raise the issue of the scoring of OV-25 and OV-8 in the lower court. Furthermore, in the event that defendant challenges the constitutionality of OV-8 on remand, the trial court shall make its findings of fact and rulings of law on the record so that appellate review may be facilitated.

Defendant also argues that he is entitled to resentencing because the court improperly considered prior convictions that defendant alleges were constitutionally infirm because they were obtained without benefit of legal counsel. Because resolution of this issue is inextricably related to resolution of the issue whether defendant's conduct was a "pattern of criminal activities" so as to warrant a score of ten points on OV-8, we direct the lower court on remand to permit defendant to attempt to satisfy his initial burden of establishing entitlement to a *Tucker-Moore*¹ hearing. In this vein, we note that neither defendant's self-serving statements in the PSIR nor his affidavit which averred that certain prior convictions were obtained without benefit of counsel constitutes the type of prima facie proof necessary to entitle defendant to an evidentiary hearing.²

People v Love (After Remand), 214 Mich App 296, 300-301; 542 NW2d 374 (1995). See also *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994).

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Robert A. Young

/s/ Donald E. Holbrook, Jr.

/s/ J. Richard Ernst

¹ *United States v Tucker*, 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972); *People v Moore*, 391 Mich 426; 216 NW2d 770 (1974).

² Defendant's reliance on *People v Alexander (After Remand)*, 207 Mich App 227, 230; 523 NW2d 653 (1994), is misplaced. Material information in a PSIR, including information regarding a defendant's prior convictions, must be verified by the investigating probation officer. MCR 6.425(A). In this case, there is no indication that defendant's self-serving assertion in the PSIR that certain prior convictions were obtained without benefit of legal counsel was verified by the investigating officer.