

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE JASON PICKARD,

Defendant-Appellant.

UNPUBLISHED

August 26, 2003

No. 239274

Grand Traverse Circuit Court

LC No. 01-008551-FC

Before: Markey, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree fleeing and eluding, MCL 257.602a(4)(b), and driving on a suspended license, MCL 257.904(1)(b). He was sentenced as a fourth habitual offender to 76 months to 25 years for the fleeing and eluding conviction and to 90 days for the suspended license conviction. Defendant appeals by right. We affirm but remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

When a police officer noticed that defendant and his passenger were not wearing seat belts, he activated his overhead lights. Defendant accelerated, so the officer activated his siren. Defendant continued to pull away. After a brief chase, the defendant's vehicle collided with another and flipped over. The incident was videotaped.

The videotape was played for the jury. But after the trial, it was taped over. Defendant argues that its destruction has deprived him of meaningful appellate review because he is unable to assess whether the videotape would have assisted him on appeal. For a criminal defendant's constitutional right to an appeal to be impaired by a missing or incomplete record, the omitted material must preclude this Court from effectively evaluating the defendant's claims on appeal. *People v Frechette*, 380 Mich 64, 73; 155 NW2d 830 (1968); *People v Horton (After Remand)*, 105 Mich App 329, 330; 306 NW2d 500 (1981). The right will not be deemed violated if the surviving record is sufficient to allow evaluation of the claims. Sufficiency in a given case depends on the questions that must be asked of the record that is missing. *People v Wilson (On Rehearing)*, 96 Mich App 792, 797; 293 NW2d 710 (1980). Since defendant has not identified any issue to which the videotape might be relevant, he has failed to establish that the record is insufficient to allow meaningful appellate review.

Defendant also argues that the judge improperly penalized him for exercising his right to a trial; consequently, he should be sentenced before a different judge. In context, the judge's comments do not indicate that he believed a plea was the only way defendant could have shown remorse. When the comment defendant quotes is reviewed in context, the fairest summary is that the judge was saying he did not believe that defendant was remorseful. This was a legitimate consideration at sentencing. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995).

Defendant next argues that the trial court erred in scoring 10 points for Offense Variable 19 based on a determination that by fleeing and eluding a police officer, defendant interfered with, or attempted to interfere with, the administration of justice. In *People v Deline*, 254 Mich App 595, 597; 658 NW2d 164 (2002), this Court held that interference with the administration of justice involves an effort to undermine or prohibit the judicial process by which a civil claim or criminal charge is processed. It concluded that OV 19 had been improperly scored where the defendant "did not engage in any conduct aimed at undermining the judicial process by which the charges against him would be determined" but "tried to evade those charges altogether by switching seats with his passenger and refusing an immediate blood alcohol content test." *Id.* Here, defendant did not engage in any conduct aimed at undermining the judicial process when he attempted to flee and elude the police; therefore; OV 19 should not have been scored 10 points. Defendant's minimum sentencing range is less when this variable is properly scored. Consequently, we remand this case for resentencing.

We affirm in part but remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Henry William Saad