

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN T. MORTON,

Defendant-Appellant.

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UNPUBLISHED

August 21, 2014

No. 315765

Oakland Circuit Court

LC No. 1999-168111-FC

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his sentences, following resentencing, for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b. Defendant was resentenced to 19 to 30 years’ imprisonment for the second-degree murder conviction and two years’ imprisonment for the felony-firearm conviction. We affirm.<sup>1</sup>

I. RESENTENCING

Defendant contends that he is entitled to resentencing because Prior Record Variable (PRV) 5 was misscored and the error affected his sentencing guidelines range, and further argues that the trial court abused its discretion in denying his motion for resentencing following remand. We disagree.

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<sup>1</sup> Defendant challenged his convictions in an earlier appeal as of right. See *People v Morton*, unpublished memorandum opinion of the Court of Appeals, decided February 1, 2002 (Docket No. 226962). This Court affirmed the convictions, and our Supreme Court denied further leave to appeal. *People v Morton*, 467 Mich 862; 651 NW2d 915 (2002). We therefore do not discuss the events underlying his convictions or his jury trial, as defendant’s current challenge is limited to his sentences received during resentencing on March 6, 2013, and the trial court’s denial of his subsequent motion for resentencing on August 28, 2013. See *People v Morton*, unpublished order of the Court of Appeals, entered August 1, 2013 (Docket No. 315765).

When this Court reviews a claim that the trial court's scoring of the sentencing guidelines was erroneous, the trial court's findings of fact 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.* This Court reviews a trial court's denial of a motion for resentencing for an abuse of discretion. *People v Puckett*, 178 Mich App 224, 227; 443 NW2d 470 (1989). An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible range of reasonable and principled outcomes. *Babcock*, 469 Mich at 269.

Defendant originally alleged in this appeal that the trial court misscored PRV 5, and therefore, resentencing was required. This Court remanded to allow defendant to move the trial court for resentencing "based on the trial court's scoring of Prior Record Variable 5."<sup>2</sup> Under the sentencing guidelines act, a court must impose a minimum sentence in accordance with the appropriate sentence range. MCL 769.34(2); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007). Michigan's sentencing scheme allows a sentencing judge the discretion to sentence within the calculated guidelines range. *Herron*, 303 Mich App at 403-404. Here, the trial court found that even if PRV 5 was scored at zero points, defendant's existing sentence was within the corrected guidelines range and the court would not have modified defendant's sentence. Contrary to defendant's contention, resentencing is not required whenever correction of an error in the scoring of prior record variables would change the recommended guidelines range. Rather, where the trial court clearly indicates, as it did here, that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range, resentencing is not required. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

"If the trial court's sentence is within the appropriate guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence." *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003); see also MCL 769.34(10) (stating same). Because defendant's sentence was within the corrected guidelines range even if PRV 5 had been scored at zero points, and the trial court indicated it would have imposed the same sentence, this Court must affirm defendant's sentence.

Defendant also contends that the trial court abused its discretion in denying defendant's post-remand motion for resentencing. We disagree.

Defendant alleges numerous specific errors that the trial court made in support of its denial of defendant's motion for resentencing. However, defendant's only sentencing issue before the trial court on remand was the scoring of PRV 5. As noted, the trial court found that even if PRV 5 was scored at zero points, defendant's existing sentence was within the guidelines

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<sup>2</sup> *People v Morton*, unpublished order of the Court of Appeals, entered August 1, 2013 (Docket No. 315765).

range and the court would not have modified defendant's sentence. Because the sentence was within the corrected guidelines range, it cannot be said that the trial court abused its discretion in holding that it would have resentenced defendant to an identical term of imprisonment. *Herron*, 303 Mich App at 403-404. As stated above, we must affirm a sentence that is within the appropriate guidelines range, unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence. *Babcock*, 469 Mich at 261; see also MCL 769.34(10). All of defendant's other challenges to the trial court's denial of its motion for resentencing, including ineffective assistance of appellate counsel, defense counsel's waiver of challenge to PRV 5 resentencing, and the applicability of the rules governing post-appellate relief, MCR 6.500 *et seq.*,<sup>3</sup> are moot in light of the fact that correction of any error in the scoring of PRV 5 would not require resentencing. *Id.*

## II. ALLEYNE CHALLENGE

Defendant next contends that the trial court violated his due process rights by sentencing him on the basis of facts not proved to a jury beyond a reasonable doubt. We disagree. Questions of constitutional law are reviewed de novo. *People v Harper*, 479 Mich 599, 610; 739 NW2d 523 (2007).

Recently, this Court addressed this very question in *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013), appeal held in abeyance \_\_\_ Mich \_\_\_ (2014). In *Herron*, this Court analyzed the current landscape of due process concerns regarding sentencing and determined that *Alleyne v United States*, \_\_\_ US \_\_\_; 133 S Ct 2151; 186 L Ed 2d 314 (2013), only stated that judicial fact-finding that triggered an increase in the *mandatory* minimum of a sentence was improper. *Herron*, 303 Mich App at 403-404. This Court went on to state:

While judicial fact-finding in scoring the sentencing guidelines produces a recommended range for a minimum sentence of an indeterminate sentence, the maximum of which is set by law, [*People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006)], it does not establish a *mandatory minimum*; therefore, the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process or the Sixth Amendment's right to a jury trial. [*Id.*]

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<sup>3</sup> We note additionally that the trial court did not err in applying the rules regarding post-appellate relief to defendant's motion for resentencing after remand. In remanding this matter to the trial court to allow defendant to move for resentencing based on the scoring of PRV 5, this Court previously stated that, in doing so, "Defendant-appellant must show that he is entitled to post-appeal relief from his original judgment of sentence on this issue, MCR 6.500 *et seq.*" *People v Morton*, unpublished order of the Court of Appeals, entered August 1, 2013 (Docket No. 315765). Accordingly, the law of the case doctrine bars defendant's claim of error on this issue. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000); *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988).

Thus, this Court determined that Michigan's sentencing system allows for the exact type of judicial discretion that the United States Supreme Court found was not violative of due process in *Alleyne. Id.* This Court is bound to follow *Herron*. MCR 7.215(J).

Finally, because resentencing is not necessary, we need not address defendant's argument that he should be resentenced before a different judge.

Affirmed.

/s/ Michael J. Riordan  
/s/ Pat M. Donofrio  
/s/ Mark T. Boonstra