

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK HAROLD O'CONNOR,

Defendant-Appellant.

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UNPUBLISHED

September 24, 1996

No. 184959

LC No. 94-002988-FH

Before: J.H. Gillis, P.J., and G.S. Allen and J.B. Sullivan, JJ.\*

MEMORANDUM.

Pursuant to a plea agreement, defendant pleaded guilty to breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305, and habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to three to fifteen years' imprisonment, and now appeals as of right. We remand. This case has been decided without oral argument pursuant to MCR 7.214(A).

First, because there is no indication that the information supplied by defense counsel at the time of sentencing was inaccurate, we reject defendant's claim that his sentence was based on inaccurate information. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990).

Next, defendant claims he was denied the effective assistance counsel at sentencing because his attorney failed to object to the improper assessment of ten points for Offense Variable 9. We have reviewed the lower court record and can find no indication that defendant was the leader in this multiple offender situation. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993); *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992). Since there is no support in the record for the assessment of ten points under OV 9, defense counsel erred in failing to object to the scoring of OV 9. The question then becomes whether defendant was prejudiced by this error. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Mayes (After Remand)*, 202 Mich App 181, 183; 508 NW2d 161 (1993). As defendant admits, after the correction of OV 9, his three-

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\*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.

year minimum sentence would still be within the revised guidelines' range of eighteen to forty-two months. However, the correction of OV 9 would alter the total offense variable score so as to change the level at which defendant was ultimately placed in calculating the guidelines range from offense level III to offense level II. Hence, defense counsel's error could have been prejudicial to defendant in that defendant may have received a lesser sentence had the guidelines been properly scored. Under these circumstances, a remand for determination of the effect of the new scoring upon the sentence is required. *People v Polus*, 197 Mich App 197, 202-203; 495 NW2d 402 (1992). Because it is "entirely possible that, even with the changed guidelines recommendation, the trial court might choose to impose the same sentence," it is "premature to order resentencing because it is not entirely clear that a resentencing will be required." *People v Chesebro*, 206 Mich App 468, 474; 522 NW2d 677 (1994). If the trial court determines that it would impose a different sentence, it may enter an order granting resentencing and bring defendant before it to be resentenced. On the other hand, if the trial court determines that its sentence would not change even in light of the correct scoring of the guidelines, then it may enter an appropriate order denying resentencing. *Id.*

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

/s/ John H. Gillis

/s/ Glenn S. Allen, Jr.

/s/ Joseph B. Sullivan