

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PRESTON RANDOLPH LOGAN,

Defendant-Appellant.

UNPUBLISHED

October 1, 1996

No. 185786

LC No. 94-037533-FH

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

MEMORANDUM.

Defendant pleaded guilty as charged to assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and was sentenced to 6-2/3 to 10 years' imprisonment. He appeals as of right. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(A).

Defendant argues that he is entitled to resentencing because the sentencing court erroneously scored Offense Variable 2. We disagree. The court assigned the variable fifty points to reflect that defendant used excessive brutality when he committed the offense. That scoring decision was supported by the testimony of the victim during defendant's preliminary examination, by defendant's admissions during the plea-taking and by the unchallenged factual statements contained in the presentence investigation report. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993); *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992).

Defendant next argues that he is entitled to resentencing because the sentencing court deprived him of the right to challenge the scoring of OV 2 by waiting until the court's sentencing articulation to increase the scoring of the variable on the court's own initiative. While we agree with defendant that he had a right to challenge the scoring, MCR 6.429(C); *People v Walker*, 428 Mich 261, 266; 407 NW2d 367 (1987), and that the court deprived him of this right, we nevertheless conclude that the

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

error was harmless. The score assigned OV 2 was supported by the record and, therefore, any challenge by defendant would have been futile. Moreover, although the court might have precluded defendant from challenging the scoring at sentencing, there is no indication in the record that defendant was precluded from seeking post-conviction relief as allowed under MCR 6.429(C).

Defendant also argues that he is entitled to resentencing where the trial court elevated his prior record level classification because his total offense variable points exceeded the number of points necessary to obtain the highest offense variable classification. We can find no legal authority for the action taken by the sentencing court and, therefore, conclude that the court exceeded its sentencing authority when it elevated defendant's prior record classification from level "B" to level "C" based on defendant's offense variable score. Nevertheless, the error was harmless. The court apparently recognized the error of its ways and took remedial action. The record reflects that the court ultimately did employ the correctly calculated guidelines' range and then departed from that range on the ground that the range did not adequately consider the excessive brutality employed by defendant.

Finally, defendant argues that he is entitled to resentencing because his sentence violates the principle of proportionality. Having reviewed the record, we hold that defendant's sentence is proportionate given that the guidelines inadequately accounted for defendant's brutality in committing the offense. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ John H. Gillis
/s/ Glenn S. Allen, Jr.
/s/ Joseph B. Sullivan