

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiffs-Appellee,

v

CEDRIC MARLON ROGERS,

Defendants-Appellant.

---

UNPUBLISHED  
November 13, 2003

No. 239365  
St. Clair Circuit Court  
LC No. 01-1790-FC

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

PER CURIAM.

Defendant appeals by right his conviction after a jury trial of assault with intent to do great bodily harm, MCL 750.84; two counts of felonious assault, MCL 750.82; two counts of felony-firearm, MCL 750.227b; felon in possession of a firearm, MCL 750.224f; and fleeing and eluding, MCL 750.479a(2). The trial court sentenced defendant as a third habitual offender MCL 769.13 to prison for concurrent terms of 114 to 240 months, 80 to 120 months, 15 to 48 months, and 32 to 96 months consecutive to two concurrent two year terms for the felony-firearm convictions. We affirm defendant's convictions, but vacate his sentence and remand for resentencing.

**I. FACTS**

This case arises from defendant's efforts to avoid being arrested after he was stopped by a police officer for a traffic violation. Sergeant William Trout testified that on April 11, 2001, he was monitoring traffic when he observed defendant's vehicle speeding in a 35-mile per hour construction zone. Trout immediately pulled into the lane of traffic and turned on his lights to stop the vehicle for a speeding violation. As he approached from the driver's side he observed that defendant was holding a rifle in his hands that was pointed towards Trout. Trout testified that he backed away from defendant towards his patrol car to attempt to get cover. Trout yelled for defendant to stay in the car. But defendant drove off. Trout pursued defendant and radioed to dispatch that a man with a gun was fleeing the scene.

Detective David Patterson testified that he was driving along the route that Trout and defendant had followed. Patterson observed Trout's car pull out after defendant's car. Patterson testified that he heard the radio dispatch by Trout stating that he was in pursuit of a vehicle and that a man had a gun in his possession. In an effort to assist, Patterson

followed Trout with his oscillating<sup>1</sup> lights turned on. Patterson testified that they pursued defendant for approximately 4 miles before defendant's vehicle made a hard turn and stopped in a ditch. Defendant got out of his vehicle while continuing to hold the rifle. Patterson testified that defendant ran in the direction of a nearby building. Trout and Patterson temporarily ceased pursuit.

Deputy Richard Mouilleseaux testified that approximately twenty-five minutes after defendant left his vehicle, he arrived with a tracking dog. Mouilleseaux and Patterson eventually tracked defendant to a location by a fence. Mouilleseaux saw defendant and yelled, "Police, don't move." Defendant crouched down, turned, and then Mouilleseaux saw a muzzle<sup>2</sup> flash. Mouilleseaux let go of the dog leash attached to the tracking dog and fired thirteen rounds in the direction of the muzzle flash. Patterson fired twice, hitting defendant and severely wounding him.

Defendant's testimony revealed that on the date of the incident, defendant was on probation, he was prohibited from using alcohol, and his driving privileges had been suspended. Further testimony revealed that authorities found a spent .22 caliber shell casing where defendant had been lying and in the vehicle defendant was driving. Defendant testified that he fired a single shot over the officers' heads to scare them. He contended that he was not trying to hurt anyone by shooting, but rather was attempting to scare the officers away in order to "buy himself more time."

Defendant also asserted that he attempted to shoot himself immediately before being shot but his rifle malfunctioned. Defendant asserted that he had been debating for some time whether he was going to commit suicide and that explained why he had the rifle with him. The jury found defendant guilty of assault with intent to do great bodily harm, two counts of felonious assault, two counts of felony-firearm, felon in possession of a firearm, and fleeing and eluding. Defendant now appeals as of right.

## II. SUFFICIENCY OF EVIDENCE

### A. Standard of Review

This Court reviews de novo challenges to the sufficiency of evidence in criminal trials to determine whether, when the evidence is viewed in the light most favorable to the prosecutor, a rational trier of fact could have found all the elements of the charged crime to have been proven beyond a reasonable doubt. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002).

### B. Analysis

Defendant argues that there was insufficient evidence to sustain the conviction for assault with intent to do great bodily harm. We disagree. The crime of assault with

---

<sup>1</sup> Detective Patterson was driving an unmarked police vehicle. He also turned on a blue light that rotates 360 degrees on the roof of his car.

<sup>2</sup> An indication that a round was fired in his direction.

intent to do great bodily harm less than murder, MCL 750.84, requires proof of specific intent. *People v Joeseype Johnson*, 407 Mich 196, 220; 284 NW2d 718 (1979). In *People v Counts*, 318 Mich 45, 54; 27 NW2d 338 (1947), our Supreme Court held that the specific intent necessary to constitute the offense of assault with intent to do great bodily harm less than murder could be found in conduct as well as words. The Court specifically held that pointing a loaded gun at a person could, under certain circumstances, be regarded as a threat indicating an intent to injure. *Id.*

In *Counts*, the defendant asserted that the specific intent necessary to constitute the offense of which he was convicted could not have been found by the jury because no threats were shown to have been made by him to the officer involved. The *Counts* court found this argument to be without merit. *Id.* The Court reasoned that a threat may be made by conduct as well as by words. Certainly pointing a loaded gun at one may be well regarded as a threat and as indicating an intent to injure. *Id.*

The contention of defendant under the facts of this case are similar, yet defendant's conduct here is far more severe. Defendant suggests that there was insufficient evidence to sustain his conviction for assault with intent to do great bodily harm. This argument cannot be accepted in light of the evidence presented at trial. Evidence was presented, including defendant's own testimony that he did, in fact, fire a .22 rifle in the direction of the officers involved; testimony established that defendant was observed taking aim in the direction of the pursuing officers with his .22 rifle; defendant himself testified that he was attempting to unlawfully elude the officers; evidence was presented regarding defendant's fervent desire not to return to prison which is strongly supported by the lengths defendant went to avoid capture.

Further, in applying the rationale of our Supreme Court in *Counts*, the pointing of a loaded gun at a person could be regarded as a threat indicating an intent to injure. Here, not only was a loaded gun pointed at the officers but it was also fired at them.

Based on the foregoing evidence, defendant's argument is unpersuasive and sufficient evidence was presented from which the jury could determine that the defendant had the requisite intent to sustain a conviction for the offense.

### III. CONSECUTIVE SENTENCING

#### A. Standard of Review

Whether the trial court properly sentenced a defendant to consecutive sentences is a question of statutory interpretation that is reviewed de novo. *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003).

#### B. Analysis

A consecutive sentence may be imposed only if it is specifically authorized by statute. *People v Lee*, 233 Mich App 403, 405; 592 NW2d 779 (1999). In certain circumstances involving controlled substances, MCL 333.7401(3), authorizes and

mandates consecutive sentences. *People v Spann*, 250 Mich App 527, 529; 655 NW2d 251 (2002).

In 2000, defendant was convicted of delivery of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), a felony offense, and sentenced to lifetime probation for that offense. On January 7, 2002, defendant pled guilty to violating his probation in the 2000 controlled substance case. The trial court scheduled the sentencing for the probation violation to be held at the same proceeding as the sentencing in the instant case.

In *People v Morris*, 450 Mich 316; 537 NW2d 842 (1995), the Supreme Court held that the term “another felony” as used in MCL 333.7401(3) includes any felony for which the defendant has been sentenced either before or simultaneously with the controlled substance felony enumerated in MCL 333.7401(3) for which a defendant is currently being sentenced. *Id.* at 320.

The Court further summarized, that where any of the felonies for which a defendant is being sentenced in the same proceeding are covered by the mandatory consecutive sentencing provision of MCL 333.7401(3), the sentence for that felony must be imposed to run consecutively with the term of imprisonment imposed for other felonies. *Id.* Here, the trial court did not err in sentencing defendant consecutively under MCL 333.7401(3).

#### IV. OFFENSE VARIABLE SCORING

##### A. Standard of Review

This Court shall affirm sentences within the guidelines range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant’s sentence. *People v Leversee*, 243 Mich App 337; 622 NW2d 337 (2000); MCL 769.34(10). This court reviews de novo the application of the sentencing guidelines. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

##### B. Analysis

The statutory sentencing guidelines apply to this case because the crimes were committed after January 1, 1999. MCL 769.34(1). Defendant challenges the trial court’s scoring of offense variable seven (OV 7), involving terrorism, and offense variable nineteen (OV 19), involving interference with justice.

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 Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000). Scoring decisions for which there is any evidence in support will be upheld. *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996). The trial court must score OV 7 as fifty points if the court finds evidence of “terrorism,” which MCL 777.37(1)(a) defines as “conduct designed to substantially increase the fear and anxiety a victim suffers during the offense. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

In overruling defendant's objection to the scoring of OV 7 at sentencing, the court correctly noted that there were ample factors in the record that the officers experienced terror within the contemplation of OV 7. Most evident is the shot fired by defendant and by his own admission, which if defendant's reasoning is to be taken at face value, was to scare them so he "could buy more time." In addition, the trial court suggested that the tape showing the officer breathing heavily after seeing the gun further illustrated that the officer experienced a substantial increase in his anxiety during the course of the offense.

Defendant also challenges the trial court's scoring of OV 19, which involves interference with the administration of justice. Specifically, defendant argues that because his conduct of fleeing from the traffic stop, using a gun at the initial stop, and leading the police on a chase while carrying the gun with him, occurred prior to the commission of the conviction offense, there was no proper basis for scoring that variable.

In summarizing the relevant portion of the statute governing OV 19, where an offender used force against another person to interfere with, or attempts to interfere with, the administration of justice, the offender shall have 15 points assessed. MCL § 777.49. This Court addressed defendant's argument in *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003). In *Cook*, the defendant appealed sentences imposed for convictions of assault with intent to commit great bodily harm less than murder, fleeing and eluding, and two counts of possession of a firearm during the commission of a felony.

The circumstances of *Cook* closely parallel the circumstances of the case before this Court. In *Cook*, the defendant fired shots into a car where his ex-girlfriend was sitting with her new boyfriend. *Id.* at 636. Defendant wounded his ex-girlfriend. *Id.* After learning that his ex-girlfriend was wounded, he offered to lead the victims to a hospital. *Id.* at 637. When the defendant noticed that the police were approaching he sped away. *Id.* Defendant led police on a brief chase before crashing into a porch of a residence. *Id.* Defendant exited his vehicle but was shortly thereafter apprehended. *Id.*

The defendant in *Cook*, argued that MCL 777.21(2) required a separate sentence calculation for each offense and that the statute restricted the trial court's ability to consider his flight from the police in calculating his sentencing guidelines range for assault conviction because his flight from the police occurred separate from the assault. In responding to defendant's argument, the court held that where the crimes involved constitute one continuum of conduct, as is present in this case, it is logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing guideline range with respect to each offense. *Cook, supra*, at 641.

The Court reasoned that in drafting the sentencing guidelines scoring instructions, the Legislature could have expressly prohibited sentencing courts from considering facts pertinent to the calculation of the sentencing guidelines range for one offense from being also used to calculate the sentencing guidelines range for another offense, but it did not do so. *Cook, supra*, at 641.

In applying the rationale of this Court in *Cook*, the defendant's conduct and offenses constituted one continuum of conduct. Thus, the trial court did not err in scoring the offense variables for defendant's convictions.

## V. LEGALITY OF SENTENCE

### A. Standard of Review

This issue presents a mixed question of fact and law. Findings of fact by the trial court may not be set aside unless clearly erroneous. MCR 2.613. This Court reviews questions of law de novo. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

### B. Analysis

If an individual convicted of a crime has previously been convicted of two felonies, the presiding judge may impose a maximum sentence of up to twice the statutory sentence for that offense. MCL 769.11.

Plaintiff concedes that, due to a clerical error on the part of the defendant's probation officer and an oversight by the trial court, defendant may have been wrongfully sentenced as a third habitual offender. After defendant was convicted of assault with intent to do great bodily harm and being a felon in possession, he was sentenced as a third felony offender to prison terms of 114 to 240 months and 80 to 120 months.

Plaintiff asserts that an oversight by the court may have occurred as a result of defendant's discharge from probation under MCL 333.7411 not having been entered into the Law Enforcement Information Network (LEIN) in 1993. Plaintiff acknowledges that it does indeed appear that defendant's computerized criminal history (CCH) obtained through LEIN still reflects the 1991 conviction for possession of less than 25 grams of cocaine.

A sentence as a third offender was a nullity where supplemental information on which defendant was charged with being a third offender was fatally defective. *People v Gunsell*, 331 Mich 105, 112; 49 NW2d 83 (1951). In light of the foregoing, the conviction and sentence, on this issue alone, as a third habitual offender should be vacated. We remand this case for the preparation of a correct and current pre-sentence investigation report, reflecting defendant's actual status as a second habitual offender, and for resentencing with the correct maximum sentence and guidelines minimum ranges.

Defendant is not entitled to be discharged from custody.

## VI. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. Standard of Review

Defendant failed to raise this issue as evidence of his counsel's ineffective assistance at any time before the instant appeal, this claim of error is not preserved. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). An unpreserved, nonconstitutional error is reviewed for plain error affecting defendant's substantial rights.

*People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). This Court's review of defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record because defendant did not move for a new trial or a *Ginther* hearing. *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002).

#### B. Analysis

Defendant asserts that trial counsel was ineffective for failing to realize that one of his prior convictions had been discharged under MCL 333.7411, and for failing to object to defendant's sentence as a third habitual offender. Our determination that an error did occur and our remand for resentencing resolve this matter. As a result, we decline to address this issue.

We affirm defendant's convictions, but vacate his sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Bill Schuette  
/s/ Mark J. Cavanagh  
/s/ Helene N. White