

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRELL COUNTS,

Defendant-Appellant.

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UNPUBLISHED

March 2, 2006

No. 257684

Wayne Circuit Court

LC No. 02-001170-01

Before: Hoekstra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and sentenced, as a fourth habitual offender, MCL 769.12, to serve a term of 15 to 25 years' imprisonment. Defendant appealed, and the matter was remanded by this Court for resentencing on the ground that the factual bases articulated by the trial court for its scoring of Offense Variables (OV) 7 and 8 were insufficient to support its scoring of those variables. See *People v Counts*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2004 (Docket No. 246717). On remand, the trial court articulated an expanded basis for its scoring decisions and again sentenced defendant to a term of 15 to 25 years' imprisonment. Defendant appeals his sentence on remand as of right. We affirm defendant's sentence, but remand for a determination of the appropriate sentencing credit award and amendment of the judgment of sentence to reflect such credit.

On appeal, defendant first argues that the trial court again erred in its scoring of OVs 7 and 8. We disagree. A sentencing court has discretion in determining the number of points to be scored for a particular sentencing variable. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). In doing so, however, this Court must give deference to the trial court's factual findings, particularly where credibility of witnesses is involved. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003); see also *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996) ("[s]coring decision for which there is any evidence in support will be upheld").

As it did at the original sentencing, the trial court assigned 50 points for OV 7 and 15 points for OV 8. Pursuant to MCL 777.37(1)(a), a defendant may be assessed 50 points under OV 7 when "[a] victim was treated with . . . conduct designed to substantially increase the fear

and anxiety a victim suffered during the offense.” A trial court may score OV 8 at 15 points if “[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” MCL 777.38(1)(a). With respect to its scoring of OV 7, the trial court found that defendant kicked down a door to the home of his former girlfriend, Bobbye Wells, then displayed a gun, made threats and held both Wells and her companion, Rena Brown, captive for an extended period of time. Regarding OV 8, the trial court found that following the home invasion, the victims were taken to a distant place where they were again threatened with violence and held for an extended period of time. The trial court’s findings in these regards are supported by evidence presented at trial, and provide a sufficient basis for a proper exercise of the court’s scoring discretion.

At trial, the prosecution provided a photograph of the damage done to the door and, although Brown’s testimony at trial contradicts itself, her statement to the police corroborates Wells’ trial testimony, which, if believed, justifies the trial court’s findings. *Galloway, supra*. Moreover, the use of a gun, the making of threats, and the holding and transporting of the victims to an unfamiliar location supports a finding that defendant engaged in conduct designed to substantially increase the fear and anxiety the victims suffered during the offense. MCL 777.37(1)(a). The transporting of the victims to an unknown location, the threats of violence, and the holding in captivity following the home invasion similarly supports a finding that defendant asported his victims to a situation of greater danger or held them captive beyond the time necessary to commit the offense. MCL 777.38(1)(a). Consequently, we conclude that the trial court properly exercised its discretion in the scoring of OVs 7 and 8, and that such scoring is adequately supported by the record. *McLaughlin, supra; Elliott, supra*.

Defendant also argues that the trial court erred in failing to consider his post-arrest cooperation with law enforcement officials for purposes of a downward departure from the sentencing guidelines range. However, under MCL 769.34(10), if a minimum sentence is within the appropriate sentencing guidelines range this Court must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or the reliance on inaccurate information in determining the sentence. See also *People v Kimble*, 470 Mich 305, 309-311; 684 NW2d 669 (2004). Here, defendant’s minimum sentence of fifteen years, i.e., 180 months, is with the guidelines’ minimum range of 99 to 320 months. Defendant does not allege that the trial court relied on inaccurate information in determining his sentence and, as already discussed, has failed to demonstrate that the guidelines were erroneously scored. Accordingly, we must affirm the sentence imposed by the trial court. *Id.*

Defendant additionally argues that the trial court violated his constitutional rights by relying at sentencing on factors that were neither determined beyond a reasonable doubt by a jury nor admitted by himself. Specifically, defendant argues that the trial court’s judicial fact-finding violated the rules of law articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), our Supreme Court indicated that *Blakely* is inapplicable to Michigan’s system of indeterminate sentencing because under that system the maximum term is not set by the sentencing court, but rather is determined by statute. See also MCL 769.8(1). We are bound by *Claypool* and thus reject defendant’s reliance on *Blakely*. See *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004).

We agree, however, that the judgment of sentence entered by the trial court on remand fails to reflect all sentencing credit to which defendant is entitled; specifically, credit for the time served by defendant between imposition of his original sentence and his resentencing on remand. See MCL 769.11b. We further agree that, as conceded by the prosecution, defendant is entitled to remand for correction of this error. *Id.*; see also MCR 6.435(A) and 7.216(A)(4).

Accordingly, we affirm defendant's sentence but remand this matter for a determination of the appropriate sentencing credit award and amendment of the judgment of sentence to reflect such credit. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Janet T. Neff

/s/ Donald S. Owens