

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES LEE,

Defendant-Appellant.

UNPUBLISHED

October 9, 2008

No. 274577

Monroe Circuit Court

LC No. 06-035298-FH

Before: White, P.J., and Hoekstra and Schuette, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of aggravated stalking, MCL 750.411i. He was sentenced, as a third habitual offender, MCL 769.11, to four to ten years' imprisonment. Defendant appeals as of right. We affirm defendant's conviction, vacate his sentence, and remand for further proceedings consistent with this opinion.

I. FACTS

As the 15-year-old victim walked home from school on March 21, 2006, defendant drove up next to her, made catcalls at her, and offered her a ride home. Defendant continued to drive alongside of her, circling around the block, until the victim ducked inside the library to call her mother. The next morning, on March 22, 2006, when the victim was walking to school, defendant came out of his house and said, "you look cold," and asked if she wanted a ride to school. Defendant kept talking to the victim until she crossed the street, at which point he stopped. The victim testified that she hurried to school because defendant scared her. The victim was able, however, to write down the license plate number of the car, which police later traced to defendant. The following day, March 23, 2006, defendant again followed the victim home from school, driving alongside of her and making catcalls. Defendant also stated that he would give the victim a ride home and that she needed to get in his car. The victim felt very threatened by the incidents.

Defendant is a convicted sex offender who was released from prison less than three months before he began stalking the victim. For his defense, defendant attempted to establish an alibi defense, through his and his wife's testimony. On March 21, 2006, at 2:30 p.m., defendant claimed that he was at his mother's house with his mother and brother-in-law until 3:30 or 4:00 p.m., when he returned to work. Defendant and his wife testified that defendant was at the parole office during the second stalking incident. During the third stalking incident, defendant

said that he was at work and offered his work sign-in sheet to corroborate his testimony. The sign-in sheet showed that defendant signed in at 3:00 p.m. The worksite is 40 to 50 miles away from defendant's house. The victim testified that defendant harassed her that day around 2:30 p.m.

The trial court decided that defendant would have had time to stalk the victim even if his alibis were true. The trial court, therefore, found defendant guilty of aggravated stalking.

At sentencing, defendant objected to the trial court scoring 50 points for prior record variable (PRV) 1, contending that his two prior convictions should be considered only one conviction because he served his sentences concurrently. The trial court disagreed, and the scoring stood. Defendant also objected to being scored 15 points for offense variable (OV) 10, predatory conduct, and argued that the evidence did not support a finding of predatory conduct. The trial court agreed with the probation agent that defendant specifically seeking out the victim and knowing her routes showed predatory conduct. The trial court ultimately decided to depart from the guidelines range, which recommended a sentence between 12 and 36 months, and sentenced defendant to four to ten years' imprisonment, to be served consecutively to any sentence imposed by the parole board. The trial court stated the following reasons for departing from the sentencing guidelines:

The guidelines are 12 to 36 months. I do intend to slightly deviate and the reason for this is Defendant's therapist feels that he is a high risk [sic] dangerous offender with personality traits consistent with psychopathy. Initially, and in subsequent reports they [his therapists] indicate this.

He was on parole for only two months for a criminal sexual conduct first degree [sic] offense and an armed robbery, after serving approximately 17 years in prison.

His stalking behavior which involved this 15-year old girl was indicative of his potential to commit a much more serious offense, such as another criminal sexual conduct offense.

The guidelines range is not sufficient to protect the community.

The Court has to consider punishment, as well as a deterrent effect in imposing sentence [sic], and I'm satisfied that Mr. Lee is a danger to the community.

Considering the seriousness of this offense and the Defendant's prior history, the Court finds the following to be a proportionate sentence:

You're sentenced to serve a minimum of 4 to a maximum of 10 years in prison, consecutive to parole.

On May 24, 2007, defendant moved this Court to remand his case to the trial court for resentencing. In his motion, defendant claimed that: (1) he was improperly sentenced as a third felony offender because his two prior convictions were for crimes committed during a single

criminal episode; (2) the trial court misscored OV 10; and (3) he was improperly denied credit for time served before sentencing on the erroneous conclusion that he was not entitled to credit because he was serving a prior sentence as a result of violating his parole. On July 17, 2007, this Court granted defendant's motion to remand, but limited the issues at resentencing to those regarding defendant's status as a habitual offender and the scoring of the sentencing guidelines. *People v Lee*, unpublished order of the Court of Appeals, entered July 17, 2007 (Docket No. 274577).

The trial court heard defendant's motion for resentencing on August 24, 2007. Defendant first argued that the trial court improperly sentenced him as a third habitual offender. Defendant's two prior convictions are for first-degree criminal sexual conduct and armed robbery. Defendant went into a gas station and robbed the clerk. He then took the clerk into a back room and sexually assaulted her. Defendant argued that, for the purposes of habitualization, his two prior convictions were part of the same transaction. As such, he should be sentenced as a second habitual offender. Defendant further argued that the trial court misscored OV 10, when it scored 15 points for pre-offense, predatory conduct. Defendant claimed that his score for OV 10 should be zero because aggravated stalking is a predatory crime by nature and the prosecutor did not present evidence of pre-offense conduct at trial or at sentencing.

The prosecutor argued that defendant's two prior convictions were two distinct crimes, and should be counted separately to calculate defendant's habitual offender status. The prosecutor noted that there was a break between the two crimes; first he robbed the clerk, then he ordered her into the back room and decided to sexually assault her. Regarding defendant's OV 10 challenge, the prosecutor argued that it was correctly scored because "the facts had indicated that there was contact between the defendant and the victim on numerous occasions."

The trial court held that defendant's two prior convictions were two separate criminal transactions and, therefore, defendant was properly sentenced as a third habitual offender. The trial court also held that it properly scored defendant for OV 10. The trial court opined:

The first contact the Defendant made with – with this victim was not aggravated stalking. It was not necessarily a crime. Had he done nothing else, it arguably was predatory conduct that did not rise to the level of stalking. It was the continued actions of the Defendant that resulted in the criminal offense after this predatory conduct, so therefore I deny the motion on the guidelines issue as well.

The trial court entered an order to deny defendant's motion for resentencing on August 24, 2007.

II. HABITUAL OFFENDER STATUS

Defendant first argues that he was improperly sentenced as a third habitual offender because his two prior convictions arose from a single transaction. We disagree.

A. Standard of Review

We review a trial court's interpretation and application of a criminal statute de novo. *People v Al-Saiegh*, 244 Mich App 391, 394; 625 NW2d 419 (2001).

B. Analysis

The trial court sentenced defendant as a third habitual offender under MCL 769.11. In doing so, the trial court counted defendant's two prior convictions as separate offenses for the purposes of the habitual offender statute, even though the convictions arose from a single transaction. In *People v Stoudemire*, 429 Mich 262, 278; 414 NW2d 693 (1987), modified by *People v Preuss*, 436 Mich 714, 739; 461 NW2d 703 (1990), the Michigan Supreme Court held that "multiple convictions arising out of a single incident may count as only a single prior conviction for purposes of the statute." In *Preuss*, the Michigan Supreme Court disavowed much of the reasoning in *Stoudemire*, but ultimately held:

The legislative history of the statute suggests that it was directed at the "persistent" or "repeat" offender. A common-sense interpretation of these phrases is that the Legislature did not have in mind the person who had only one criminal episode in which he managed to commit several different crimes. Instead, "repeat" suggests some time interval between crimes, and "persistent" suggests a criminal who continues in his criminal pursuits after these intervals. [*Preuss, supra* at 738.]

However, our Supreme Court recently overruled *Stoudemire* and *Preuss*, concluding that "[t]he unambiguous statutory language [of Michigan's habitual offender statutes, MCL 769.10, 769.11, 769.12, and 769.13] directs courts to count each separate felony conviction that preceded the sentencing offense, not the number of criminal incidents resulting in felony convictions." *People v Gardner*, ___ Mich ___ ; 753 NW2d 78, 81 (2008).

Here, the transcript of the preliminary examination for defendant's prior convictions for armed robbery and first-degree criminal sexual conduct show that defendant first robbed the victim and then immediately took her to the back room of the gas station where he raped her. Accordingly, under *Gardner*, because defendant committed two separate felonies, the trial court did not err when it sentenced him as a third habitual offender.

III. EFFECTIVE ASSISTANCE OF COUNSEL

As a corollary to his argument that he was improperly sentenced as a third habitual offender, defendant argues that his trial counsel was ineffective for failing to object to the error. Again, we disagree.

A. Standard of Review

In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther*¹ hearing before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). If the defendant fails to preserve the issue, appellate review is “limited to mistakes apparent on the record.” *Id.* “If the record does not contain sufficient detail to support defendant’s ineffective assistance claim, then he has effectively waived the issue.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant did not move for a new trial or a *Ginther* hearing before the trial court; therefore, our review of his ineffective assistance claim is limited to mistakes apparent on the record. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id.*

B. Analysis

In *Gardner, supra* at 95, our Supreme Court rejected this same argument, reasoning as follows:

Defendant was properly sentenced as a third offense habitual offender because “he ha[d] been convicted of . . . 2 or more felonies . . . and commit[ted] a subsequent felony within his state . . .” MCL 769.11(1). Because defendant was properly sentenced, resentencing is not required on the basis of his claim that he received ineffective assistance of counsel. When an attorney fails to raise “an objection that would have been supported by a decision which subsequently was overruled,” a defendant cannot show that he was prejudiced within the meaning of *Strickland*. *Lockhart v Fretwell*, 506 US 364, 366; 113 S Ct 838; 122 L Ed 2d 180 (1993). Under these circumstances, a focus on “mere outcome determination” is insufficient because the result of the proceeding is not fundamentally unfair or unreliable. *Id.* at 369. “To set aside a conviction or sentence solely because the outcome would have been different but for counsel’s error may grant the defendant a windfall to which the law does not entitle him.” *Id.* at 369-370, citing *United States v Cronin*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

Accordingly, defendant’s ineffective assistance of counsel argument fails.

IV. SENTENCING DEPARTURE

Defendant next argues that the trial court did not give substantial and compelling reasons for departing from the sentencing guidelines. We disagree.

A. Standard of Review

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

A trial court may depart from the minimum range established under the sentencing guidelines for substantial and compelling reasons. MCL 769.34(3). The existence or nonexistence of a particular factor supporting the departure is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Whether a particular factor is objective and verifiable is reviewed de novo as a matter of law. *Id.* The trial court's determination that objective and verifiable factors constituted substantial and compelling reasons for departure is reviewed for abuse of discretion. *Babcock, supra* at 265.

B. Analysis

“A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). A substantial and compelling reason must be objective and verifiable, must keenly or irresistibly grab the court's attention, be recognized as of considerable worth in deciding the length of a sentence, and exists in only exceptional cases. *Babcock, supra* at 258, citing *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). An “objective and verifiable” reason must be based on “actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Further, a departure may not be based on characteristics already taken into account in determining the appropriate sentencing guidelines range unless the court determines from facts in the record that the particular characteristic at issue has been given inadequate or disproportionate weight. *Id.*; see also MCL 769.34(3)(b).

The trial court departed from the guidelines range for four reasons: (1) defendant's therapists reported that defendant has psychopathic tendencies; (2) defendant committed this crime within two months of being paroled; (3) defendant's stalking indicated his potential to commit a much more serious offense; and (4) defendant's sentence under the guidelines did not adequately protect the community from him.

The trial court's first two reasons, defendant's psychopathic tendencies and the brevity of his parole, are objective and verifiable. Two different therapists defendant saw during his parole documented his psychopathic tendencies; the therapists noted his lack of remorse for the woman he raped and the fact that he does not think the rape was a violent act. Also, the brevity of defendant's parole is objective and verifiable. Defendant was paroled on January 10, 2006, and arrested for the instant offense on March 30, 2006, just over two months after he was released from prison. These facts undoubtedly grabbed the trial court's attention as they are quite compelling indictments of defendant's inability to conform his behavior to societal norms.

The trial court's next reason, that this crime evidences defendant's proclivity to commit a more serious crime, may lack the objectivity and verifiability required for a departure. It appears that there is no independent support for the trial court's finding in the record. Further, this reason is not based on an action or occurrence external to the minds of the judge, defendant, and others involved in making the decision. Therefore, the trial court's reliance on this factor for departure was erroneous. See *Abramski, supra* at 74.

The last reason the trial court gave for departing from the guidelines was that the guidelines did not adequately protect the community. Considering the objective and verifiable

facts that defendant spent 17 years in prison and committed the instant offense within three months of being paroled, we conclude that the trial court's concern for the community is a substantial and compelling reason to depart from the sentencing guidelines. The threat defendant poses to the community is also a reason that certainly "keenly" grabbed the trial court's attention. See *Babcock*, *supra* at 258.

If a trial court articulates multiple reasons supporting a departure, and this Court determines that some of the reasons are substantial and compelling and some are not, this Court must determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons alone. *Babcock*, *supra* at 260. The trial court's statements clearly show that the court would have imposed the same sentence in reliance on the validly stated substantial and compelling reasons. Thus, resentencing based on defendant's argument on this issue is not required.²

V. *BLAKELY*

Defendant's next argument on appeal is that the trial court erred by increasing his sentencing in reliance on facts that were not submitted to the jury and proved beyond a reasonable doubt. Defendant relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), for the argument that *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), requires a jury to find all facts underlying sentencing beyond a reasonable doubt. Defendant acknowledges that the Michigan Supreme Court has held that *Blakely* does not apply to Michigan's sentencing guidelines. However, defendant asks this Court to consider his *Blakely* argument in light of the United States Supreme Court's recent decision to remand *McCuller v Michigan*, ___ US ___; 127 S Ct 1247; 167 L Ed 2d 62 (2007), to the Michigan Supreme Court for reconsideration in light of *Cunningham v California*, 549 US 270; 127 S Ct 856; 166 L Ed 2d 856 (2007). In *Cunningham*, the United States Supreme Court held that the defendant's sentence resulted in a *Blakely* violation because the trial court engaged in fact-finding, found that aggravating circumstance existed, and then sentenced the defendant to a 16-year prison term instead of the 12-year prison term the defendant would have been entitled to if the aggravating circumstances were not present.

The Michigan Supreme Court has issued its opinion in *People v McCuller (On Remand)*, 479 Mich 672, 676; 739 NW2d 563 (2007). After considering the United States Supreme Court's opinion in *Cunningham*, the Michigan Supreme Court held that no *Blakely* violation occurs when the sentencing court makes factual findings in scoring the OVs, even if the defendant's PRV score would normally qualify him or her for an intermediate sanction cell. *McCuller*, *supra* at 686-690. The Michigan Supreme Court distinguished California's sentencing scheme at issue in *Cunningham*, from Michigan's indeterminate sentencing scheme, stating, "Michigan's sentencing scheme does not entitle defendant to a maximum sentence of an intermediate sanction in the same way that the defendant in *Cunningham* was entitled to a 12-year maximum sentence." *McCuller*, *supra* at 688. Our Supreme Court further opined:

² Defendant does not raise a proportionality argument on appeal. Therefore, we need not address whether the trial court's departure from the guidelines was proportionate.

Upon conviction, a defendant is legally entitled only to the statutory maximum sentence for the crime involved. A defendant has no legal right to expect any lesser maximum sentence. As the *Blakely* Court stated, whether a defendant has a legal right to a lesser sentence “makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.” *Blakely, supra* at 309, 124 S Ct 2531. Thus, a sentencing court does not violate *Blakely* principles by engaging in judicial fact-finding to score the OVs to calculate the recommended minimum sentence range, even when the scoring of the OVs places the defendant in a straddle cell or a cell requiring a prison term instead of an intermediate sanction cell. The sentencing court’s factual findings do not elevate the defendant’s maximum sentence, but merely determine the defendant’s recommended minimum sentence range, which may consequently qualify the defendant for an intermediate sanction. [*McCuller, supra* at 689-690.]

The case presented on appeal does not involve an intermediate sanction cell and, in *McCuller*, the Michigan Supreme Court again reaffirmed that *Blakely* does not apply to Michigan’s indeterminate sentencing scheme; therefore, we conclude that defendant’s sentence does not violate *Blakely*.

VI. SCORING OF OFFENSE VARIABLE (OV) 10

Defendant next argues that the trial court erred by scoring him 15 points for OV 10, MCL 777.40. We agree.

A. Standard of Review

We review a trial court’s scoring decision for an abuse of discretion, and we will uphold a scoring decision with any evidence to support it. *Cox, supra* at 453-454.

B. Analysis

MCL 777.40(1)(a) instructs sentencing courts to add 15 points to the defendant’s OV score if predatory conduct was involved. MCL 777.40(3)(a) defines “predatory conduct” as “pre-offense conduct directed at a victim for the primary purpose of victimization.”

In this case, there is no evidence that defendant directed any pre-offense conduct at the victim “for the primary purpose of victimization.” See MCL 777.40(3). It is not apparent from the record that defendant had any contact with the victim before he began stalking her. See, e.g., *Cox, supra* at 455 (upholding the trial court’s scoring 15 points for OV 10 when the victim had been to the defendant’s house numerous times and the defendant visited the victim at his foster home before the offense occurred). Nor did the prosecution present any evidence to support the trial court’s conclusion that defendant formulated a plan to stalk the victim before the stalking began. There is no evidence in the record to support a score of 15 points for OV 10; therefore, the trial court’s scoring decision was an abuse of discretion.

In general, “[a] defendant is entitled to be sentenced by a trial court on the basis of accurate information.” *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). Therefore, if a guidelines scoring error alters the recommended guidelines sentence range, and the defendant

preserved the scoring error, the defendant is entitled to resentencing. *Id.* at 89-92. Moreover, if there is no “indication in the record that the trial judge would have departed upward to the same extent if the guidelines had been properly scored,” then the matter must be remanded for resentencing. *People v Lathrop*, 480 Mich 1036; 743 NW2d 565 (2008).

The trial court’s OV 10 scoring error affects defendant’s sentencing range. With his original OV total score, defendant fell within the E-III sentencing grid, and the recommended minimum sentence range for a third habitual offender was 12 to 36 months. MCL 777.66. With the corrected total OV score of 10 points, and considering defendant’s status a second habitual offender, see discussion *supra*, defendant falls into the E-II grid, with a corresponding minimum sentence range of 10 to 28 months. *Id.* Also, defendant preserved this sentencing scoring error by raising it in his motion for remand. See *Francisco*, *supra* at 88-89. Further, there is nothing in the record to indicate that the trial court would have imposed the same sentence regardless of the error. *Lathrop*, *supra*. Therefore, defendant is entitled to resentencing.

VII. SENTENCING CREDIT

Defendant’s final argument on appeal is that the trial court erred by failing to award him sentence credit under MCL 769.11b. Again, we disagree.

A. Standard of Review

A trial court must grant a defendant credit against that defendant’s sentence for any time served in jail before sentencing as a result of their having been denied, or unable to furnish, bond. MCL 769.11b.

B. Analysis

Here, defendant committed the instant offense while he was on parole. Upon violating his parole, by committing the instant offense, defendant became “liable, when arrested, to serve out the unexpired portion of his . . . maximum imprisonment” for his previous offenses. MCL 791.238(2). Further, because defendant violated parole, credit for time spent in custody while awaiting trial and sentencing is applied to the unexpired portion of the sentence for which defendant was on parole. *People v Watts*, 186 Mich App 686, 687-689; 464 NW2d 715 (1991).

However, the record does not indicate whether the Parole Board did, in fact, require defendant to serve an additional portion of his previous sentence because of his parole violation and, if so, how much. Therefore, on remand, we instruct the trial court to determine whether defendant was required to serve an additional portion of his previous sentence and credit his previous sentences accordingly.

We affirm defendant’s conviction, vacate defendant’s sentence, and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Bill Schuette

White, P.J. did not participate.