

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL MORA,

Defendant-Appellant.

UNPUBLISHED

July 30, 2009

No. 285502

Oakland Circuit Court

LC No. 2005-204023-FC

Before: Owens, P.J., and Servitto and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of conspiracy to deliver or possess with intent to deliver 1000 or more grams of cocaine, MCL 750.157a, and possession with intent to deliver 1000 or more grams of cocaine, MCL 333.7401(1)(a)(i). After a resentencing hearing in the trial court,¹ the court imposed concurrent imprisonment terms of 225 months to 45 years for each conviction. Defendant appeals as of right. We affirm, and decide this appeal without oral argument pursuant to MCR 7.214(E).

Defendant insists that his sentences qualify “as disproportionate because of the unusual circumstances and mitigating factors presented” in this case, including his lack of prior felony convictions, “that he was merely a delivery man not a main player in the transaction, that he received his GED, has been employed in the same position for the past two years and has picked up no major misconducts while incarcerated.” The parties did not dispute at the resentencing hearing that the statutory guidelines range governing the minimum term of defendant’s sentences constituted 135 months to 225 months. The trial court selected a minimum term of imprisonment at the outer reaches of the statutory guidelines range, but within the guidelines

¹ In May 2007, this Court granted defendant’s motion to remand for a resentencing hearing, “limited to the resentencing issue raised in the motion to remand.” *People v Mora*, unpublished order of the Court of Appeals, entered May 24, 2007 (Docket No. 272733). In March 2008, this Court found that the trial court had improperly scored prior record variable five in a manner that affected the proper sentencing guideline range, vacated defendant’s sentences, and remanded for resentencing. *People v Mora*, unpublished memorandum opinion of the Court of Appeals, issued March 8, 2008 (Docket No. 272733). The resentencing at issue in this appeal occurred in April 2008.

range nonetheless. Consequently, the plain language of MCL 769.34(10) mandates that this Court affirm defendant's sentence, "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." See *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003); *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002) (rejecting the defendant's claim that "his sentence is disproportionate because it fails to consider either the seriousness of the offense or his rehabilitation," on the grounds that "nothing in the record indicates that his sentence is outside the statutory guidelines" and pursuant to MCL 769.34(10) "this Court may not consider challenges to a sentence based exclusively on proportionality if the sentence falls within the guidelines").²

We next consider issues raised by defendant in a supplemental brief he filed pursuant to Standard 4 of Supreme Court Administrative Order No. 2004-6. Defendant first suggests that the trial court violated his due process and other constitutional rights when it cited defendant's lies during trial testimony as a basis for sentencing him at the highest end of the guidelines. We may consider these arguments because MCL 769.34(10) does not limit review of constitutional sentence challenges. *People v Conley*, 270 Mich App 301, 316-317; 715 NW2d 377 (2006).

"[W]hen the record contains a rational basis for the trial court's conclusion that the defendant's testimony amounted to wilful, 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." *People v Adams*, 430 Mich 679, 693; 425 NW2d 437 (1988). A trial court "should be allowed to infer that a defendant's wilful 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. "[I]t is proper—indeed, even necessary for the rational exercise of discretion—to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision." *United States v Grayson*, 438 US 41, 53; 98 S Ct 2610; 57 L Ed 2d 582 (1978). "A defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing." *Id.* at 50.

At defendant's resentencing hearing, the trial court, defendant and his counsel engaged in the following relevant exchange:

The Court: Well, Mr. Mora, one thing I can say about you is—because you stick out in my mind—I've never heard anybody lie so much on the stand as you did. It was incredible, just incredible—

* * *

² The cases cited by defendant all involved appellate review of sentences imposed under the former judicial guidelines, not the statutory guidelines that became effective on January 1, 1999.

Let me just finish. I sat hear [sic] and listened and I thought, my God, he would have been better off never taking the stand.

Defendant: And I do regret that, but I needed—

The Court: Well, you're a good B.S.er.

Defendant: Well that wasn't my intentions [sic], Your Honor—

* * *

The Court: Your intentions were to lie and get out of this as best you could.

Defendant: My intentions were to [sic] clear to the Court that there was false testimony by the police and evidence planted, but it all crumbled in front of me because I was so upset.

The Court: Yeah, it sure did.

Defense counsel: Your Honor, maybe I could add too, perhaps that's from the lack of criminal sophistication that others may have had. I'm certain the Court sees people on a weekly basis that come in and perhaps are smooth or have their stories down right—

The Court: Oh, he was smooth; he just wasn't smooth enough.

Defense counsel: But he's not experienced, I mean that's my point. That's where we are. You know, he's scared certainly.

The Court: Well, look . . . , the guidelines are one thirty-five to two twenty-five. I'm not going to vary. . . . I think this is a case—because I remember the testimony. He was meeting somebody from Mexico and southern Arizona, picking stuff up and transporting it here in Michigan. He had I don't know how many bags of marijuana. I know my office was full because they couldn't keep 'em in the courtroom. I thought it was garbage day for a little bit.

So, I'm going to stay at the high end of the guidelines

Because the record supplies a rational basis for the trial court's finding that defendant willfully perjured himself in material respects throughout his testimony at trial, and because his lack of truthfulness is "probative of his attitudes toward society and prospects for rehabilitation," *Grayson, supra* at 50, the trial court properly considered defendant's untruthfulness as a factor in imposing sentence. *Adams, supra* at 701-702. Furthermore, contrary to defendant's suggestions, the trial court's consideration of his false testimony cannot be deemed to have chilled the exercise of his right to trial. *Grayson, supra* at 54-55; *Adams, supra* at 694. Defendants do not have a right to testify falsely. *Id.* In summary, we find no due process or other constitutional violation.

Defendant also contends that the trial court improperly scored points for the same facts in both prior record variable (PRV) 7 and offense variable (OV) 15, which resulted in a sentence that amounted to cruel and unusual punishment. Defendant inaptly cites decisions recognizing that a court may not invoke a characteristic already taken into account in determining the sentence range as a basis for departing from the sentencing range, unless the factor was given inadequate weight. See MCL 769.34(3)(b). PRV 7 contemplates a scoring of 10 points when an “offender has 1 subsequent or concurrent conviction,” a fact that defendant does not dispute. MCL 777.57(1)(b). With respect to OV 15, which assigns points for “aggravated controlled substance offenses,” the trial court correctly calculated 100 points under this variable because the jury convicted defendant of possession with intent to manufacture or deliver 1,000 or more grams of cocaine, another fact that defendant does not dispute. MCL 777.45(1)(a). Because PRV 7 and OV 15 plainly “are two separate categories addressing two different situations,” “[t]he trial court’s assessment of points for both variables was proper.” *People v Jarvi*, 216 Mich App 161, 163-164; 548 NW2d 676 (1996). “[A] sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment.” *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Because the trial court properly scored PRV 5 and OV 15, defense counsel was not ineffective for failing to lodge a meritless objection to the scoring decisions. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).³

Affirmed.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher

³ To the extent defendant briefly suggests that his arrest was improper, he failed to include this claim in his statement of questions presented, *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990), and his inadequate appellate briefing of his position amounts to an abandonment of the issue. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007).