

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
July 24, 2014

v

THOMAS LEE BREEDING,  
Defendant-Appellant.

No. 312279  
Macomb Circuit Court  
LC No. 2010-002490-FC

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Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right from concurrent sentences of 240 months to 35 years on each of two counts of criminal sexual conduct, first degree, MCL 750.520b, and 30 months to six years on one count of accosting a child for immoral purposes, MCL 750.145a. Defendant was sentenced as a second habitual offender, MCL 769.11. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant was convicted following a jury trial. He was originally sentenced to concurrent terms of 20 years to life for the criminal sexual conduct convictions and a consecutive term of 10 to 25 years for the accosting conviction. Defendant appealed as of right those sentences in Docket No. 303862, arguing that his sentences were invalid. The prosecutor filed an answer confessing error in defendant's sentencing and agreeing that defendant was entitled to be resentenced. This Court vacated defendant's sentences and remanded to the trial court for resentencing. *People v Thomas Lee Breeding*, unpublished order of the Court of Appeals, issued March 7, 2012 (Docket No. 303862).

At resentencing, defendant argued that Prior Record Variable (PRV) 6 should be assessed at five points. He took the position that he was on probation for a misdemeanor, not a felony, at the time of the current offenses. The trial court scored PRV 6 at 10 points, finding that defendant was on probation for a felony at the time of the offenses. The trial court also stated that PRV 7 was scored at 20 points. Defendant contested the fourth habitual offender enhancement, and the trial court found that defendant was correct and that the correct enhancement should have been third habitual offender. After additional discussion, the trial court further reduced the enhancement to second habitual offender to facilitate the matter. Defendant was then resentenced to concurrent sentences of 240 months to 35 years for each count of first-degree

criminal sexual conduct and 30 months to six years for accosting a child. Defendant now appeals from his resentencing.

## II. STANDARD OF REVIEW

We review questions of law, such as the interpretation and application of the sentencing guidelines, de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). However, a trial 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). We will affirm a defendant's sentence absent an error in scoring which alters the recommended guidelines range. See *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

## III. DISCUSSION

Defendant challenges the trial court's scoring of PRV 6. We agree that the scoring of PRV 6, as reflected on the Sentencing Information Report (SIR), is inaccurate and does not reflect the score to which the trial court found defendant was entitled at sentencing. However, as this error does not affect defendant's recommended guidelines range, reversal is not required.

PRV 6 addresses an offender's "relationship to the criminal justice system." MCL 777.56(1). A court must assess 10 points if the offender is on probation for a felony. MCL 777.56(1)(c). During sentencing, defendant objected to the trial court scoring him 10 points for PRV 6, arguing that at the time of the instant offenses he was not on probation for a felony but for a misdemeanor and therefore should have been scored only 5 points. On appeal, defendant now argues that the trial court erroneously assessed him 20 points for PRV 6.

A review of the record shows that the trial court stated at the sentencing hearing that defendant was to be scored 10 points for PRV 6 and 20 points for PRV 7. However, as the prosecution points out, the SIR defendant submitted to this Court shows a scoring of 20 points for PRV 6 and a scoring of 10 points for PRV 7. This appears to be an administrative error, and may in fact even have been corrected by the court below; we note that the SIR submitted to this Court does not bear the trial judge's signature. In any event, the result of this administrative error is that defendant received the same total PRV score as the total score placed on the record by the sentencing court. Where a scoring error does not alter the appropriate guidelines range, resentencing is not required. *Davis*, 468 Mich at 83.

In defendant's Standard Four brief, he argues that the trial court erred in scoring PRV 6 and offense variable (OV) 13 by making reference to offenses committed by defendant after March 21, 2005. Defendant does not explain how such references could alter his score for PRV 6, which assesses an offender's relationship to the criminal justice system at the time of the offense. MCL 777.56(1). Assuming that defendant intended to make reference to PRV 5, which relates to prior misdemeanor convictions, MCL 777.55, we find that the record supports defendant's score of 20 points. The record indicates that even using a "cut off date" of

March 21, 2005,<sup>1</sup> defendant had at least seven prior scoreable misdemeanor adjudications, specifically assault, malicious destruction of property, two separate incidents of domestic violence, assaulting/resisting/obstructing a police officer, attempted possession of a controlled substance, and operating while impaired. The trial court thus did not err in scoring 20 points for PRV 5.

With regard to OV 13, defendant does not elaborate on how the trial court erred in scoring this variable. OV 13 relates to a continuing pattern of criminal behavior, and 25 points is to be scored if the offense is part of a “pattern of felonious activity involving 3 or more crimes against a person.” MCL 777.43(1)(c). All crimes within a 5-year period, including the sentencing offense, are to be scored for this variable. MCL 777.43(1)(a). Defendant was convicted in the instant case of three crimes against a person. However, defendant was scored 25 points for OV 11, criminal sexual penetration. MCL 777.41. Conduct scored in OV 11 cannot be used in OV 13. MCL 777.43(c). The trial court indicated it was not scoring OV 13 based on any of the conduct used to score OV 11. The record reflects that defendant was convicted of assault/resisting/obstructing a police officer, a felony against a person, on October 5, 2005, and again on May 4, 2007. These two offenses, along with the sentencing offense, support defendant’s score for OV 13. See *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006) (“[I]n order for the sentencing offense to constitute a part of the pattern, it must be encompassed by the same five-year period as the other crimes constituting the pattern.”).

Affirmed.

/s/ Mark T. Boonstra  
/s/ Patrick M. Meter  
/s/ Deborah A. Servitto

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<sup>1</sup> Defendant alleged at resentencing that this date was the date of the commission of the sentencing offense. The trial court apparently found it unnecessary to challenge this assertion at the time in light of the fact that defendant had committed at least seven scoreable misdemeanors by 2003. Later in the resentencing hearing, the trial court indicated that the court was “using the August date of 2006” as the date of the commission of the sentencing offense. The SIR lists the offense date as “9/27/06.”