

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN WAYNE STOCKS, SR.,

Defendant-Appellant.

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UNPUBLISHED

March 22, 2007

No. 266786

St. Clair Circuit Court

LC No. 04-000874-FC

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant pleaded guilty to conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, and was sentenced to a prison term of 10 years 6 months to 25 years. Following this Court's denial of defendant's delayed application for leave to appeal,<sup>1</sup> defendant sought leave in our Supreme Court. In lieu of granting the application, our Supreme Court remanded this case to this Court to consider defendant's challenge to the scoring of offense variable (OV) 1, MCL 777.31.<sup>2</sup> We vacate defendant's sentence and remand for resentencing.

Defendant and his son hatched what can only be described as a hare-brained scheme to frighten and rob a man defendant had known when he was a boy. Defendant's son entered the victim's home armed with a starter pistol<sup>3</sup>, but matters quickly went awry and he was shot during a struggle with the victim over the victim's gun, a .38 caliber pistol.<sup>4</sup>

The only issue in this case is whether the trial court properly scored OV 1. Defendant argues that a starter pistol is not a "firearm" for purposes of scoring OV 1 and that the error in scoring resulted in an increased guidelines range requiring resentencing. We agree.

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<sup>1</sup> *People v Stocks*, unpublished order of the Court of Appeals, entered August 12, 2005 (Docket No. 263122).

<sup>2</sup> *People v Stocks*, 474 Mich 930; 706 NW2d 25 (2005).

<sup>3</sup> The prosecutor does not contest on appeal that the weapon possessed by defendant's son was a starter pistol and it is clear from the transcript of the preliminary examination that there was no disagreement that it was not capable of firing any kind of projectile.

<sup>4</sup> Defendant's son pleaded guilty to the same charge as defendant.

Defendant argues that the trial court improperly scored OV 1 at 15 points. A sentencing court has discretion in scoring variables if record evidence supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). “Scoring decisions for which there is any evidence in support will be upheld.” *Id.* (citation omitted).

Resolution of this appeal involves an issue of statutory interpretation. The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature, and the Legislature is presumed to have intended the meaning it plainly expressed. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 15; 697 NW2d 913 (2005). If statutory language is clear and unambiguous, then a court is required to apply the statute as written. *Id.*

MCL 777.31 provides in relevant part as follows:

(1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

\* \* \*

(c) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon . . . . . 15 points

The Legislature has defined “firearm” in MCL 750.222(d)<sup>5</sup>:

“Firearm” means a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air. “Firearm” does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by spring, or by gas or air, BB’s not exceeding .177 caliber.

A starter pistol is not a firearm within the meaning of this statute. *People v Ray*, 119 Mich App 724, 729; 326 NW2d 622 (1982).

Because there is no dispute that the starter pistol used by defendant’s son during the commission of the crime is incapable of propelling a projectile as constructed, the starter pistol is not a “firearm” under the statute and the trial court abused its discretion in scoring OV 1 at 15 points<sup>6</sup>. See *People v Peals*, 476 Mich 636, 638; 720 NW2d 196 (2006).

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<sup>5</sup> See also MCL 8.3t.

<sup>6</sup> In scoring OV 1 at 15 points the trial court reasoned that the term “firearm” should be defined broadly in relation to the remaining language of the statute, which includes placing the victim under a reasonable apprehension of an immediate battery and that the purpose of the statute was to focus on the mind of the victim. While we might be in general agreement with the trial court’s conclusion, the plain language of the statutes in question compels the result we reach here.

Defendant's prior record variables (PRVs) were scored at 25 points and his OVs were scored at 60 points, rendering his minimum sentencing guideline range at 126 months to 210 months. When properly scored, his OV score is 45 points, rendering his minimum sentencing guideline range at 108 months to 180 months. The possibility that defendant could be scored points under MCL 777.31(1)(d) or (e) is not dispositive because any other score under these subsections would not change the guideline range. Thus, resentencing is required.

Defendant's sentence is vacated and we remand for resentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Joel P. Hoekstra