STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 2013
v	No. 312849 Roscommon Circuit Court
JOHN JOSEPH BOUGHNER, Defendant-Appellant.	LC No. 11-006413-FH

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by leave granted his guilty plea of manufacturing less than five kilograms or fewer than 20 plants of marijuana, MCL 333.7401(2)(d)(*iii*). Defendant was sentenced to 23 to 48 months. While we affirm defendant's conviction, we remand for resentencing.

I. FACTUAL BACKGROUND

Two individuals drove to defendant's uncle's house at 1054 West Robinson Lake Road with the intent of purchasing an eighth of an ounce of marijuana from defendant.[1] After they arrived, an argument unfolded, and defendant eventually grabbed what appeared to be a gun. The two individuals ran from the house, but subsequently discovered that $360 was missing from their possession. One of the individuals called defendant and demanded that he return the money, but defendant denied taking the money and threatened to shoot the windows out of their car. The two individuals reported the incident to the police.

The police obtained a search warrant for defendant's uncle's house where the attempted drug purchase occurred. The police only found a sawed-off shotgun. The police also obtained a search warrant for defendant's house, located at 1010 West Robinson Lake Road, and found $360 in cash, some marijuana, and 15 marijuana plants. While defendant pleaded guilty to manufacturing marijuana for the marijuana found at 1010 West Robinson Lake Road, he claimed

[1] Because there was no trial in this case, the facts are derived from the presentence investigation report and the plea colloquy.

that he had a medical marijuana card, but simply had too many marijuana plants. At sentencing, defendant objected to the scoring of Offense Variables (OVs) 1 and 15, both of which the trial court scored at five points. The trial court agreed with the prosecution that these OVs were properly scored. Defendant now appeals.

II. SENTENCING

A. Standard of Review

As the Michigan Supreme Court recently clarified in *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013):

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [Footnotes omitted.]

B. OV 15

Defendant first argues that the trial court erred in scoring OV 15 at five points because the trial court impermissibly considered evidence outside of the sentencing offense and because there was no trafficking involved. Pursuant to MCL 777.45, a score of five points under OV 15 is justified when "[t]he offense involved the delivery or possession with intent to deliver marihuana or any other controlled substance or a counterfeit controlled substance or possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking."

The sentencing offense in this case was defendant's guilty plea to manufacturing marijuana, based on the 15 marijuana plants found at defendant's house at 1010 West Robinson Lake Road. Defendant claimed that he had a medical marijuana card but had exceeded the amount of plants allowable. On appeal, defendant claims that the trial court erred in scoring OV 15 because it considered the incident at his uncle's house involving allegations that defendant attempted to sell marijuana.

Even if the trial court was permitted to consider the events at defendant's uncle's house, a score of five points under OV 15 was not justified. As noted above, five points for OV 15 is warranted when defendant possessed a controlled substance under circumstances that indicate trafficking. The statute defines "trafficking" as "the sale or delivery of controlled substances . . . on a continuing basis to 1 or more other individuals for further distribution." MCL 777.45(2)(c). Here, at most, there was evidence that defendant attempted to sell marijuana one time. Defendant was not in possession of a large amount of marijuana, and the prosecution did not dispute that he had a medical marijuana card that would explain his possession of some

marijuana.[2] No evidence was presented of packaging materials or measuring equipment indicative of repeated or large-scale distributions of marijuana. *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992). There also was no evidence that defendant was distributing marijuana for further distribution, as the two individuals never indicated such and only attempted to buy an eighth of an ounce of marijuana. Further, there was no large amount of cash usually associated with drug trafficking.

Thus, there was no evidence that defendant was involved in drug trafficking, as that requires a showing that defendant was selling or delivering marijuana "on a continuing basis . . . for further distribution." MCL 777.45(2)(c) (emphasis added). Therefore, the trial court erred in scoring OV 15 at five points.

C. OV 1

Defendant also contests the trial court's scoring of OV 1 at five points. MCL 777.31(1)(e) permits a trial court to assess five points for OV 1 when "[a] weapon was displayed or implied."

The Michigan Supreme Court and this Court have recognized that the default rule when scoring offense variables is that the trial court should consider the sentencing offense alone, not the entire criminal transaction. *People v McGraw*, 484 Mich 120, 127; 771 NW2d 655 (2009); *People v Gray*, 297 Mich App 22, 31-34; 824 NW2d 213 (2012). Unless otherwise indicated in the statutory language, a sentencing court should not consider "the entire criminal transaction" or a "defendant's conduct after the crime was completed" when scoring an OV. *McGraw*, 484 Mich at 133. In regard to OV 1, there is no indication in MCL 777.31(e) that the Legislature intended it to be scored based on conduct outside of the sentencing offense. There is no reference to other crimes, uncharged offenses, or conduct beyond the sentencing offense. Thus, we agree with defendant that OV 1 should be scored only in consideration of the sentencing offense, not the entire criminal transaction.

Here, the sentencing offense was manufacturing marijuana less than 20 plants, based on defendant's possession of 15 plants at his house. The trial court, however, scored OV 1 at five points because it considered the sawed-off shotgun found at defendant's uncle's house at 1054 West Robinson Lake Road. In explaining its ruling, the trial court stated: "I think when you look at the totality of circumstances and the entire transaction, that . . . offense variable one is scored correctly, looking at the entire factual basis for the entire transaction." This ruling was in error, as the trial court considered the entire criminal transaction rather than limiting itself to the sentencing offense. Moreover, there is no evidence that a gun was found or used at defendant's house at 1010 West Robinson Lake Road, which is the basis for the sentencing offense. Therefore, OV 1 should have been scored at zero points.

[2] Pursuant to the Michigan Medical Marihuana Act, a qualifying patient is permitted to possess 12 plants. MCL 333.26424(a). Here, defendant was found with 15 marijuana plants in his possession.

Because these two sentencing errors affect defendant's minimum guidelines range, remanding for resentencing is required. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

III. CONCLUSION

We agree that the trial court erred in scoring OV 15 and OV 1. We affirm defendant's conviction, but we remand for resentencing. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly