

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY MACK,

Defendant-Appellant.

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UNPUBLISHED

December 28, 2006

No. 261912

Saginaw Circuit Court

LC No. 02-021898-FH

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

PER CURIAM.

Defendant appeals by leave granted from the decision of the circuit court to deny his motion to withdraw his guilty plea in connection with a fraudulent check-cashing scheme. Defendant was sentenced to concurrent terms of imprisonment of 13 years and four months to 20 years on count one, conducting a criminal enterprise, MCL 750.159i, 112 months to 168 months on count two, uttering and publishing, MCL 750.249, and 80 to 120 months on count three, forgery of a driver's license, MCL 257.310(7)(a), with credit for 186 days served. We affirm.

Defendant argues three issues on appeal: first, that the trial court abused its discretion in failing to allow him to withdraw his plea; second, that his sentence is invalid due to the court's incorrect scoring of the sentencing guidelines; and third, that the court should have allowed him to withdraw his plea because the offense which he admitted to was not the same as the offense to which he pled.

Defendant raises a number of sub-issues under his claim that the court abused its discretion by not allowing him to withdraw his plea. We review the trial court's decision to deny defendant's request to withdraw his plea for an abuse of discretion. *People v Wilhite*, 240 Mich App 587, 594; 618 NW2d 386 (2000). To the extent his arguments rest on a claim of ineffective assistance of counsel, our review is limited to the mistakes apparent on the existing record because an evidentiary hearing was not conducted. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

The record does not support defendant's argument that he was misled about his possible sentence. When the trial court accepted defendant's plea, it told defendant that it had not agreed to a possible sentence. Defense counsel specifically acknowledged that no sentence agreement had been reached. We find no error in the trial court's decision to not believe defendant's later self-serving statements that counsel had promised him a specific sentence.

Defendant also maintains that defense counsel, who had allegedly represented one of defendant's codefendants, Freddie Davis, provided ineffective assistance due to a conflict of interest. Defendant likewise claims error due to the trial court's failure to question counsel further about this conflict pursuant to MCR 6.005(F).

When claiming ineffective assistance due to defense counsel's conflict of interest, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). MCR 6.005 generally forbids a lawyer from representing two or more indigent defendants who are jointly charged with an offense. It states in relevant part, "Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer." MCR 6.005(F).

In the instant case, the trial court did not hold a hearing pursuant to MCR 6.005(F) once it learned that defense counsel had previously represented Davis, but, facts concerning counsel's representation were presented to the court. Defendant and Davis were not tried together. Instead, counsel indicated during sentencing that he had previously represented Davis at his preliminary examination; however, there is no indication that he represented Davis during the remainder of his proceedings. In addition, defense counsel indicated that Davis's case and those of the other three codefendants had been resolved before defense counsel began to represent defendant, as all of those parties had been sentenced.

Defendant claims that he was prejudiced here because defense counsel was restricted in putting on a vigorous defense of either client: To "point the finger" at Davis during defendant's proceedings would have harmed Davis, and vice versa. But, the fact that Davis had already been sentenced at the time of defendant's sentencing proceedings renders this claim questionable. To the contrary, when defense counsel advised of his previous representation of Davis before the trial court, he used it specifically to argue that because he was present at Davis' preliminary exam, he "just didn't see any evidence that [defendant] was a leader of the enterprise, rather that we would characterize him as one more of the marching men" who should be sentenced similarly to the other defendants. Nor did defendant claim any prejudice from the fact that counsel had represented Davis before sentencing. Under the circumstances, we find that defendant has failed to establish that an actual conflict of interest adversely affected his lawyer's performance. See *People v Fowlkes*, 130 Mich App 828, 836; 345 NW2d 629 (1983) (to warrant reversal, the prejudice shown must be actual, not merely speculative). Thus, defendant has not shown that he was entitled to withdraw his plea due to counsel's alleged conflict of interest.

Defendant next claims that his sentence is invalid because the trial court incorrectly scored his sentencing guidelines. Trial courts are given broad discretion over their scoring decisions. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2005). "[W]e will uphold the trial court's guidelines scoring if there is any evidence in the record to support it." *Id.* Questions concerning the proper application of the statutory sentencing provisions are reviewed de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

Defendant first argues that the trial court misscored offense variable (OV) 9 (number of victims) because the trial court incorrectly determined the number of separate victims. MCL

777.39. We agree with defendant that the trial court's scoring decision concerning OV 9 was erroneous, regardless of whether the trial court correctly determined the correct number of "victims." In *People v Melton*, 271 Mich App 590, 592; 722 NW2d 698 (2006), a special panel of this Court determined that OV 9 can only be scored when the victim is placed in danger of physical injury. It overruled this Court's decision in *People v Knowles*, 256 Mich App 53, 62; 662 NW2d 824 (2003), which had held that OV 9 be scored for financial injuries. The special panel held that a business that suffers financial injury does not constitute a "victim" under OV 9 because the variable's language regarding victims only applies where there exists a danger of physical injury. *Melton II*, *supra* at 595-596. No danger of physical injury was alleged here. Hence, the trial court erred in scoring 25 points for OV 9 instead of zero.

Defendant also alleges that the trial court misscored OV 14 (offender's role). We disagree. OV 14 assigns a score of 10 points to an offender who was the leader in a multiple offender situation. MCL 777.44(1)(a). Defendant maintained throughout the proceedings that he was merely the driver of those who perpetrated the check fraud and was guilty in that he knew what was to occur and agreed to accept payment from the illegal proceeds. However, at the sentencing hearing, ample evidence was presented from various law enforcement agents to support a reasonable belief that defendant was in fact the leader, or at least a major player, in the check fraud ring. Based on this testimony, it was reasonable for the court to infer that defendant had a leadership role in the offense. Thus, we find that the court's scoring of OV 14 was justified by evidence in the record.

The trial court's OV 9 scoring error affects defendant's sentencing range. With his original OV in the D-V sentencing grid, defendant's corresponding recommended minimum sentence range was 78 to 130 months. MCL 777.63. With the corrected OV score of 35 points, defendant should have been placed in the D-IV grid, with a corresponding minimum sentence range of 72 to 120 months. *Id.*

In general, "[a] defendant is entitled to be sentenced by a trial court on the basis of accurate information." *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). So if a guidelines scoring error alters the recommended guidelines sentence range, and the defendant has preserved the issue for appeal, the defendant is entitled to resentencing. *Id.* at 89-92. Our Supreme Court noted two exceptions to its holding in *Francisco*, one of which might apply here:

Where a scoring error does not alter the appropriate guidelines range, resentencing is not required. *People v Davis*, 468 Mich 77, 83, 658 NW2d 800 (2003). Resentencing is also not required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range. *People v Mutchie*, 468 Mich 50, 51, 658 NW2d 154 (2003). [*Francisco*, *supra* at 89 n 8.]

We find that the exception recognized in *Mutchie* may apply to the case at bar. Here, the trial court imposed a sentence outside the guidelines recommended range, but the trial court also stated that it intended to sentence defendant to the sentence imposed should this Court decide that any of its rationale for departure survive review. See *People v Babcock*, 469 Mich 247, 260-261, n 15; 666 NW2d 231 (2003).

We initially note that we are troubled by footnote 8 in *Francisco* because we believe it misstates the holding of *Mutchie*. Specifically, we note that the sentence imposed in *Mutchie* was not within the appropriate guidelines range. Rather, the *Mutchie* Court succinctly stated the facts pertinent to its holding: “The forty-year minimum sentence imposed [on the defendant] for each CSC-I conviction was a departure above the recommended range in any event, and the court expressly stated the substantial and compelling reasons that justified the departure.” *Mutchie, supra* at 52. Indeed, it was for this reason that our Supreme Court admonished this Court for even addressing the purported guidelines scoring error. This Court had opined, “the scoring issue is moot because, even if there were error, resentencing is not warranted given the trial court’s remarks that it would have imposed the same sentences regardless of the scoring of OV 11.” *Id.* at 51, quoting 251 Mich App at 274. Our Supreme Court approved this statement, but found this Court’s discussion regarding the guidelines scoring issue to be dicta. *Id.* at 51-52. Accordingly, our reading of *Mutchie* leads us to conclude that we may affirm a sentence when the trial court expresses its intent to impose the sentence it does, regardless of the guidelines scoring or guidelines recommended range provided the trial court also states on the record a valid substantial and compelling reason for doing so. MCL 769.34(3); *Mutchie, supra* at 52, n 1.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error; the determination that the factor is objective and verifiable is reviewed as a matter of law; the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *Babcock, supra* at 264-265. In ascertaining whether the departure was proper, we defer to the trial court’s direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so and states on the record the reasons for departure. MCL 769.34(3). A court may not depart from a sentencing guidelines range based on an offense or offender characteristic already considered in determining the guidelines range unless the court finds from the facts in the record that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). Factors meriting departure must be objective and verifiable, must keenly attract the court’s attention, and must be of considerable worth. *Babcock, supra* at 257-258. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In addition, a departure from the guidelines range must be proportionate to the seriousness of the defendant’s conduct and his criminal history. *Babcock, supra* at 263 n 20, 264. A court abuses its discretion when the sentence imposed is not within the range of principled outcomes. *Id.* at 269.

In the instant case, the trial court indicated during sentencing that it chose to exceed the guidelines because, while defendant did not receive points for terrorism under OV 20, MCL 777.49a, he was a “financial terrorist” who has “wreak[ed] havoc more than anyone I’ve seen in 25 years in the criminal justice system.” The court also found that the guidelines did not fit defendant because he was “very sophisticated” and not the “hopeless dupe” that he tried to portray in his comments to the court. In the written reasons for departure, the trial court noted that the guidelines did not take into account the amount or extent of damages that the defendant caused, that he was the major operator in an extensive scheme to produce counterfeit checks in

many communities, and that he realized tens of thousands of dollars from fraud from a few hours work in one given site. The trial court further stated that it intended to sentence defendant to the sentence imposed should this Court decide that any of its rationale for departure survives review.

Defendant first argues that some of the trial court's reasons for departure were taken into account during the guideline scoring; however, defendant does not discuss in any detail which departure factors had already been considered by the guidelines. Defendant may not simply announce a position or assert an error and leave it to this Court to discover and rationalize the basis for his claims. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). We do note, however, that the guidelines did not adequately take the extent of this operation into account. Defendant was only scored 10 points for OV 12 (contemporaneous felonious criminal acts) and 20 points for PRV 7 (subsequent or concurrent felony convictions). Neither of these guidelines adequately addresses the instant situation. MCL 769.34(3)(b).

Defendant also maintains that the trial court's reasons for departure were not objective and verifiable. We conclude however, to the contrary; the extensive scope of the criminal operation at issue was, in fact, objective and verifiable. The trial court took great pains over the four days necessary to sentence defendant to review evidence concerning the scope of defendant's multi-state criminal enterprise, and defendant's role in it.

We further find that the trial court's list of reasons for departure were substantial and compelling grounds for departure. Defendant was not involved in a simple one-time attempt to obtain money fraudulently, or even a short series of crimes in Saginaw County. The extent of defendant's ongoing scheme can be fairly said to keenly attract the court's attention.

Defendant also argues that his sentence was improperly based on facts the trial court, not a jury, found, and where defendant did not admit the truth of these facts during his plea. Defendant relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) for the argument that *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000) requires a jury to find all facts underlying sentencing beyond a reasonable doubt. However, our Supreme Court has determined that *Blakely*, and the subsequent decision in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), do not apply to Michigan's indeterminate sentencing scheme as long as a defendant is not sentenced beyond the statutory maximum. *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006).

Defendant also argues that the prosecutor's statements throughout the sentencing proceedings were improperly prejudicial and resulted in an unjustified sentence, which was higher than those codefendants received. Although the prosecutor has a duty to see that a defendant receives a fair trial he need not state his positions in the blandest of possible terms but rather may advocate them using hard or even emotional language. *People v Ullah*, 216 Mich App 669, 677-678; 550 NW2d 568 (1996). We find no error warranting reversal.

In summary, because the trial court clearly stated it would impose the sentence it did regardless of the guidelines range, even if some but not all of its reasons for doing so were found invalid by this Court, and stated proper substantial and compelling reasons for the sentence it imposed, we affirm defendant's sentence. *Mutchie, supra* at 52.

Finally, defendant argues that his plea is invalid because although he pleaded guilty to participating in a criminal enterprise, the facts of the incident do not fit the statutory definition of a criminal enterprise. We disagree. MCL 750.159i(1) provides that “[a] person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity.” MCL 750.159i(1). “Enterprise” is defined as “an individual, sole proprietorship, partnership, corporation, limited liability company, trust, union, association, governmental unit, or other legal entity or a group of persons associated in fact although not a legal entity. Enterprise includes illicit as well as licit enterprises.” MCL 750.159f(a). “Pattern of racketeering activity” is defined as follows:

“Pattern of racketeering activity” means not less than 2 incidents of racketeering to which all of the following characteristics apply: (i) The incidents have the same or a substantially similar purpose, result, participant, victim, or method of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated acts. (ii) The incidents amount to or pose a threat of continued criminal activity. (iii) At least 1 of the incidents occurred within this state . . . and the last of the incidents occurred within 10 years after the commission of any prior incident, excluding any period of imprisonment served by a person engaging in the racketeering activity. [MCL 750.159f(c).]

Defendant argues that the incident to which he pleaded guilty does not fit any of the above-listed criteria or definitions, but, upon close examination of the language of the statute, we find that the trial court did not err in accepting defendant’s plea. Contrary to defendant’s arguments, MCL 750.159f(a) does not provide that the individuals comprising the enterprise must have known each other for any specified period of time. Rather, the statute only requires that a group of persons be associated in some way, whether or not they form a legal entity. Clearly, and by his own admission, defendant and codefendants were acting in concert.

Second, defendant pleaded guilty to participating in two separate incidents of check fraud, one at the Birch Run credit union and one at the Frankenmuth credit union. The purpose of codefendants’ entry into both branches was the same—to defraud the institutions of their funds, fulfilling the first of the requirements for designation as a “pattern of racketeering activity.” MCL 750.159f(c)(i). The second requirement is also met, that “[t]he incidents amount to or pose a threat of continued criminal activity.” MCL 750.159f(c)(ii). Defendant and codefendants allegedly followed the same protocol at each bank. Even without considering the extrinsic evidence brought in during the sentencing hearing of defendant’s alleged possession of 15 reams of blank check stock and his participation in the additional check cashing schemes, the two instances for which defendant was sentenced by themselves amount to “continued criminal activity.” Last, the incidents occurred within the state during the period in which the statute was effective, satisfying the third prong of the statute. Therefore, defendant cannot argue that he should be allowed to withdraw his guilty plea on this basis.

We affirm.

/s/ Jane E. Markey  
/s/ Henry William Saad  
/s/ Kurtis T. Wilder