

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDRIC E. BAIZ,

Defendant-Appellant.

UNPUBLISHED

January 9, 2007

No. 262912

Livingston Circuit Court

LC No. 04-014504-FH

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

Talbot, J. (*concurring in part, dissenting in part*).

I concur with the majority's conclusion regarding the scoring of OV 10, but respectfully dissent regarding the majority's determination that OV 19 was improperly scored by the trial court based on defendant's perjury. As such, I would affirm the trial court's scoring of the statutory guidelines and defendant's sentence of 18 months to 15 years' imprisonment for second-degree criminal sexual conduct.

Notably, defendant does not challenge the trial court's conclusion that perjury constitutes an attempt to interfere with the administration of justice, which is consistent with this Court's prior determination that perjury rises to the level of obstruction of justice. *People v Jenkins*, 244 Mich App 1, 15 n 6; 624 NW2d 457 (2000) (citation omitted). However, "[a] court in passing sentence may not consider factors that violate a defendant's constitutional rights." *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998). A statutory provision such as MCL 777.49(c) cannot authorize an unconstitutional action. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). Accordingly, defendant asserts, and the majority apparently concurs, that it was error to score OV 19 on the basis of his alleged perjury because doing so interferes with his constitutional rights to testify, to refuse to admit guilt, to have a trial, and to due process of law.

In *People v Adams*, 430 Mich 679; 425 NW2d 437 (1988), our Supreme Court held that a defendant's perjury can be considered in determining his sentence because the perjury reflects on his prospects for rehabilitation. The *Adams* Court stated, "[i]n the sentencing process, the trial judge is required to presume guilt in fact and should be allowed to infer that a defendant's willful material perjury under oath circumstantially indicates the absence of a character trait for being law-abiding that bears on the appropriate sentence." *Id.* at 693-694. The Court rejected the claim that such an inference would "chill the exercise of the defendant's right to trial_[,]" noting that "there is no right, constitutional or otherwise, to testify falsely_[,]" *Id.* at 694.

In reaching its holding in *Adams*, our Supreme Court relied on *United States v Grayson*, 438 US 41; 98 S Ct 2610; 57 L Ed 2d 582 (1978). *Grayson* rejected the defendant's argument that enhancing his sentence based on his perjury during trial chilled his right to testify and constituted punishment for a crime of which he had not been convicted by due process. *Id.* at 53-55. Recently, in *United States v Dunnigan*, 507 US 87, 97-98; 113 S Ct 1111; 122 L Ed 2d 445 (1993), the United States Supreme Court rejected a challenge to a sentence enhancement concerning obstructing or impeding the administration of justice.

In *Dunnigan*, the Court stated that the commission of perjury was relevant to the determination of the appropriate type and extent of punishment "because it reflects on a defendant's criminal history, on her willingness to accept the commands of the law and the authority of the court, and on her character in general." *Dunnigan, supra* at 94. The Court further stated:

It is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process. The perjuring defendant's willingness to frustrate judicial proceedings to avoid criminal liability suggests that the need for incapacitation and retribution is heightened as compared with the defendant charged with the same crime who allows judicial proceedings to progress without resorting to perjury. [*Id.* at 97-98.]

The Court rejected the argument that an enhanced sentence based on a willful presentation of false testimony undermines a defendant's right to testify, noting that the right to testify does not encompass the right to commit perjury and that "[o]ur authorities do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights." *Id.* at 96.

The *Dunnigan* Court rejected the argument that the enhancement would be automatic whenever a defendant testified, but was found guilty. The Court noted that inaccurate testimony might be presented because of mistake and that an accused might truthfully testify regarding matters such as lack of capacity or self-defense, which a jury could find insufficient to excuse criminal liability, and, thus, further held:

[I]f a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition [set out by the Court.] [*Dunnigan, supra* at 95.]

This conclusion is consistent with the Michigan Supreme Court's ruling in *Adams* that a trial court must have concluded that the defendant's alleged perjury was willful, material, and flagrant. *Adams, supra* at 693. The trial court made this finding when it acknowledged that the jury's verdict, as the result of the wholesale rejection of defendant's testimony, necessarily

determined that defendant had perjured himself at trial and where no evidence was presented that defendant's testimony was the result of mistake or confusion.

The record in this case is replete with defendant's false testimony. At trial, defendant testified in direct contradiction to the victim, denying not only every allegation of wrongdoing but also asserting her recollection of most details of the event and circumstances to be erroneous. In addition, during the police investigation, defendant not only denied any wrongdoing regarding the victim, but also falsely asserted that he had never been arrested before this incident and had worked as a confidential informant for federal law enforcement. See *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004) (holding that "[c]onduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference with the administration of justice, and OV 19 may be scored for this conduct where applicable.") This assertion was again reiterated at trial, despite evidence of defendant having been arrested in other jurisdictions. Hence, not only does the jury's verdict, through acceptance of the victim's version of events and commensurate rejection of defendant's testimony support the scoring of this variable based on perjury, defendant's false statements to police and during trial regarding his history of prior police involvement serves to substantiate the scoring of 10 points on OV 19. In accordance with this Court's holding in *Adams*:

[W]hen the record contains a rational basis for the trial court's conclusion that the defendant's testimony amounted to wilful [sic], material, and flagrant perjury, and that such misstatements have a logical bearing on the question of the defendant's prospects for rehabilitation, the trial court properly may consider this circumstance in imposing sentence. [*Adams, supra* at 693.]

Therefore, I would reject defendant's claim that his sentencing enhancement for perjury constituted error, which infringed on his rights to trial and to testify and "uphold the trial court's guidelines scoring" based on the existence of "evidence in the record to support it." *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004) (citations omitted).

Additionally, defendant contends that a sentencing enhancement based on perjury infringes on his right to refuse to admit guilt. *Conley, supra* at 314. However, there is no evidence that the trial court asked the defendant to admit guilt or offered to lower his sentence in return for an admission of guilt. *Id.* More importantly, defendant elected to testify and not to remain silent. Having giving up this right, defendant was required to speak truthfully. *Adams, supra* at 689.

/s/ Michael J. Talbot