

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN LEE PINKAVA,

Defendant-Appellant.

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UNPUBLISHED

October 27, 2005

No. 255818

Wayne Circuit Court

LC No. 03-013754-01

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant was convicted of first-degree home invasion, MCL 750.110a(2), and domestic violence, MCL 750.81(2). He was sentenced to fifty-five months to twenty years in prison for the first-degree home invasion conviction, and time served for the domestic violence conviction. He appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that the trial court erred when it sentenced defendant to a minimum of fifty-five months in prison. We disagree.

The sentencing court has discretion in determining the number of offense variable and prior record variable points to be scored, provided that there is evidence on the record which adequately supports a particular score, *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score, *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

The sentencing guidelines apply to any enumerated felony committed on or after January 1, 1999. *People v Hendrick*, 472 Mich 555, 557; 697 NW2d 511 (2005); MCL 769.34(2). Under the sentencing guidelines act, a court must impose a sentence in accordance with the appropriate sentence range. *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001); MCL 769.34(2). Under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, this Court must affirm the sentence and may not remand for re-sentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. *People v Kimble*, 470 Mich 305, 309; 684 BW2d 669 (2004); MCL 769.34(10). “Generally, to determine a minimum sentence range under the legislative sentencing guidelines, the sentencing court must first determine the offense category.” *People v*

*Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004); MCL 777.21(1)(a). “The sentencing court must then determine which offense variables (OV) are applicable, score those variables, and total the points to determine the offender's offense variable level.” *Id.* “The sentencing court also scores all prior record variables [(PRV)].” *Id.*; MCL 777.21(1)(b). “The offender's [OV] score and [PRV] score are then used with the sentencing grids to determine the recommended minimum sentence range under the guidelines.” *Id.*; MCL 777.21(1)(c).

On appeal, defendant specifically argues that the trial judge should not have scored fifteen points for OV1 and five points for OV2. In pertinent part, under OV1, fifteen points should be scored if “[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.” MCL 777.31(1)(c). In pertinent part, under OV2, five points should be scored if “[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon.” MCL 777.32(1)(d). Defendant specifically argues that the points should not have been scored because the jury found that defendant did not possess a gun, which is evidenced by the fact that the jury found defendant not guilty of felonious assault and felony-firearm. Defendant states that, per *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), facts not reflected in the jury verdict nor admitted by defendant cannot be used to enhance an individual’s sentence. We disagree.

In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), our Supreme Court stated that *Blakely*, *supra*, is inapplicable to Michigan’s indeterminate sentencing scheme. *Claypool*, *supra*, is binding precedent in this point. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd \_\_\_ Mich \_\_\_; (2005). We similarly conclude that the United States Supreme Court’s recent decision in *United States v Booker*, \_\_\_ US \_\_\_; 125 S Ct 738; 160 L Ed 2d 621 (2005), is inapplicable. Like the sentencing scheme in *Blakely*, *supra*, *Booker*, *supra* dealt with the application of the federal sentencing guidelines to a determinate sentencing scheme, and not to an indeterminate sentencing scheme such as that in effect in Michigan. Cf. *McMillan v Pennsylvania*, 477 US 79, 81; 91 L Ed 2d 67; 106 S Ct 2411 (1986) (finding no Sixth Amendment violation as applied to Pennsylvania’s indeterminate sentencing scheme).

Because *Blakely* does not apply, factual findings in support of a particular sentence may be made based upon a mere preponderance of the evidence. *People v Perez*, 255 Mich App 703, 712-713; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003). Information relied upon may come from several sources, “including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial.” *Id.*

Since, the victim testified that defendant pointed a gun at her during the incident and defendant admitted that he had a gun with him when he testified at a failed plea attempt, we conclude that the trial court did not abuse its discretion when it scored fifteen points on OV1 and five points on OV2. Therefore, the trial court properly scored defendant’s sentencing guidelines and properly imposed a minimum sentence that fell within the range of applicable minimum sentences, *Morson*, *supra*, p 255, and thus, we affirm defendant’s sentences. *Kimble*, *supra*, p 309; MCL 769.34(10).

Affirmed.

/s/ Michael J. Talbot

/s/ Helene N. White

/s/ Kurtis T. Wilder