

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LAUGHLIN, JR.,

Defendant-Appellant.

UNPUBLISHED

January 24, 1997

No. 189428

Shiawassee Circuit Court

LC No. 95-117230-FC

Before: Doctoroff, P.J., and Hood and P.J. Sullivan,* JJ.

PER CURIAM.

Defendant, who was approximately four months shy of his seventeenth birthday when the offenses were committed, was charged with conspiracy to commit armed robbery, MCL 750.529; MSA 28.797, four counts of armed robbery, MCL 750.529; MSA 28.797, and one count each of first-degree home invasion, MCL 750.110a(2); MSA 305(1), unlawful driving away of an automobile, MCL 750.413; MSA 28.645, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and assault with intent to rob while armed, MCL 750.89; MSA 28.284. He pleaded guilty to the assault charge and was sentenced as an adult to six to fifteen years' imprisonment and ordered to pay restitution of \$3358.95. Defendant appeals as of right. We remand for resentencing.

Defendant first argues that the trial court erred in considering certain juvenile adjudications in deciding to sentence him as an adult and in imposing the sentence. We agree. Because this issue raises a question of law, we review it de novo. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996).

"Prior convictions obtained in violation of the right to counsel cannot be considered in determining punishment for another offense." *People v Zinn*, 217 Mich App 340, 342; 551 NW2d 704 (1996). In *People v Carpentier*, 446 Mich 19, 29-30; 521 NW2d 195 (1994), this rule was

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

considered in the context of counselless juvenile adjudications used to enhance the sentence of an adult offender. A defendant who collaterally challenges a prior conviction bears the initial burden of establishing that the conviction was obtained without counsel or a proper waiver of counsel. *Id.* A defendant can satisfy this initial burden by presenting “prima facie proof . . . such as a docket entry showing the absence of counsel or a transcript evidencing the same” or “by presenting evidence that the defendant requested such records from the sentencing court and that the court either (a) failed to reply to the request, or (b) refused to furnish copies of the records, within a reasonable time.” *Id.* at 31, quoting *People v Moore*, 391 Mich 426; 216 NW2d 770 (1974). Once either approach is satisfied, a hearing will be convened at which the burden shifts to the prosecutor to establish the constitutional validity of the prior conviction. *Carpentier, supra* at 31.

In this case, defendant presented prima facie proof, through the presentence investigation report (PSIR), that the challenged juvenile adjudications were without counsel and thus satisfied his burden. The prosecutor conceded that the constitutional validity of the adjudications could not be demonstrated. Thus, those adjudications could not be considered for purposes of sentencing defendant. Nevertheless, at the hearing to determine whether defendant should be sentenced as a juvenile or an adult, the trial court considered defendant’s juvenile record, including the counselless adjudications. At defendant’s motion for resentencing hearing, the trial court stated its belief that it could consider the counselless adjudications when making the determination regarding sentencing as a juvenile or adult. The court used the fact that defendant was placed at Teen Ranch for over a year as a result of these adjudications to support its conclusion that defendant was unresponsive to juvenile treatment and would therefore be more successful in the adult system. We conclude that the trial court erred in considering defendant’s counselless juvenile adjudications in making the decision to sentence him as an adult rather than a juvenile. Defendant is therefore entitled to resentencing. *Carpentier, supra; Zinn, supra.*

Defendant also argues that he is entitled to resentencing because the trial court erred in scoring offense variable (OV) 2, OV 25, and prior record variable (PRV) 6. Although we are required to vacate defendant’s sentence on the basis of the first issue, we will address this issue in order to avoid recurrence at resentencing. In the event that, upon remand, the trial court again determines that defendant should be sentenced as an adult, we find that the trial court’s calculations of the guidelines variables were proper.

Appellate review of guidelines calculations is very limited. *People v Garner*, 215 Mich App 218, 219; 544 NW2d 478 (1996). A sentencing court has broad discretion in determining the number of points to be scored, provided there is evidence on the record that adequately supports a particular score. *Id.* A trial court’s scoring of the sentencing guidelines will be upheld if there is evidence to support the score. *Id.*

Defendant was scored fifty points for OV 2. A trial court may assess fifty points under OV 2 when the victim was treated with excessive brutality. Michigan Sentencing Guidelines (2d ed, 1988), p 26. During the commission of the crime, one of the codefendants hit two of the victims in the head with a flashlight, kicked another, bound all four victims with an electrical cord, and generally terrorized the victims with death threats. Defendant argues that, because he abandoned the crime before the actions

of brutality were committed by the codefendant, he should not be held liable for the codefendant's actions. When presented with this objection, the trial court concluded that the actions of the codefendant were within the contemplation of the scheme and plan, and therefore attributable to defendant. We agree with the trial court. Defendant admitted that he and the two codefendants conspired to commit armed robbery. OV 2 provides that "[i]n multiple offender cases when one offender is assessed points for physical attack and/or injury, all offenders *shall* be assessed the same number of points." *Id.* We find that the trial court did not abuse its discretion in assessing fifty points for OV 2.

Defendant was scored fifteen points for OV 25. OV 25 provides for a score of five points for two contemporaneous criminal acts and a maximum score of fifteen points for three or more contemporaneous criminal acts. *Id.* at 27; *People v Raby*, 218 Mich App 78, 81; 554 NW2d 25 (1996). A criminal act is contemporaneous if "(1) it occurs within twenty-four hours of the offense upon which the offender is being sentenced or within six months if it is identical to or similar in nature and (2) it has not and will not result in a separate conviction." *Id.* We agree with the trial court's conclusion that the score properly includes one act of home invasion, two assaults, and the conspiracy count. We further find that defendant's argument that he was "doubly punished" because he was scored under OV 25 and OV 6 (for two victims) is without merit.

Defendant also challenges the trial court's assessment of five points for PRV 6. Five points may be assessed for PRV 6 when an "other relationship" to the criminal justice system exists. Sentencing Guidelines, *supra* at 24. The instructions for PRV 6 state that an "other relationship" exists if, at the time of the instant offense, the offender was either (1) on bond or bail, (2) on pretrial diversion, or (3) on Holmes Youthful Trainee status. *Id.*; *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676. Defendant argues that, because at the time of the instant offense, he was not on bond or bail, on pretrial diversion, or on Holmes Youthful Trainee status, the trial court abused its discretion. PRV 6, however, recognizes that a subsequent offense is even more egregious if it was committed while the offender was still on or was just recently on parole, probation, or *otherwise involved with the criminal justice system.* *People v Maben*, 208 Mich App 652, 655; 528 NW2d 850 (1995). The instructions for PRV 6 provide that a "relationship to the criminal justice system, applies to relationships determined by felony, *juvenile* and/or misdemeanor convictions *or charges.*" Sentencing Guidelines, *supra*. Because defendant had pending juvenile charges, we conclude that the trial court did not abuse its discretion.¹

Reversed and remanded.

/s/ Martin M. Doctoroff

/s/ Harold Hood

/s/ Paul J. Sullivan

¹ Although the issues are moot, had we found no error in the first issue, we would conclude that the trial court did not abuse its discretion in sentencing defendant as an adult and that defendant's sentence was proportional to the offense and the offender.