STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK W. BROWN,

Defendant-Appellant.

UNPUBLISHED
February 25, 1997

No. 186856
Genesee Circuit Court
LC No. 94-51072-FH

Before: White, P.J., and Cavanagh, and J.B. Bruff,* JJ.

PER CURIAM.

Defendant pleaded guilty of breaking and entering an occupied dwelling with intent to commit larceny, MCL 750.110; MSA 28.305, felon in possession of a firearm, MCL 750.227f; MSA 28.421(5), and habitual offender, second offense, MCL 769.10; MSA 28.1082. In exchange for the plea, it was agreed that the court would impose a sentence within the guidelines' minimum sentence range, which was calculated at thirty to eighty-four months. Defendant was sentenced to seven to 22 ½ years' imprisonment as a habitual offender, second, and a concurrent term of four to 7 ½ years for felon in possession of a firearm, to be served consecutive to the completion of a sentence from which defendant was on parole at the time of the instant offense.

Defendant filed a motion for resentencing alleging that the sentencing guidelines were improperly scored and that his sentence was thus not within the correct guidelines, in violation of the plea agreement made pursuant to *People v Cobbs,* 443 Mich 276; 505 NW2d 208 (1993). The trial court denied the motion. Defendant appeals, arguing that OV 17, "Aggregate Value of Property Obtained, Damaged, or Destroyed," was improperly scored at five points, which corresponds to $1,000 to $5,000, when it should have been scored at zero points, which corresponds to less than $200. [One point corresponds to $200 to $999.]

The PSIR states under "Evaluation and Plan" that the offense involved defendant breaking into the home of a seventy-three year old woman while she was asleep and that he stole "between $2,000 and $3,000 worth of her property." The PSIR states under "Investigator's Description of Offense" that

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

in plain view in the vehicle defendant was found next to, there was "a glass jar containing assorted change. . . and the aforementioned [camera] equipment." It further states that the officer found a sales receipt from Fretter Appliance inside the owner's manual to the video equipment and it showed that it was sold to the victim. The PSIR also states that the victim believed that between $10 and $20 had been taken from her wallet, that there may have been some tools missing from the garage, although she could not say if any tools were missing, and that the camera equipment and a jar with change had also been taken.

Defendant testified at the plea hearing that he took "some stuff" from the victim's garage, and took from inside the victim's house a camcorder, a VCR, some beer, and "other things." The following colloquy occurred at the motion for resentencing:

> MS. PILETTE (*defense counsel)*: . . . we disputed the scoring of defense variable 17, that's the amount of the property obtained, damaged, and destroyed and Your Honor put it over for the prosecutor to refer it to probation.
>
> Now, in the presentence report, they said two to three thousand dollars. The probation department has come back with a report. Do you have that in your file, your Honor?
>
> THE COURT: No.
>
> MS. PILETTE: I have that from the prosecutor if I may approach, your Honor. The probation department has come back indicating that the property they indicate was a little more than a thousand dollars.
>
> Your Honor, I motioned it up for today for an order but the defense still disputes the amount of the property because at the preliminary examination the victims say this camcorder, VCR was purchased 12 years ago for $900.00.[1]
>
> * * *
>
> MR. RIGGS (*assistant prosecutor):* Judge, the matter was referred to the probation department for an investigation as to the valuation of the property in question. Here the probation department investigated, came up with various prices for a VCR, camcorder, cash that was taken, change, flashlight, bowling bag, beer, a tripod, sum total of $1,105.85.
>
> Now, remember we're not talking about the value in 1996, we're talking about when the crime happened. I think that there is sufficient factual basis to afford the Court the opportunity to assess the valuation correctly at more than a thousand dollars.
>
> Even if you accept the most conservative, speculative valuation, it is certainly worth more than $200.00 which has no affect [sic] on the guidelines whatsoever if you find such and, therefore, we would ask that the defendant's motion be denied. There is a

> [sic] support for the Court scoring the guidelines. The probation department has reinvestigated, again substantiated that the value was more than $1,000.00 . . .

The probation report is not before us, nor is the preliminary examination transcript.

We note, as did the trial court, that in order for defendant's minimum sentencing guidelines range to change, the aggregate value of the property taken would have to be less than $200. In denying the motion, the trial court stated:

> Well, I'm not certain, frankly, whether this is evidence when we receive a report from the department of corrections. I thought perhaps that might resolve the issue. Frankly, I'm not certain what we do. I suppose take testimony on the valuation. I'm not certain for the moment. I know nothing about the articles other than what the probation department has recited here. They talk about the value of the items when purchased. Of course we're talking about 1994 as to the date of the crime, some two years ago.
>
> I'm going to take it on myself to deny the motion, I'll deny it. I think there is a [sic] enough information to allow me to draw a conclusion that the valuation is established. Thank you, my pleasure.

Defendant argues that the trial court's comments in denying the motion that it was "not certain" as to what to do regarding the OV 17 scoring were not an appropriate response to defendant's objection to the PSIR scoring, and he is thus entitled to resentencing. Defendant argues that once a defendant objects to the accuracy of the information relied on at sentencing, the trial court has a duty to make an affirmative response and the prosecution has a duty to prove by a preponderance of the evidence that the facts are as it asserts.

We conclude that the court adequately responded to defendant's objection. There was sufficient information from which the court could conclude that the value exceeded $200. Having observed that the guidelines would not change, the court was not obliged to hold a hearing to determine the actual value.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ John B. Bruff

[1] The preliminary examination transcript is not before us.