

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellee,

v

RUSSEL EUGENE HARRIS, JR., a/k/a RUSSELL
EUGENE HARRIS, JR.,

Defendant-Appellant.

UNPUBLISHED

November 21, 1997

No. 196576

Grand Traverse Circuit Court

LC No. 94-006472 FC

Before: Jansen, P.J., and Fitzgerald and Young, JJ.

MEMORANDUM.

Defendant pleaded guilty to breaking and entering an unoccupied building with intent to commit larceny, MCL 750.110; MSA 28.305, and received a sentence of five to ten years' imprisonment. On defendant's motion, the trial court vacated defendant's sentence because the court had relied upon a sentencing guidelines recommended sentence range for an offense other than the one for which defendant was convicted. The trial court then resentenced defendant to a sentence of identical length. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

The trial court placed this case in a presentence posture when it vacated defendant's sentence in contemplation of resentencing defendant.¹ *People v Ezell*, 446 Mich 869; 522 NW2d 632 (1993). Every aspect of the sentence was therefore before the trial court de novo. *People v Williams (After Remand)*, 208 Mich App 60, 65; 576 NW2d 614 (1994). Accordingly, the trial court had the authority to rescore the sentence information report before resentencing defendant. The record does not support defendant's contention that the trial court's rescoring of Offense Variable 25 was motivated by vindictiveness on the part of the court. *People v Mazzie*, 429 Mich 29; 413 NW2d 1 (1987); *People v Grady*, 204 Mich App 314, 317; 514 NW2d 541 (1994). Moreover, while we agree with defendant that due process requires fundamental fairness in the sentencing proceeding, *People v Wright*, 432 Mich 84, 90; 437 NW2d 603 (1989), we do not agree that due process entitles defendant to a repetition of any scoring errors made in conjunction with the sentencing of his codefendants.

We decline to review defendant's claim that the score the trial court assigned Offense Variable 25 was based on the court's misinterpretation of the variable. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997).

Defendant has failed to overcome the presumption that sentences within the guidelines are proportionate to the offense and offender, particularly in light of defendant's criminal history, the benefit bestowed upon defendant by the plea bargain and defendant's parolee status at the time of the commission of the instant offense. *People v Eberhardt*, 205 Mich App 587; 518 NW2d 511 (1994).

Affirmed.

/s/ Kathleen Jansen

/s/ E. Thomas Fitzgerald

/s/ Robert P. Young, Jr.

¹ Alternatively, as resentencing was based merely on error involving the sentence guidelines, the trial court was without jurisdiction to grant resentencing and the original sentence stands. *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997).