

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO MORENO,

Defendant-Appellant.

UNPUBLISHED
October 22, 1996

No. 186810
LC No. 94-008245

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,* JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction of common law obstruction of justice, MCL 750.505; MSA 28.773. Defendant was sentenced to three to five years in prison. We affirm.

Defendant argues that there was insufficient evidence to support his conviction. We disagree. In determining whether evidence presented at trial was sufficient to sustain a conviction, this Court, viewing the evidence presented in a light most favorable to the prosecution, must determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 515, 515; 489 NW2d 748 (1992).

Obstruction of justice is “committed when the effort is made to thwart or impede the administration of justice.” *People v Coleman*, 350 Mich 268, 274; 86 NW2d 281 (1957). Obstruction of justice is not a singular offense, but rather, represents a category of offenses. To constitute violation of the offense, a defendant must commit one of the individual offenses recognized at common law as obstructing justice. *People v Thomas*, 438 Mich 448, 457-458; 475 NW2d 288 (1991); *People v Vallance*, 216 Mich App 415, 419; 548 NW2d 718 (1996). To dissuade or prevent or attempt to dissuade or prevent a witness from giving testimony at trial constitutes obstruction of justice. *Coleman, supra*, 280-281; *People v Boyd*, 174 Mich 321, 324-326; 140 NW 475 (1913); *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996).

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

Viewing the evidence presented in a light most favorable to the prosecution, sufficient evidence was presented to support defendant's conviction. Defendant confronted Mary Payne Liddick and instructed her that if she testified in a forthcoming criminal trial against James McCall, he would kill her. At approximately the same time, defendant confronted Michael Goddard and requested that he withdraw his complaint against McCall. An attempt to prevent a witness from testifying completes the offense of obstruction of justice, even if the witness ultimately testifies. *Coleman, supra*, 280-281; *Boyd, supra*, 326-327. Therefore, sufficient evidence was presented to sustain defendant's conviction.

Defendant further argues that pursuant to 18 USC 1503, the prosecutor failed to establish defendant's specific intent to support a conviction for the crime charged. However, defendant was not charged pursuant to 18 USC 1503. Therefore, defendant's reliance on that statute is misplaced.

Defendant argues that, at sentencing, the court erred by considering defendant's affiliation with a local gang without articulating the effect of such consideration on the sentence imposed. We disagree. At sentencing, the court stated:

[L]et me add that I would not take any severe action against the defendant for the bare reason that he's a member of the Latin Counts. Make no mistake about that . . . the court would not take action against him for that reason alone.

The court expressly did not impose sentence based solely upon defendant's gang affiliation. Rather, the court merely considered the same as part of defendant's social and personal history. These are appropriate considerations in calculating sentence. *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985).

Defendant next argues that the sentencing court erred by considering the effect of defendant's crime upon the judicial branch of government by assuming facts not in evidence. We disagree. The language used by a sentencing court need not be tepid; rather, sentencing is an appropriate time for comments against felonious, anti-social behavior. *People v Antoine*, 194 Mich App 189, 191; 486 NW2d 92 (1992). The court rendered no specific findings of fact with regard to the effect of the crime of obstruction of justice upon the judicial system. Therefore, the court's statement was not inappropriate.

Defendant finally argues that his sentence shocks the judicial conscience and represents an abuse of discretion on behalf of the sentencing court. We disagree. The "shock the conscience" standard of sentencing review has been replaced in favor of a test of proportionality; the sentence must be proportionate to the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Here, defendant argued at sentencing that the sentence imposed should be analogized to assault with a maximum term of five years in prison. Defendant was sentenced to three to five years in prison for committing the crime of obstruction of justice by threatening to kill a witness subpoenaed to testify in a forthcoming criminal trial. Defendant had a prior criminal record of violent crimes and a social history of gang membership. Moreover, defendant has a history of parole violations and was on

parole at the time of commission of the instant offense. It cannot be said that the sentencing court abused its discretion in rendering defendant's sentence.

Affirmed.

/s/ Myron H. Wahls
/s/ Mark J. Cavanagh
/s/ John F. Kowalski