

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 16, 2012

v

MARKUS DEMOND BAILEY,

Defendant-Appellant.

No. 305759
Washtenaw Circuit Court
LC No. 10-001719-FC

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

SHAPIRO, P.J. (*concurring*).

After a review of the record, it appears to me that defendant has several potentially meritorious sentencing guideline issues. Unfortunately, these issues were not raised by defendant's appellate counsel leaving this Court with neither argument nor response upon which to render a proper ruling.

First, defendant was scored at 25 points for OV 9 for "10 or more victims." However, there were eight, not ten, victims of the armed robbery. This would justify a score of 10 points, not 25. It appears that the trial court likely erred in counting two police officers as victims.

Second, defendant was scored 25 points for OV 13 based upon the same conduct for which he was scored under OV 12 despite the OV 13 instructions provision "[d]o not consider OV conduct scored in OV's 11 or 12 unless the offense was related to membership in an organized criminal group." As the offense was not related to gang membership, it appears that OV 13 was misscored.

Third, defendant was scored 15 points under OV 19 for resisting arrest. However, I can find no support in the record for this scoring. The officer who first entered the building testified that when he entered defendant was standing there with a handgun. He told defendant to drop the gun and to lay down and defendant immediately complied. Both officers testified that defendant never attempted to get up or reach for the gun or to struggle when they put handcuffs on him. A different robber did resist arrest, but I cannot find any basis in the record to conclude that defendant did so.

It may be, therefore, that defendant's proper OV score was 80 rather than 135. This change would place him in a more favorable sentencing grid.

These issues, however, were not raised or briefed to this Court. The only sentencing issue raised by defendant is a claim that the trial court should have departed downward from the guidelines as scored, a claim which I must, like my colleagues, reject.

/s/ Douglas B. Shapiro