

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
February 20, 2014

v

ALBERT DANIEL RICHARDS,  
  
Defendant-Appellant.

No. 312400  
Hillsdale Circuit Court  
LC No. 11-352667-FH

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Before: SAWYER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Defendant, Albert Daniel Richards, appeals by delayed leave granted his sentence of 29 to 168 months' imprisonment for uttering and publishing, MCL 750.249. We affirm.

I

On July 25, 2011, defendant presented a false check for \$475 drawn on a closed account at 127 Party Store in Pittsford, Michigan. He was arrested and pleaded guilty to one count of uttering and publishing, MCL 750.249. In exchange for defendant's guilty plea and agreement to pay restitution, the prosecution dropped one pending uttering and publishing charge where defendant presented a false check for \$150 at Pittsford Feed Mill. In addition, the prosecution promised not to charge defendant with four other instances of uttering and publishing fraudulent checks. The prosecution also agreed not to charge defendant as an habitual offender. Defendant testified at the plea hearing that he believed he passed the check some time during the morning of July 25, 2011. Defendant informed the trial court that he forged and presented 10 to 12 checks throughout Hillsdale County in what he described as a "crime spree," and that not all of these checks were discovered by the police. The trial court accepted defendant's guilty plea.

At his sentencing hearing, although it appears from defense counsel's statements that defendant did not have an opportunity to review the presentence investigation report (PSIR) until that morning, neither defendant nor his counsel objected to the guidelines scoring or the minimum guidelines range of 14 to 29 months. The trial court sentenced defendant to 29 to 168 months' imprisonment.

After receiving appointed appellate counsel, defendant moved for resentencing, arguing that the trial court erred by scoring offense variable (OV) 12, MCL 777.42, at ten points for three or more contemporaneous felonious criminal acts. Defendant contended that there was no proof

in the PSIR or on the record of the plea transcript that any of the checks were presented within 24 hours of the sentencing offense. In response to defendant's motion, the Michigan Department of Corrections provided supplemental information to the PSIR that identified the dates on which defendant passed forged checks. Three checks were passed on July 26, 2011, one day after the sentencing offense. As noted above, defendant testified at the plea hearing that he believed he passed the bad check at the party store in the morning on July 25<sup>th</sup>. Defendant argued that because there was no evidence to establish when he passed the bad checks on July 26<sup>th</sup>, there is no evidence to support the scoring of OV 12, which requires that the contemporaneous felonious acts must occur within 24 hours of the sentencing offense.

The trial court held that the three checks on July 26, 2011, fell within OV 12's 24-hour requirement because "essentially 24 hours is one day. One day later, the checks were written on July 26." The trial court also noted that if the three checks were presented "an hour or a couple of hours, or whatever the case may be, beyond the magic 24 hours," it would use "each and every one of those checks" as grounds for a departure. The court took note of not only the three checks passed on July 26, but also checks defendant passed on August 12, and August 17, and indicated that all of the checks were "potentially prosecutable as uttering and publishing forgeries" that were not pursued pursuant to the plea bargain. With respect to the sentence constituting a departure if OV 12 were improperly scored, the court elaborated:

The Court finds that if [the checks are] not properly scored under the guidelines, there is sufficient grounds for departure and [the court] would find clear and convincing reason to utilize the same to depart from the guidelines. And the Court would—and I'll tell that right now on the record—would give him the exact same sentence that I gave him originally.

Hence, the trial court denied defendant's motion for resentencing.

## II

Defendant argues that the trial court erred in scoring OV 12 at ten points because there was no record evidence establishing that he committed three felonious criminal acts within 24 hours of the July 25, 2011 sentencing offense. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Questions of statutory interpretation are reviewed de novo. *Hardy*, 494 Mich at 438.

OV 12 scores contemporaneous felonious criminal acts. MCL 777.42(1). It may be scored at ten points when "[t]hree or more contemporaneous felonious criminal acts involving other crimes were committed." MCL 777.42(1)(c). MCL 777.42(2) provides, in pertinent part:

All of the following apply to scoring offense variable 12:

(a) A felonious criminal act is contemporaneous if both the following circumstances exist:

(i) The act occurred within 24 hours of the sentencing offense.

(ii) The act has not and will not result in a separate conviction.

The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). “To ascertain that intent, this Court begins with the statute’s language. When that language is unambiguous, no further judicial construction is required or permitted, because the Legislature is presumed to have intended the meaning it plainly expressed.” *Id.*

The phrase “occurred within 24 hours of the sentencing offense” is unambiguous. It creates a defined time period of 24 hours. The trial court reasoned that, although there was no record evidence as to when defendant presented the three checks on July 26, 2011, they were within “24 hours” of the sentencing offense because they were presented sometime on July 26, 2011, the next calendar day. However, “24 hours” is a definite and specific period of time, and this Court enforces statutory language pursuant to its “plain and ordinary meaning.” *People v Haynes*, 281 Mich App 27, 29; 760 NW2d 283 (2008). Therefore, a felonious criminal act is contemporaneous under the statute, and may only be scored for OV 12, if it occurred within 24 hours of the sentencing offense. Because there was no record evidence establishing that defendant presented the three checks within 24 hours of his presentation of the July 25, 2011 check underlying the sentencing offense, the trial court clearly erred in scoring OV 12 at ten points. *Hardy*, 494 Mich at 438. OV 12 should have been scored at zero.

Defendant’s uttering and publishing conviction under MCL 750.249 constitutes a Class E offense. See MCL 777.16n. At sentencing, defendant’s total prior record variables (PRV’s) were scored at 95, placing him at PRV Level F. His OV’s were scored at 25 points, placing him at OV Level III. Thus, defendant’s minimum guidelines range was 14 to 29 months. When properly scoring OV 12 at zero points, defendant has a total OV score of 15 points, placing him at OV Level II, with a proper guidelines range of 12 to 24 months. Defendant’s minimum sentence of 29 months falls outside the proper guidelines range.

Because it is clear from the trial court’s remarks at defendant’s motion for resentencing that even if OV 12 was improperly scored because it cannot be proven that defendant passed the forged checks within the “magic 24 hours,” it would use “each and every one of those checks” as grounds to depart from the sentencing guidelines recommended range and give defendant “the exact same sentence that [it] gave him originally,” and because M.C.L. § 769.34(3) authorizes such departures, *People v. Hegwood*, 465 Mich. 432 439–440; 636 NW2d 127 (2001); *People v. Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003), we conclude that any error in the scoring of OV 12 was harmless. See *People v Mutchie*, 468 Mich 50, 52; 658 NW2d 154 (2003). Defendant’s passing of three fraudulent checks one day after committing the sentencing offense, as well as two checks only weeks later, is objective and verifiable, it does keenly attract the court’s attention, and it is of considerable worth in deciding the length of defendant’s sentence. *Babcock*, 469 Mich at 257-258.

Defendant also argues that trial counsel was ineffective for failing to object to the scoring of OV 12 at sentencing. However, appellate counsel raised the scoring issue in a motion for resentencing. The motion raised the issue before the trial court, and the trial court addressed and decided the issue. Therefore, the scoring issue was preserved for appellate review, MCL 769.34(10), and defendant suffered no prejudice by trial counsel’s failure to object to the scoring

of OV 12. See *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).  
Defendant's ineffective assistance of counsel claim lacks merit.

Affirmed.

/s/ David H. Sawyer  
/s/ Stephen L. Borrello  
/s/ Jane M. Beckering