

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC ANTHONY DAVIS,

Defendant-Appellant.

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UNPUBLISHED

August 8, 2006

No. 260597

Saginaw Circuit Court

LC No. 03-023907-FC

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529, armed robbery, MCL 750.529, assault with intent to do great bodily harm, MCL 750.84, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 21 to 50 years for conspiracy to commit armed robbery, 29 to 50 years for armed robbery, 78 months to 15 years for assault with intent to do great bodily harm, and 3 years to 90 months for felon in possession of a firearm. Defendant was also sentenced to a consecutive term of two years' imprisonment for felony-firearm. In addition, the court ordered that defendant's sentence for felon in possession of a firearm be served concurrently with his sentence for felony-firearm. We affirm.

At trial, there was evidence that defendant and another man entered a convenience store brandishing handguns. Defendant immediately shot the store clerk in the right leg, jumped over the counter, opened the cash register, and took money. The other man hit the clerk over the head and took cigarettes from behind the counter. A store video captured the incident.

Defendant first argues that his sentence violates *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because the scoring of offense variable (OV) 7 and OV 14 of the sentencing guidelines relied on facts not proven to a jury beyond a reasonable doubt. We disagree.

This Court reviews constitutional questions de novo. *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997). As related to the scoring of OV 7 and OV 14, this Court reviews a trial court's factual findings at sentencing for clear error. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), aff'd 473 Mich 399 (2005). Moreover, "[a] sentencing court has

discretion in determining the number of points to be scored, provided that evidence of record adequately 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.* Thus, this Court reviews a scoring issue to determine whether the sentencing court properly exercised its discretion and whether the evidence properly supported a particular score. *People v McLaughlin* 258 Mich App 635, 671; 672 NW2d 860 (2003).

The Michigan Supreme Court recently held that the imposition of a minimum sentence, which although based on judicially ascertained facts does not exceed the statutory maximum, does not violate a defendant’s Sixth Amendment right to trial by jury or the principles outlined in *Blakely*. *People v Drohan*, 475 Mich 140, 165; 715 NW2d 778 (2006). Here, the sentencing guidelines as applied to defendant resulted in recommended minimum sentence ranges of 14 to 36 months’ imprisonment for felon in possession of a firearm, 34 to 83 months’ imprisonment for assault with intent to do great bodily harm, 171 to 356 months’ imprisonment for armed robbery, and 126 to 262 months’ imprisonment for conspiracy to commit armed robbery. Defendant’s minimum sentences for these crimes fell within the proper ranges, i.e., 36 months, 78 months, 29 years (356 months), and 21 years (262 months), respectively. As was the case in *Drohan*, the minimum sentences set by the trial court did not exceed the statutory maximums authorized by the jury verdict. Accordingly, the trial court’s exercise of discretion in imposing a sentence within the range authorized by the verdict did not implicate *Blakely*.

We also conclude that the record contains adequate evidence to support defendant’s scores for OV 7 and OV 14. OV 7 requires a court to assess fifty points for OV 7 if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). Here, the evidence shows that defendant came into the store, waived a gun at the clerk, demanded money, and almost immediately shot the clerk in the leg. The trial court viewed the tape of the incident and concluded “my view of the tape was that this man walked in, fired and shot the clerk before the clerk has an opportunity to even do anything. . . . I don’t think that . . . you could do much more than what he did to justify the 50 points.” We conclude that the evidence offered at trial adequately supports a determination that defendant acted with excessive brutality, caused the victim extreme and prolonged pain, or acted in a way to substantially increase the victim’s fear and anxiety. See *Hornsby*, *supra* at 468-469 (concluding that holding a gun to a store clerk and threatening to kill her was conduct designed to substantially increase the fear and anxiety a victim suffered during the offense).

OV 14 requires the court to assess ten points if the offender “was a leader in a multiple offender situation.” MCL 777.44(1)(a). The entire criminal transaction should be considered when scoring OV 14. MCL 777.44(2)(a). Here, the evidence shows that defendant demanded money, shot the victim, took money from the register and drove the minivan when the two men attempted to flee. Evidence indicates that defendant’s co-conspirator hit the victim over the head and took cigarettes. A reasonable inference arising from this evidence is that defendant was the leader, and thus the evidence was adequate to support the trial court’s score.

Next, defendant argues that his sentence should be vacated because it was based on inaccurate information. However, defendant has waived this argument on appeal. At sentencing defendant’s counsel failed to object to the accuracy of the information in the report and specifically stated, “I believe that the [presentence investigation] report is accurate in the

information it contains.” MCL 769.34(10) provides that “[a] party shall not raise on appeal an issue . . . challenging the accuracy of information relied upon in determining a sentence . . . unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.” In addition, this Court has held that the plain language of MCL 771.14(6) and MCR 6.425(E)(2)(b) requires a defendant to challenge the accuracy of any information contained in the PSIR at the time of sentencing. *People v Sharp*, 192 Mich App 501, 504; 481 NW2d 773 (1992).<sup>1</sup> In *Sharp*, this Court specifically refused to allow postsentencing preservation of issues concerning the accuracy of presentencing information in light of the cited statute and court rule. *Id.* Accordingly, defendant’s failure to challenge the accuracy of the information contained in the presentence report and admission that the report was accurate preclude appellate review. *Id.*; *People v Gezelman*, 202 Mich App 172, 173-174; 507 NW2d 744 (1993).

Next, defendant argues that his sentence was disproportionate because the trial court failed to consider all relevant sentencing factors when imposing his sentence and because the court failed to make a downward departure from the sentencing guidelines. “Under MCL 769.34(10), this Court may not consider challenges to a sentence based exclusively on proportionality, if the sentence falls within the guidelines.” *People v Pratt*, 254 Mich App 425, 429-430, 656 NW2d 866 (2002). Here, as noted above, defendant’s sentence is within the applicable statutory sentencing guidelines range. On appeal, defendant has failed to demonstrate that the guidelines were erroneously scored or that the trial court relied on inaccurate information in determining his sentence. Accordingly, this Court must affirm defendant’s sentence. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Lastly, defendant argues that the sentencing court unconstitutionally punished him for exercising his right to a trial. When imposing a convicted defendant’s sentence, a sentencing court may not take into account “factors that violate a defendant’s constitutional rights,” *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998), including the defendant’s exercise of his right to have a trial by jury. *People v Snow*, 386 Mich 586, 592-594; 194 NW2d 314 (1972). Here, defendant originally pled guilty to the charges based on a calculated minimum guidelines range of 171 to 356 months’ imprisonment in addition to two years’ imprisonment for the felony-firearm conviction. The trial court indicated that it would “stay in the mid-range of the guidelines plus the two years.” Defendant withdrew his guilty plea, and the matter went to trial. After a jury trial, the sentencing court imposed the highest minimum sentence at the top of the guidelines range, 356 months’ imprisonment. After reviewing the record, we find no indication that the court punished defendant for exercising his right to a trial. The court had significant evidence available to it at sentencing that was not available during the plea, including the victim’s testimony, a tape of the armed robbery, and the officers’ testimony related to defendant’s attempt to flee. It is within the trial court’s discretion to give defendant a minimum sentence at the high end of the sentencing guidelines, and this Court must affirm a sentence within the applicable guidelines range absent an error in the scoring of the guidelines or reliance

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<sup>1</sup> The Court in *Sharp* referenced prior versions of the statute and court rule in which the numbering was different, MCL 771.14(5) and MCR 6.425(D)(2)(b), but the relevant language was identical to the current statute and court rule.

on inaccurate information in determining the sentence. MCL 769.34(10); *Kimble, supra* at 310-311.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Michael R. Smolenski  
/s/ Michael J. Talbot