

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 27, 2012

v

SAUL DOUGLAS BRIGGS,

Defendant-Appellant.

Nos. 305028; 305029
Muskegon Circuit Court
LC Nos. 09-058381-FH;
10-059291-FH

Before: M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals by leave granted his sentences for resisting and obstructing, MCL 750.81d(1) (Docket No. 305028), and escape from jail while serving a felony sentence, MCL 750.195(2) (Docket No. 305029). In Docket No. 305028, defendant pleaded nolo contendere to resisting and obstructing after he fled from a police officer who responded to a potential domestic assault. He was sentenced to 24 months' probation with the first ten months served in county jail and was also granted work release. On March 9, 2010, defendant violated his probation by failing to return to jail while he was out on work release. He pleaded guilty to violating his probation and the trial court revoked his probation. On July 13, 2010, the trial court in Docket No. 305028 resentenced defendant on his resisting and obstructing charge as an habitual offender, fourth offense, to 3 years and 6 months' imprisonment to 15 years' imprisonment with credit given for 145 days served. In Docket No. 305029, he pleaded guilty to escaping from jail on June 8, 2010, and on July 13, 2010, was sentenced as an habitual offender, third offense, to 12 months in jail. Defendant's sentences are consecutive to each other. We affirm defendant's sentences, but remand for a calculation of whether defendant is entitled to credit for good time earned on his resisting and obstructing sentence in Docket No. 305028.

Defendant first contends that the trial courts in Docket Nos. 305028 and 305029 improperly scored ten points under OV 19. Pursuant to MCL 777.49(c), the trial court may score ten points if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice . . ." OV 19 "encompasses more than just the actual judicial process." *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). An act that interferes with law enforcement personnel during the investigation of a crime can justify the trial court's scoring decision under OV 19 because "[t]he investigation of crime is critical to the administration of justice." *Id.* Additionally, "[a] trial court's scoring decision 'for which there is any evidence in

support will be upheld.” *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009), quoting *People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

The trial courts properly scored OV 19 in each case. First, with regard to defendant’s sentence for resisting and obstructing in Docket No. 305028, the trial court properly scored ten points because defendant’s presentence investigation report (PSIR) indicated that he ran from a police officer when he was commanded to stop, and that he hid from the same officer after leading the officer on a brief chase. These actions demonstrate that defendant interfered with the investigation of a crime; thus, scoring defendant’s conduct under OV 19 was appropriate. *Barbee*, 470 Mich at 288. Second, the trial court also properly scored ten points under OV 19 for defendant’s escape offense in Docket No. 305029. The plain language of OV 19 directs the trial court to score ten points if “[t]he offender otherwise interfered with or attempted to interfere with the administration of justice” MCL 777.49(c). Defendant’s escape from lawful imprisonment interfered with the administration of justice because it was an attempt to avoid the administration of justice.

Pursuant to MCL 777.16d, resisting and obstructing is classified as a crime against a person. It is a class G offense. MCL 777.22(1) states, “For **all** crimes against a person, score offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, **19** and 20.” (Emphases added.) Pursuant to MCL 777.16j, escaping a felony sentence, is classified as a crime against public safety and is a class F offense. MCL 777.22(5) states, “For **all** crimes against public safety, score offense variables 1, 3, 4, 9, 10, 12, 13, 14, 16, **19**, and 20.” (Emphases added.) Consequently, the clear statutory language indicates that OV 19 should be scored for each of defendant’s offenses despite the fact that the crimes for which defendant was found guilty required a finding that defendant engaged in conduct which is in and of itself an interference with the administration of justice. Our Supreme Court has seemingly recognized the explicit statutory language when it stated “[t]he Legislature has also directed, without exception, that OV 19 be scored for each and every one of these offense categories.” *People v Smith*, 488 Mich 193, 200; 793 NW2d 666, 669-70 (2010). Thus, there was evidence to support the scoring decision of both trial courts and their decisions must be upheld. *Steele*, 283 Mich App at 490.

Next, defendant contends that the trial court in Docket No. 305028 erred by failing to determine whether he was entitled to good-time credit earned during his original jail sentence. The issue of whether a defendant receives the proper amount of credit for the time he was incarcerated is a question of law that this Court reviews de novo. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). The record reveals that defendant was credited with 145 days for his actual time served. However, the trial court did not engage in an analysis concerning whether defendant was entitled to good-time credit; defendant argues that he was entitled to such a determination. We agree with defendant.

MCL 51.282(2) permits the sheriff to award a defendant with good time served:

[e]very prisoner whose record shows that there are no violations of the rules and regulations shall be entitled to a reduction from his or her sentence as follows: 1 day for each 6 days of the sentence. The sheriff may, by general rule, subject to amendment from time to time, prescribe how much of the good time earned under this subsection a prisoner shall forfeit for any infraction of the general rules and

regulations, and for any act of insubordination the sheriff may by special order take away any portion of or the whole of the good time made by any prisoner up to the date of such offense. The sheriff may as a reward for especially good conduct, in case of insubordination, restore to any prisoner the whole or any portion of the good time lost because of any minor infraction of the rules.

If a defendant is awarded good-time credit, the trial court may not take away such credit if it resentences the defendant. *People v Resler*, 210 Mich App 24, 28; 532 NW2d 907 (1995).

The record does not indicate whether defendant was entitled to good-time credit, or whether the trial court analyzed whether defendant was entitled to good-time credit. Therefore, because the record is silent on this matter, we remand the issue to the trial court in Docket No. 305028 with instructions to determine if defendant is entitled to any good-time credit. If defendant is entitled to such credit, the trial court should enter an amended judgment of sentence to reflect as much.

Next, defendant argues that the trial court in Docket No. 305029 erred by imposing consecutive sentences for his resisting and obstructing offense and his escape offense because it was not authorized to do so. “A consecutive sentence may be imposed only if specifically authorized by statute.” *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996) (internal citations omitted). See also *People v Burks*, 220 Mich App 253; 559 NW2d 357 (1996). In *Burks*, this Court determined that MCL 750.195(2), the escape statute under which defendant was sentenced, authorizes the trial court to impose a sentence for an escape offense that was consecutive to the sentence that the defendant is already serving. *Id.* at 257, 259. Accordingly, the trial court did not err by imposing consecutive sentences on defendant. *Id.* at 259. Defendant, however, contends that *Burks* was decided in error because the panel incorrectly interpreted MCL 750.195(2). We do not agree. Moreover, we are bound to follow *Burks* because it is a published decision. MCR 7.215(J)(1).

As an alternative, defendant argues that if the trial court in Docket No. 305029 had the authority to impose consecutive sentences, it erred when it determined the time at which his consecutive sentence for escape should begin to run. The trial court imposed a sentence for escape that was to run consecutively to the completion of defendant’s new 3 year and 6 month to 15-year sentence for resisting and obstructing. Defendant contends that the consecutive sentence for escape should begin to run at the end of his original term of imprisonment, i.e., his now-revoked probationary sentence that provided for ten months in jail for resisting and obstructing.

We find that the trial court in Docket No. 305029 correctly determined that defendant’s escape sentence should run consecutively to his post-probation violation sentence for resisting and obstructing. In *Burks*, 220 Mich App at 258, we declared that when a defendant’s probation is revoked, it is as if the probation was never ordered, and the defendant is resentenced on the original offense. See also MCL 771.4. Thus, in this case, defendant’s original sentence of probation with ten months in jail was “rendered a nullity” when his probation was revoked. *Burks*, 220 Mich App at 528. Accordingly, defendant’s new sentence for resisting and obstructing takes the place of his old probationary sentence and it is as if his probationary sentence never existed. *Id.* Consequently, his sentence for escape runs consecutively to his new sentence for resisting and obstructing. See *id.*

Defendant also raises two issues that were not included in his statement of questions presented. Thus, they are not properly before this Court, and need not be considered. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). However, we have reviewed the issues nonetheless, and determined that they lack merit.

Finally, defendant contends that his trial counsel rendered constitutionally ineffective assistance. A criminal defendant is denied effective assistance of counsel in violation of the Sixth Amendment if counsel's "performance fell below an objective standard of reasonableness . . . [and] the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Defendant alleges that his trial counsel was ineffective for failing to object to any of the errors he has alleged on appeal. We note that the issues defendant raised pertaining to the scoring of OV 19 and the trial court's ability to impose consecutive sentences are meritless. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Moreover, with regard to defendant's claim for good-time credit, defendant's trial counsel raised this issue before the trial court in Docket No. 305028 in a motion for resentencing. Thus, because defendant's trial counsel identified the error, if any, his performance did not fall below an objective standard of reasonableness, and defendant was not denied the effective assistance of counsel.

We affirm defendant's sentences but remand in Docket No. 305028 for consideration of the applicability of good time credit to that sentence. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens