

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT URELL HATHORN,

Defendant-Appellant.

UNPUBLISHED

May 2, 2006

No. 258570

Muskegon Circuit Court

LC No. 04-050292-FH

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals by right his sentences for third-degree fleeing and eluding, MCL 750.479a(3), resisting and obstructing a police officer, MCL 750.81d(1), and driving while license suspended, MCL 257.904(3)(b). He was sentenced as an habitual offender, MCL 769.11, to 43 to 120 months in prison for fleeing and eluding, with concurrent prison terms of 18 to 48 months for resisting and obstructing a police officer, and 60 days in jail for driving with a suspended license. These sentences were to run consecutively to defendant's earlier sentences for prior convictions. We reverse and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was involved in a chase after a police officer attempted to follow his automobile to check whether it was one that had been reported stolen. The officer testified that defendant made a number of quick turns, and accelerated to approximately 35 to 45 miles per hour in a residential area. After the officer turned on his emergency lights and siren, defendant again accelerated and turned into an alley that had flooded with water. Defendant's car stopped abruptly, and the officer's patrol vehicle collided with it. Defendant fled on foot; however, the officer was unable to follow due to damage to his driver's door. When the officer emerged from his car, he spoke with defendant's passenger, who had not fled. She indicated that defendant had been driving. The officer ran a LIEN check and discovered that defendant's license had been suspended. Later, as defendant's passenger was leaving the police station, she received a call from defendant on her cell phone. She told the police she would meet defendant at a nearby hotel. Officers went to the hotel and spotted defendant, who attempted to flee. Defendant resisted being handcuffed, but was eventually restrained.

During sentencing for the instant offenses, the trial court scored 25 points for Offense Variable (OV) 13, MCL 777.43, continuing pattern of criminal behavior. Offense Variable 13 provides in pertinent part:

(1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(b) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person..... 25 points

* * *

(2) All of the following apply to scoring offense variable 13:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

In *People v McDaniel*, 256 Mich App 165, 172-173; 662 NW2d 101 (2003), a majority of this Court held that the language of this provision required the sentencing court to examine any five-year period in determining the correct scoring for this variable. Thus, even when the three previous offenses occurred more than five years prior to the sentencing offense, scoring points for this variable was appropriate. *Id.* at 173.

Defendant’s prior criminal history included 1997 and 2000 convictions for resisting and obstructing. He was also separately charged with criminal sexual conduct (CSC) concerning a minor that allegedly occurred in either 1996 or 1997. During sentencing, the scoring of OV 13 was based upon defendant’s instant resisting and obstruction conviction, his 2000 resisting and obstructing conviction, and the CSC allegations, which the trial court appears to have erroneously believed occurred in 2000. Defendant initially challenged the inclusion of the resisting and obstructing charge and maintained that it did not constitute a crime against a person, but later withdrew that objection.¹

During his motion for resentencing, defendant, through new counsel, noted that the allegations concerning the CSC offense arose from conduct that occurred in 1996 or 1997, outside the five-year window containing the sentencing offense. Defendant acknowledged that a scoring of 25 points would still be required under *McDaniel, supra*, because the 1997 and 2000 resisting and obstruction convictions and the CSC offense now ostensibly comprised the “pattern” for OV 13. Defendant focused his challenge on the inclusion of the alleged CSC charge, and maintained that the prosecutor had not shown that he committed that offense. He also maintained that *McDaniel, supra*, incorrectly interpreted the language of MCL 777.43.

¹ These convictions are currently scored as “crimes against a person” for purposes of calculating sentence guidelines. MCL 777.5; MCL 777.16d. During resentencing, defendant did not challenge the inclusion of his 1997 resisting and obstructing conviction.

The trial court denied resentencing after determining that the defendant's initial trial had not been ineffective in failing to challenge the inclusion of the CSC charges in the scoring of OV 13. The trial court further found that the prosecutor had provided sufficient evidence to show that defendant committed the CSC offense.

Defendant now argues that *McDaniel, supra*, was incorrectly decided and that the trial court thus erred in scoring OV 13 at 25 points. We agree. Our Supreme Court has recently specifically overruled *McDaniel*. *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006). The *Francisco* Court found that the language of MCL 777.43, when read as a whole, required the trial court to look only at the five-year period immediately preceding the sentencing offense:

We agree with the Court of Appeals dissent [in *McDaniel*] that only those crimes committed during a five-year period that encompasses the sentencing offense can be considered.

MCL 777.43(1)(b) states that the sentencing offense must be “*part of a pattern* of felonious criminal activity involving 3 or more crimes against a person.” (Emphasis added.) MCL 777.43(2)(a) defines a “pattern” as three or more crimes committed “within a five-year period, *including the sentencing offense . . .*” (Emphasis added.) Therefore, in order for the sentencing offense to constitute a part of the pattern, it must be encompassed by the same five-year period as the other crimes constituting the pattern.

The Court of Appeals majority in *McDaniel, supra* at 172, concluded that because MCL 777.43(2)(a) refers to “*a 5-year period,*” rather than “*the 5-year period,*” “*any 5-year period may be utilized.*” However, MCL 777.43(2)(a) does not just refer to “*a 5-year period*”; instead, it refers to “*a 5-year period, including the sentencing offense . . .*” (Emphasis added.) It is a long-accepted principle of statutory construction that the court must construe a statute so as to give full effect to all its provisions. *Drouillard v Stroh Brewery Co*, 449 Mich 293, 302; 536 NW2d 530 (1995). The Court of Appeals erred in not considering the language of MCL 777.43(2)(a), above, which specifies that the five-year period must include the sentencing offense.

The Court of Appeals concluded that “the sentencing offense may be counted as one of the three crimes in a five-year period. That does not, however, preclude consideration of a five-year period that does not include the sentencing offense.” *McDaniel, supra* at 172-173. However, MCL 777.43(2)(a) specifically states that “all crimes within a 5-year period, including the sentencing offense, *shall* be counted . . .” (Emphasis added.) “Shall” is a mandatory term, not a permissive one. *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005). Because MCL 777.43(2)(a) states that the sentencing offense “shall” be included in the five-year period, the sentencing offense must be included in the five-year period. Therefore, MCL 777.43(2)(a) does preclude consideration of a five-year period that does not include the sentencing offense. [*Francisco, supra*, slip op at 4-5.]

In the instant case, while the trial court denied defendant's motion for resentencing, it acknowledged an error in the initial determination that the alleged criminal sexual conduct occurred in 2000. Thus, defendant's criminal history does not support the scoring of OV 13 at 25 points. The five-year period containing the sentencing offenses includes only two includable offenses.

The erroneous scoring of OV 13 resulted in an increase of the applicable sentencing grid from a recommended minimum sentence range of ten to 34 months rather than 14 to 43 months. Defendant's 43-month minimum sentence is outside the correct guidelines range. Accordingly, we remand this case for resentencing.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Helene N. White
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot