

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
April 1, 2014

v

JOSEPH VINCENT RANDAZZO,  
  
Defendant-Appellant.

No. 314326  
Antrim Circuit Court  
LC No. 12-004511-FH

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Before: DONOFRIO, P.J. and SAAD and METER, JJ.

PER CURIAM.

Defendant appeals his jury convictions of: (1) conspiracy to deliver/manufacture less than 50 grams of heroin, MCL 333.7401(2)(a)(iv) and MCL 750.157a; (2) conspiracy to deliver/manufacture marijuana 45 kilograms or more, MCL 333.7401(2)(d)(i) and MCL 750.157a; and (3) maintaining a drug house, MCL 333.7405(1)(d). The court ordered that the conspiracy to deliver/manufacture less than 50 grams of heroin conviction to be served consecutive to the concurrent sentences imposed for the two other convictions. For the reasons stated below, we affirm.

**I. BACKGROUND**

In 2006 and 2007, defendant and his then-girlfriend Jenny Ketz traveled weekly to Detroit to purchase marijuana, which they resold for profit. Around 2007, they started purchasing heroin as well. In addition to other sales, defendant and Ketz sold drugs to Ketz's sister and her boyfriend, and retained some drugs for personal use. Ketz testified that she and defendant furnished their home with luxury items purchased with drug money. However, she explained that as their drug use increased, they used the sales proceeds to support their habit. Eventually, they were unable to meet their living expenses and moved in with defendant's parents.

**II. SENTENCING**

## A. OFFENSE VARIABLE 16<sup>1</sup>

Defendant unconvincingly argues that the court erred in scoring offense variable (OV) 16. The trial court scored OV 16 at 10 points for defendant’s marijuana-conspiracy conviction, and at 5 points for his heroin-conspiracy conviction.

OV 16 addresses “property obtained, damaged, lost, or destroyed.” MCL 777.46(1). Ten points must be assessed if the “property had a value of more than \$20,000.00 or had significant historical, social, or sentimental value.” MCL 777.46(1)(b). Five points must be assessed if “the property had a value of \$1,000.00 or more but not more than \$20,000.00.” MCL 777.46(1)(c). Zero points are scored if “[n]o property was obtained, damaged, lost, or destroyed or the property had a value of less than \$200.00.” MCL 777.46(1)(e).

Conspiracy is a crime against public safety. MCL 777.18. If an offender is being sentenced for conspiracy, the court must apply both of the following in order to determine the minimum sentence:

(a) Determine the offense variable level by scoring the offense variables for the underlying offense and any additional offense variables for the offense category indicated in section 18 of this chapter.

(b) Determine the offense class based on the underlying offense. If there are multiple underlying felony offenses, the offense class is the same as that of the underlying felony offense with the highest crime class. If there are multiple underlying offenses but only 1 is a felony, the offense class is the same as that of the underlying felony offense. If no underlying offense is a felony, the offense class is G. [MCL 777.21(4).]

Here, the prosecution correctly observes that the statute indicates that when the sentencing offense is conspiracy, the court should score the OVs for both crimes against public safety (conspiracy) and the underlying crime(s) (here crimes involving a controlled substance under MCL 777.13m). Although OV 16 is not scored for the latter, MCL 777.22(3), it is scored for the former, MCL 777.22(5).

As the plain meaning of MCL 777.21(4)(a) refutes his argument for rescoring, defendant claims that points should not have been scored because his crimes did not involve property obtained from a victim. Leaving aside the offensive implications of defendant’s argument—that the sale and use of drugs are “victimless crimes”—defendant fails to support his assertions with any legal authority. “It is not enough for an appellant . . . simply to announce a position . . . and

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<sup>1</sup> “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). “Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *Id.*

then leave it up to this Court to discover and rationalize the basis for his claims . . . and then search for authority either to sustain or reject his position.” *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Though defendant cites property-theft cases where the court scored OV-16, it does not follow that because OV-16 applies in such situations, it does not also apply to defendant’s crimes.

In any event, defendant’s argument is without merit. MCL 777.46(2)(b) states: “In cases in which the property was *obtained* unlawfully, lost to the lawful owner, or destroyed, use the value of the property in scoring this variable” (emphasis added). “Obtain” means “[t]o succeed in gaining possession of as the result of planning or endeavor; acquire.” *The American Heritage Dictionary of the English Language* (1996). Defendant clearly obtained the heroin and marijuana unlawfully, because it was unlawful for defendant and Ketz to purchase, possess, or resell heroin and marijuana. Ketz testified that she and defendant purchased 1 to 7 grams of heroin per week “countless times.” The heroin was worth approximately \$200 per gram. Ketz also stated that defendant once told her he had 120 tickets of heroin in their son’s diaper bag. Because a “ticket” sells for \$20, the value of the heroin in the bag was \$2,400. This evidence is sufficient to establish that the value of the property (heroin) was at least \$1,000 but not more than \$20,000, thus supporting the score of 5 points. MCL 777.46(1)(c).

Ketz also testified that defendant purchased on average six pounds of marijuana per week, and that he obtained ten pounds on about four occasions. She stated that each pound cost \$1,200 and that they tried to sell each pound for up to \$2,400. Accordingly, it is reasonable to infer that defendant paid \$12,000 for the marijuana on four occasions and that it was valued up to \$24,000. This is sufficient to establish that the value of the marijuana was over \$20,000, thus supporting the OV score of 10 points. MCL 777.46(1)(b).

## B. RETALIATORY SENTENCING

Defendant asserts that the trial court improperly considered his decision to go to trial when imposing a consecutive sentence. This unpreserved constitutional issue is reviewed for plain error affecting defendant’s substantial rights. *People v Loper*, 299 Mich App 451, 467; 830 NW2d 836 (2013).

A defendant cannot be punished for exercising his right to trial. *United States v Jackson*, 390 US 570; 88 S Ct 1209; 20 L Ed 2d 138 (1968). “[N]o accused person should face the dilemma of either waiving trial or facing retaliatory sentencing as a consequence of insisting on a trial.” *People v Atkinson*, 125 Mich App 516, 518; 336 NW2d 41 (1983). Thus, a trial court may not base its sentencing decision, “in whole or in part,” on a defendant’s refusal to admit guilt; however, “evidence of a lack of remorse can be considered in determining an individual’s potential for rehabilitation.” *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987). To determine whether sentencing was improperly influenced by a defendant’s failure to admit guilt, this Court focuses on three factors: “(1) the defendant’s maintenance of innocence after conviction; (2) the judge’s attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe.” *Id.* at 713. “Resentencing is warranted if ‘it is apparent that the court erroneously considered the defendant’s failure to admit guilt, as indicated by action such as asking the defendant to admit his guilt or offering him a lesser sentence if he did.’” *People v Conley*, 270 Mich App 301, 314;

715 NW2d 377 (2006), quoting *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003).

MCL 333.7401(3), which governs the imposition of consecutive terms, provides that “[a] term of imprisonment imposed under subsection (2)(a) may be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony.”<sup>2</sup>

In this case, the trial court did not specifically indicate why it was imposing consecutive sentences. However, this omission is not an indication that the consecutive sentence was retaliatory. And the trial court referenced defendant’s decision to go to trial in the context of (1) disputing defendant’s alleged remorse for his actions,<sup>3</sup> and (2) defendant’s lack of cooperation with law enforcement in a drug case<sup>4</sup>—both factors on which the trial court is permitted to comment when it discusses sentencing. The court’s statements, when viewed in this light, are an effort to highlight what the court evidently saw as defendant’s hypocrisy—not one to berate him for deciding to go to trial. In fact, the court made repeated references to defendant’s right to a jury trial. It is thus not “apparent that the court erroneously considered the defendant’s failure to admit guilt” when it imposed the consecutive sentence. *Conley*, 270 Mich App at 314.

Affirmed.

/s/ Pat M. Donofrio  
/s/ Henry William Saad  
/s/ Patrick M. Meter

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<sup>2</sup> The prosecution correctly observes that two conspiracy convictions for controlled substance offenses under MCL 333.7401(2)(a) are subject to consecutive sentencing because the applicable conspiracy statute uses the word “penalty.” See *People v Denio*, 454 Mich 691, 704; 564 NW2d 13 (1997).

<sup>3</sup> *Wesley*, 428 Mich at 713 (“[i]f . . . the record shows that the court did no more than address the factor of remorsefulness as it bore upon defendant’s rehabilitation, then the court’s reference to a defendant’s persistent claim of innocence will not amount to error requiring reversal”).

<sup>4</sup> See *People v Hooks*, 101 Mich App 673, 679–680; 300 NW2d 677 (1980); citing *Roberts v United States*, 445 US 552; 100 S Ct 1358, 63 L Ed 2d 622 (1980).