

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL ROBERT BALLARD,

Defendant-Appellant.

UNPUBLISHED

September 13, 2007

No. 268151

Saginaw Circuit Court

LC No. 04-025143-FC

Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

After a jury trial, defendant Darryl Robert Ballard was convicted of first-degree home invasion, MCL 750.110a(2), and of assaulting, resisting, or obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 20 to 30 years' imprisonment for the first-degree home invasion conviction and 2 to 15 years' imprisonment for the assaulting, resisting, or obstructing a police officer conviction, to be served concurrently. Defendant does not challenge his conviction, but he appeals his sentence as of right. We remand to the sentencing court for clarification concerning defendant's challenge to the accuracy of the presentence investigation report ("PSIR").

I. Facts

On the morning of the incident underlying this prosecution, Yvette Doran was running late for work, which began at 7:00 a.m. She left her home in a hurry and failed to lock a door to the house and to close the garage door. Her husband, Carlton Township Police Officer William Doran, was sleeping in the couple's bedroom when she left. Officer Doran testified that about 8:00 a.m. that morning, he awoke to find defendant rummaging through a chest of drawers in the bedroom. Defendant told him to not to get up. Officer Doran started to rise from the bed, but defendant jumped on top of him. After fighting with Officer Doran for a time, defendant placed an object, which turned out to be his finger, against Officer Doran's side and told him not to move or he would kill him. After Officer Doran realized that the object was not a weapon, he threw defendant off the bed. Officer Doran ran to the kitchen and dialed 911. Shortly thereafter, defendant broke a bedroom window and escaped.

After receiving information about the suspect from dispatch, Saginaw Sheriff's Department Detective John Butcher saw defendant running in a backyard. Detective Butcher identified himself as a police officer. Defendant then began moving in the opposite direction and

eventually crouched down near some bushes by a house. Numerous officers arrived, and defendant failed to listen to their commands to surrender. Defendant physically resisted the officers who attempted to handcuff him and refused orders to release his hands so he could be handcuffed. At least three officers were needed to take defendant into custody.

Saginaw Police Department Officer James Vondett processed the crime scene. In the Dorans' living room, he found defendant's jacket. Officer Doran's police badge and a small wooden jewelry box belonging to Yvette Doran were in the pockets. Defendant's cap was found lying by a pillow in the bedroom.

At sentencing, the trial court asked if there were any challenges to the accuracy of the PSIR. Defense counsel stated that although the PSIR provided that Officer Doran's vehicle had been rifled through and that a neighbors' vehicle had been rummaged through, he did not recall any evidence elicited at trial to support the allegations. The trial court responded, "I don't remember it either_[s]," to which defense counsel asked if that part would be stricken from the PSIR. The trial court responded, "Anything else?" but did not order the challenged information stricken.

II. Fourth Habitual Offender Status

Defendant argues that the trial court erroneously sentenced him as fourth habitual offender because he did not have the requisite number of prior felony convictions. We disagree. Because this issue was not raised below, we review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To obtain relief in this regard, plaintiff must show that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.*

A person who has been previously convicted of three or more felonies is subject to an increased sentence as a fourth habitual offender if convicted of a subsequent felony. MCL 769.12. Multiple convictions arising from a single criminal transaction count as a single prior conviction for purposes of the habitual offender statute. *People v Stoudemire*, 429 Mich 262, 278; 414 NW2d 693 (1987), mod on other grounds by *People v Preuss*, 436 Mich 714, 717, 737; 461 NW2d 703 (1990). Our Supreme Court reasoned:

[T]he statute does not require that a fourth offender's three prior convictions, the sentences for those convictions, or the offenses upon which those convictions and sentences are based, occur in any particular sequence. The statute requires only that the fourth offense be preceded by three convictions of felony offenses, and that each of those three predicate felonies arise from separate criminal incidents. [*Preuss, supra* at 717.]

For purposes of sentencing a defendant as a habitual offender, "[t]he existence of a prior conviction may be established by any evidence that is relevant for that purpose, including information contained in the presentence report." See *People v Green*, 228 Mich App 684, 700; 580 NW2d 444 (1998).

Defendant claims that his six prior felony convictions were committed on the same day during a single criminal transaction. However, our Supreme Court has concluded that breaking

and entering into two adjacent commercial buildings within a one-hour period on the same day constitutes two separate criminal transactions. *People v Hampton*, 439 Mich 860; 475 NW2d 822 (1991) (peremptorily reversing this Court’s decision in *People v Hampton (On Remand)*, 188 Mich App 675, 677-678; 470 NW2d 499 [1991], which held that such convictions were a part of a single criminal transaction). In addition, the six prior felony convictions occurred in Gratiot, Midland, and Saginaw counties. Accordingly, the trial court’s decision to sentence defendant as a fourth habitual offender is not plainly erroneous.

III. OV Scoring

Defendant argues that he should not have been scored 10 points for offense variable (“OV”) 19. We disagree. MCL 777.49(c) provides that the trial court may score 10 points under OV 19 if “[t]he offender otherwise interfered with or attempted to interfere with the administration of justice.” A trial court properly scores 10 points under OV 19 for a defendant’s conduct in attempting to flee from the police, see *People v Cook*, 254 Mich App 635, 640; 658 NW2d 184 (2003), and when a defendant provides a false name to the police during the course of the officer’s duties, *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004).

Here, not only did defendant physically resist and fail to comply with the officers’ commands when they were attempting to apprehend him, but he also initially refused to identify himself after he was arrested and then identified himself using a false name. These facts indicate that defendant interfered with the administration of justice during his apprehension and the police investigation. Accordingly, the trial court’s decision to score 10 points for OV 19 does not constitute plain error.

Defendant also argues that he should not have been scored five points for OV 10. MCL 777.40(1)(c) provides that the trial court may score five points under OV 10 if “[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious.” Even if this variable were improperly scored, it does not change defendant’s classification in the sentencing grid. MCL 777.63. “Where a scoring error does not alter the appropriate guidelines range, resentencing is not required.” *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Accordingly, any error was harmless.

IV. Accuracy of PSIR

Finally, defendant challenges the court’s failure to adequately address his challenge to the accuracy of the PSIR. We review a sentencing court’s response to a challenge to the accuracy of the PSIR for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

MCR 6.425(E) governs challenges to the accuracy of the information contained in a PSIR. A trial court is required to comply with the procedure outlined in MCR 6.425(E)(2), which provides as follows:

If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will

not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

(a) correct or delete the challenged information in the report, whichever is appropriate, and

(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

Here, the trial court agreed with defense counsel that the challenged information was not elicited at trial but failed to render a clear decision concerning the challenge and failed to strike the challenged information from the PSIR. Therefore, we remand to the trial court for clarification concerning the challenge. On remand, if the court determines that the disputed matter was considered in its sentencing decision, it must resolve the challenge pursuant to MCR 6.245(E)(2) and thereafter resentence defendant. But if the disputed matter was not considered in the sentencing, the sentence is affirmed, and the trial court must follow the procedure governing the deletion and subsequent review of the corrected report. See *People v Landis*, 197 Mich App 217, 219; 494 NW2d 865 (1992).

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

/s/ Donald S. Owens