

Order

Michigan Supreme Court
Lansing, Michigan

October 28, 2009

Marilyn Kelly,
Chief Justice

138926

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 138926
COA: 288828
Oakland CC: 2005-202065-FH

LARRY LEE JOHNSON,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the April 2, 2009 order of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we VACATE the sentence of the Oakland Circuit Court, and we REMAND this case to the trial court for resentencing. The sentence is invalid because the trial court scored 25 points under offense variable 13 based on crimes that were not committed during a five-year period encompassing the sentencing offense. *People v Francisco*, 474 Mich 82 (2006). This Court decided *Francisco* before the defendant's appellate counsel filed an application for leave to appeal in the Court of Appeals on direct appeal. Therefore, the scoring of OV 13 should have been challenged on direct appeal. On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.



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I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 28, 2009

Corbin R. Davis

Clerk