

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRUMON DONTAE CANNON,

Defendant-Appellant.

UNPUBLISHED

March 23, 2010

No. 289633

Saginaw Circuit Court

LC No. 04-024226-FC

Before: SERVITTO, P.J., and BANDSTRA and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted of conspiracy to commit armed robbery, MCL 750.529; MCL 750.157a, and was sentenced to 210 to 500 months in prison. This Court affirmed defendant's conviction and sentence. *People v Cannon*, unpublished per curiam opinion of the Court of Appeals, issued July 25, 2006 (Docket No 259532). In *People v Cannon*, 481 Mich 152; 749 NW2d 257 (2008), our Supreme Court held that the trial court applied an incorrect test when scoring Offense Variable (OV) 10, MCL 777.40, and remanded to the trial court for rescore and, if no points were assessed, resentencing. On remand, the trial court determined that the original scoring of OV 10 was correct. Defendant appeals as of right. We vacate defendant's sentence and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The following facts are taken from our Supreme Court's opinion:

Defendant entered a Burger King restaurant in the city of Saginaw. His codefendants, Maurice Mayes and Larry Hibler, immediately followed him inside. At the time, there were four employees on duty and no customers in the restaurant. Mayes and Hibler went into the bathroom while defendant approached the counter. Defendant, appearing nervous, stood near the counter, but did not place an order. Mayes and Hibler then emerged from the bathroom with bandannas covering their faces. They jumped over the counter and attempted to gather the restaurant employees into one place. Hibler displayed a gun.

Defendant did not appear surprised by their actions. He moved closer to the front of the restaurant, pulled a hood over his head, and began pacing back and forth, looking out the windows. While Mayes and Hibler ordered the restaurant manager to open the safe and the cash registers and removed the cash, one employee escaped into the freezer and called the police. Defendant, Mayes,

and Hibler fled as the police approached. All three were apprehended shortly afterwards. In the parking lot of a nearby business, the police found a stolen pickup truck with an open door and three coats in the back. [*Cannon*, 481 Mich at 154-155.]

The *Cannon* Court held that to score OV 10 at 15 points there had to be exploitive conduct directed at a vulnerable victim. *Id.* at 157-158. Regarding vulnerability, the *Cannon* Court stated:

Thus, we conclude that points should be assessed under OV 10 only when it is readily apparent that a victim was “vulnerable,” i.e., was susceptible to injury, physical restraint, persuasion, or temptation. Factors to be considered¹¹ in deciding whether a victim was vulnerable include (1) the victim’s physical disability, (2) the victim’s mental disability, (3) the victim’s youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious. The mere existence of one of these factors does not automatically render the victim vulnerable.

¹¹ The absence of one of these factors does not preclude a finding of victim vulnerability when determining whether it is appropriate to assess 15 points for predatory conduct. Rather, the evidence must show merely that it was readily apparent that the victim was susceptible to injury, physical restraint, persuasion, or temptation. MCL 777.40(3)(c). [*Id.* at 158-159 (other footnotes omitted)].

Further, the *Cannon* Court held:

To aid lower courts in determining whether 15 points are properly assessed under OV 10 [for predatory conduct], we set forth the following analytical questions:

(1) Did the offender engage in conduct before the commission of the offense?

(2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?

(3) Was victimization the offender’s primary purpose for engaging in the preoffense conduct? If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40. [*Id.* at 161-162.]

We review the interpretation of the statutory sentencing guidelines de novo as a question of law. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

We hold that the trial court erred in finding that the victims were vulnerable. The eight factors for determining vulnerability focus on the victim's *susceptibility* to e.g., physical restraint, not on whether a victim was subject to physical restraint in a given case. Arguably, anyone who is restrained is *susceptible* to being restrained. Anyone can be targeted and physically overcome. But the statute suggests that susceptibility has to be that of the *victim*, not of the victim's particular circumstance in a given case. The configuration of the Burger King counter did not render the victims vulnerable.

The prosecutor argued that the victims were susceptible to physical restraint since three of the victims were females who were smaller than defendant. However, the statute requires that zero points be assessed for OV 10 when "[t]he offender did not exploit a victim's *vulnerability*." MCL 777.40(1)(d) (emphasis added). Here, the perpetrators did not exploit the victims' sizes, but rather used a gun. Accordingly, OV 10 should have been scored at zero points.

Absent the score of 15 points for OV 10, the defendant's overall OV score would have been 55 points. Armed robbery is a class A offense. MCL 777.16y. With the revised score, defendant's OV level would have been III instead of IV. See MCL 777.62. With defendant's PRV level of D, the recommended sentencing range would have been 108 to 180 months. Defendant's minimum sentence of 210 months was outside that range. Accordingly, defendant is entitled to resentencing.

Sentence vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood