

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROSCOE C. HUMPHREY, Jr.,

Defendant-Appellant.

UNPUBLISHED

March 27, 1998

No. 194990

Oakland Circuit Court

LC No. 88-087725-FC

Before: Young, Jr., P.J., and Michael J. Kelly and Doctoroff, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying his postappeal motion for relief from judgment. We affirm.

Roughly five years after his conviction of armed robbery, MCL 750.529; MSA 28.797, and three years after his initial appeal of that conviction, defendant filed his postappeal motion for relief from judgment arguing that his twenty- to forty-year prison sentence was invalid because the trial court improperly considered a 1969 armed robbery conviction listed in the presentence report, which was subsequently reversed. Defendant also argued that trial counsel was ineffective for failing to raise the issue at sentencing, and that appellate counsel was also ineffective for failing to raise in the initial appeal the issue of trial counsel's allegedly defective performance. The trial court found that defendant failed to show good cause for the lengthy delay in raising these issues and further that he could have raised them in his first appeal. The court also found that defendant could not show actual prejudice because his sentence was appropriate based upon defendant's record and the circumstances of the crime and that his ineffective assistance of counsel claim was without merit. We granted leave to appeal.

The court rule establishing the circumstances under which relief from judgment is available, MCR 6.508(D), provides, in pertinent part:

The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief.

“Actual prejudice” in cases such as this one involving a challenge to the sentence means “that the sentence is invalid.” MCR 6.508(D)(3)(b)(iv). We conclude that the trial court properly denied defendant’s motion for postappeal relief because defendant’s sentence is not invalid and, therefore, he has failed to demonstrate actual prejudice.

Defendant’s first ground for challenging the validity of his sentence is that reversal of the 1969 armed robbery conviction listed in the presentence report rendered the report and, therefore, the factual basis for the sentence, inaccurate, and that the trial court incorrectly scored the sentencing guidelines as a result. Defendant further argues that the trial court also incorrectly scored offense variable 1 (OV 1) (aggravated use of weapon). These arguments are without merit. It was permissible for the court to take into account at sentencing the conduct underlying the reversed conviction. *People v Ewing (After Remand)*, 435 Mich 443, 451; 458 NW2d 880 (1990). Moreover, while the presentence report was technically inaccurate because it listed the conviction without also indicating that it was subsequently reversed, defendant is not entitled to resentencing on this basis because the record indicates that the trial court was aware of this fact at sentencing. See *People v Horton*, 98 Mich App 62, 73; 296 NW2d 184 (1980).

With regard to the trial court’s scoring of the sentencing guidelines, we note that even if defendant had preserved this issue and the guidelines were, in fact, incorrectly scored, defendant would not be entitled to relief. In *People v Mitchell*, 454 Mich 145, 178; 560 NW2d 600 (1997), our Supreme Court held that “[a]ppellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied.” Application of the guidelines only states a cognizable claim for relief on appeal where “(1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate.” *Id.* at 177. Defendant does not dispute the fact of his 1969 conviction, and defendant’s objection to the trial court’s alleged misinterpretation of the instructions for scoring OV 1 simply does not state a valid claim for relief. *Mitchell*, *supra*. Moreover, as explained below, defendant’s sentence is not disproportionate. Therefore, he is not entitled to resentencing on the ground that the guidelines were misapplied.

Defendant also claims that the trial court’s incorrect scoring of the guidelines rendered his twenty-year minimum sentence disproportionate because the sentence represents an upward departure from what would have been the “correct” guidelines range. Again, we disagree. A sentence must be “proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Even if we were to concede that an

error in the guidelines scoring occurred in this case, the appropriate inquiry is whether defendant's sentence was proportionate. *Mitchell, supra*. Where the sentence is not disproportionate, there is no basis for relief on appeal. *People v Raby*, ___ Mich ___; ___ NW2d ___ (Docket No. 108010, issued 2/5/98), slip op at 10. Given the serious nature of the instant offense, as well as defendant's background reflecting numerous prior felonies, a prison escape, and numerous other contacts with the criminal justice system, his twenty-year minimum sentence is proportionate to the offense and the offender.

For all the reasons stated, the trial court properly denied defendant's motion for relief from judgment.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Martin M. Doctoroff