

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON DANIEL CONLEY,

Defendant-Appellant.

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UNPUBLISHED

January 29, 2008

No. 275122

Ingham Circuit Court

LC No. 03-001137-FH

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant was convicted of first-degree home invasion, MCL 750.110a, felonious assault, MCL 750.82 and possession of a firearm during the commission of a felony, MCL 750.227b. In a prior appeal, this Court remanded for resentencing because the sentencing judge implicitly imposed harsher sentences because defendant had not revealed the location of the gun used in the crimes, which was tantamount to requiring him to admit guilt. *People v Conley*, 270 Mich App 301; 715 NW2d 377 (2006). On remand, a successor judge sentenced defendant to the same terms of imprisonment as originally imposed,<sup>1</sup> with credit for time served. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At the resentencing hearing, defense counsel said that he and defendant had reviewed the updated presentence investigation report (PSIR). Counsel challenged the scoring of Offense Variable (OV) 1, but acknowledged that the challenge was not raised at the original sentencing hearing. The trial court ruled that the challenge to OV 1 was untimely, and that, in any case, there was sufficient evidence in the trial record to support the score of five points.

After being resentenced, defendant filed a motion for resentencing *in propria persona*, challenging the accuracy of the updated PSIR and the scoring of the OVs 1, 3, and 9. Shortly

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<sup>1</sup> Defendant was sentenced as a third habitual offender, MCL 769.11, to 16 to 40 years' imprisonment for the home invasion conviction, 4 to 8 years' imprisonment for the felonious assault conviction, and two years' consecutive imprisonment for the felony-firearm conviction.

thereafter, defendant also moved *in propria persona* for a *Ginther*<sup>2</sup> hearing, alleging that he was denied the effective assistance of counsel at the resentencing hearing.

The trial court issued an opinion and order on November 7, 2006, denying defendant's motions. The court held that defendant's claims of errors in the scoring of the sentencing guidelines and allegations of erroneous information in the PSIR were either waived or untimely. The court also ruled that defendant was not denied the effective assistance of counsel.

On appeal, defendant asserts that it was error for the trial court to refuse to consider the alleged errors in the updated PSIR and in the sentencing guidelines' scores. We disagree.

Where sentencing issues are not properly preserved by a failure to object at trial or via an appropriate motion under MCR 6.429(C),<sup>3</sup> we review these claims for plain error affecting the defendant's substantial rights. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007), lv pending.

In this case, there was no proper challenge to any error in either the updated PSIR or the scoring of the sentencing guidelines until defendant's untimely motion filed after resentencing. Defendant has waived or abandoned these claims. *People v Gezelman*, 202 Mich App 172, 173-174; 507 NW2d 744 (1993); *People v Persails*, 192 Mich App 380, 384; 481 NW2d 747 (1991); *People v Maxson*, 163 Mich App 467, 471-472; 415 NW2d 247 (1987). Moreover, defendant cannot demonstrate that his lawyer was constitutionally ineffective, so relief cannot be granted. *Kimble, supra*, 470 Mich at 310-312; *People v Francisco*, 474 Mich 82, 89-90 n 8; 711 NW2d 44 (2006).

In any event, a review of the record establishes that there was more than sufficient evidence to support the scoring of OVs 1, 3 and 9. As to OV 1, the evidence showed that defendant broke down the front door of a home and threatened more than a dozen residents by pointing and waving a handgun at or near them. Fifteen points were properly assessed. MCL 777.31(1); *People v Morson*, 471 Mich 248, 256; 685 NW2d 203 (2004); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). OV 3 was properly assessed 5 points because defendant assaulted and injured one of the victims. MCL 777.33(1). Contrary to what defendant asserts, bodily injury is not an element of either first-degree home invasion or felonious assault. Finally, OV 9 was properly scored at 10 points because, as previously mentioned, there were more than one dozen people threatened by defendant's actions. MCL 777.39(1)(c).

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<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>3</sup> MCR 6.429(C) provides:

A party shall not raise on appeal an issue challenging the scoring of the sentence guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

Furthermore, at defendant's resentencing, the court stated that it was not considering information in the updated PSIR report concerning defendant's mother or his alleged gang activities. Thus, defendant's claim that his sentences were based on inaccurate or false information must fail.

Defendant's claim that he was denied the due process of law by the resentencing court's alleged refusal to hear any challenges to the scoring of the sentencing guidelines or to the contents of the PSIR is not supported by the record and, therefore, is without merit. The record shows that defendant and his lawyer had access to and reviewed an updated PSIR prior to the resentencing hearing. We hold that the requirements of MCR 6.425(E)(1) were met and that further review is not necessary.

Defendant's claim that he was denied the effective assistance of counsel at the resentencing hearing raises a mixed question of fact and law. Fact issues are reviewed for clear error, while the constitutional law questions are reviewed de novo. *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004). To prevail on an ineffective counsel claim, a defendant must show not only that his lawyer's conduct fell below an objective standard of reasonableness, but also that he was prejudiced as a result. *Strickland v Washington*, 466 US 668, 689-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Grant, supra*.

Our review of the record shows that counsel did not fall below an objective standard of reasonable conduct at the resentencing hearing. Even if counsel's conduct was substandard, defendant cannot demonstrate any prejudice. In its opinion and order denying defendant's motions after resentencing, the trial court clearly stated that it was not considering the information in the updated PSIR that defendant was challenging. And our review of the guidelines scoring satisfies us that, even if defendant's challenges were timely, the OVs were properly scored.

We affirm.

/s/ Richard A. Bandstra  
/s/ Pat M. Donofrio  
/s/ Deborah A. Servitto