

Court of Appeals, State of Michigan

ORDER

People of MI v Mark Anthony Garth Jr.

Docket No. 327735

LC No. 14-035565-FC

Amy Ronayne Krause
Presiding Judge

Peter D. O'Connell

Michael F. Gadola
Judges

Pursuant to MCR 7.205(E)(2), in lieu of granting the delayed application for leave to appeal, the Court REMANDS this matter to the Genesee Circuit Court for the purposes of allowing defendant to move for resentencing on the ground that OV 13 was erroneously scored and the circuit court to reconsider the scoring of that offense variable. *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006). The trial court assessed 10 points for OV 13, reflecting that the sentencing offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person or property. MCL 777.43(1)(d). All crimes within a five-year period are counted, including the sentencing offense and any offense committed contemporaneously with the sentencing offense even if the contemporaneous offense did not result in a conviction. *People v Earl*, 297 Mich App 104; 822 NW2d 271 (2012). The PSIR lists only three qualifying felony offenses, the 2011 burglary, the sentencing offense and the assault with intent to rob while armed offense dismissed as part of the plea bargain. The latter offense may not be used to sustain a 10-point score for OV 13, however, if the conduct underlying that offense was scored in OV 11 or OV 12. MCL 777.43(2)(c); *People v Marshall*, 497 Mich 986; 861 NW2d 47 (2015). The five-points assessed to OV 12 suggest that it was used to score that variable. Thus, absent a record to the contrary, which we do not have, the assault with intent to rob offense may not be used to sustain the 10 points assessed to OV 13. Should the trial court find a scoring error that, when corrected, results in a reduction of the appropriate guidelines range, the court must resentence defendant in conformity with the process set forth in *People v Lockridge*, ___ Mich ___; ___ NW2d ___ (2015), i.e., the court must employ the sentencing guidelines in an advisory capacity and impose a reasonable sentence. In all other regards, the delayed application is DENIED for lack of merit in the grounds presented. The motion to remand is DISMISSED as MOOT. This order has immediate effect. MCR 7.215(F)(2). The Court does not retain jurisdiction.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG 12 2015

Date

Jerome W. Zimmer Jr.
Chief Clerk