

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN LEE KLINGER,

Defendant-Appellant.

UNPUBLISHED

July 18, 2006

No. 267930

St. Joseph Circuit Court

LC No. 04-012199-FH

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

Defendant pleaded guilty to breaking and entering a building with the intent to commit larceny, MCL 750.110. He was sentenced to 38 to 120 months' imprisonment. He appeals his sentence by leave granted. We vacate defendant's sentence and remand for resentencing.

Defendant broke into and entered CJ's General Store on December 10, 2003, with codefendant Martin Clarey. In exchange for defendant's guilty plea, the prosecutor dismissed a supplemental charge of habitual offender, fourth offense, MCL 769.12, and charges pending in a separate criminal file arising from the alleged breaking and entering of another establishment on a separate occasion.

At sentencing the trial court adjusted defendant's guidelines score to include ten points for offense variable ("OV") 9, MCL 777.39 (number of victims), five points for OV 12, MCL 777.42 (contemporaneous criminal offenses), and five points for OV 16, MCL 777.46 (property obtained, damaged, lost, or destroyed), each of which were originally scored at zero points. Before the trial court's adjustment, defendant's OV score of 21 placed him at OV level II (0-24 points). Given his prior record variable score placing him at PRV Level E, defendant's recommended minimum sentence range was 10 to 23 months' imprisonment. MCL 777.65. As rescored by the trial court, defendant's new OV score of 25 raised his OV level to level III (25-34 points), resulting in an increased minimum sentence range of 19 to 38 months' imprisonment. MCL 777.65. The trial court sentenced defendant to 38 to 120 months' imprisonment.

Defendant argues that the scores imposed for OVs 9, 12, and 16 were unwarranted. We review the trial court's guidelines scoring decisions "to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A sentencing court has discretion to determine the scoring of offense variables, provided that there is evidence

on the record to support a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). The sentencing court's scoring should be upheld if there is any support in the record for it. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), aff'd 473 Mich 399 (2005). The sentencing court's findings of fact are reviewed for clear error, *id.*, while the proper interpretation and application of the legislative sentencing guidelines is reviewed de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). We agree with defendant that the trial court erred in scoring OV 9 at ten points, but disagree that the points assessed for OVs 12 and 16 were improper.

OV 9, MCL 777.39, is to be scored at zero points if there were fewer than two victims or at ten points if there were 2 to 9 victims. MCL 777.39(1)(c)-(d). For purposes of scoring OV 9, a court shall "[c]ount each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a). "[O]ffense variables are to be scored only with respect to the specific criminal transaction that gives rise to the conviction for which the defendant is being sentenced unless the instructions for a variable specifically and explicitly direct the trial court to do otherwise." *People v Chesebro*, 206 Mich App 468, 471; 522 NW2d 677 (1994).¹ Defendant pled guilty to a single count of breaking and entering CJ's General Store with the intent to commit the crime of larceny therein. There was only one identified victim to this crime. Thus, the trial court was required to score OV 9 at zero points. MCL 777.39(1)(d).

Contrary to defendant's assertions, however, we find that the record adequately supports the trial court's assessment of five points on OV 12, MCL 777.42. OV 12 is to be scored at five points if "[o]ne contemporaneous felonious act involving a crime against a person was committed" or "[t]wo contemporaneous felonious criminal acts involving other crimes were committed." MCL 777.42(1)(d)-(e). The trial court assessed defendant five points for OV 12, finding that, because defendant acted with another person in breaking and entering CJ's General Store and because a tool was used to pry open the door in order to gain entry, defendant committed two additional contemporaneous felonious criminal acts, specifically conspiracy and possession of burglary tools.

A criminal conspiracy is an agreement, express or implied, between two or more people to accomplish an unlawful or criminal act. *People v Bettistea*, 173 Mich App 106, 117; 434 NW2d 138 (1988). To establish the existence of a conspiracy, the prosecution must prove that the parties "specifically intended to further, promote, advance, or pursue an unlawful objective." *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). Proof of a conspiracy may be derived from the circumstances, acts, and conduct of the parties, and inferences are permissible. *Id.* Thus, "[w]hat the conspirators actually did in furtherance of the conspiracy is evidence of what they had agreed to do." *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002). Defendant acted with Clarey to break and enter CJ's General store in order to take money. Therefore, the trial court reasonably inferred that defendant entered into an agreement with Clarey to accomplish that unlawful activity. *Id.*

¹ *Chesebro* addressed offense variable 6 of the former judicial sentencing guidelines, which was identical to offense variable 9 of the legislative sentencing guidelines at issue here.

Additionally, MCL 750.116 provides in relevant part that any person who knowingly has in his possession any tool adapted and designed for forcing or breaking open any building in order to steal money or property, knowing that the tool is adapted and designed for that purpose and having the intent to use or employ the tool for that purpose, shall be guilty of a felony. In *People v Gross*, 118 Mich App 161, 167; 324 NW2d 557 (1982), this Court determined that an ordinary crowbar was a burglary tool adapted and designed for an illegal purpose where it was used to pry off a coin unit on a pool table, and to smash the glass on pinball machines, a jukebox, and a cigarette machine. In this instant case, defendant admitted that he and Clarey pried the door open to gain entry to CJ's General Store, and a crow bar matching the pry marks was later found in Clarey's car. This record information was sufficient to allow the trial court to conclude that defendant knowingly possessed a burglary tool which he intended to use, and in fact, did use, to break and enter a building. Thus, the trial court properly exercised its discretion in scoring OV 12 at five points.

In arguing his position with respect to OV 12, defendant also claims that the trial court made impermissible factual findings relating to the scoring of OV 12, thus depriving him of his right to a jury trial in contravention of the United States Supreme Court's decisions in *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000); *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). In light of the Michigan Supreme Court's recent opinion in *People v Drohan*, 475 Mich 140, ___; ___ NW2d ___ (2006), defendant's argument is without merit.

In *Drohan*, the Court summarized the constitutional rule of *Apprendi*, *Blakely*, and *Booker* as follows:

(1) a trial court may not impose a sentence greater than the statutory maximum unless it does so on the basis of a prior conviction or the fact at issue is "admitted by the defendant or proved to a jury beyond a reasonable doubt[.]" *Booker, supra* at 756; (2) where a defendant's maximum sentence is calculated through the use of mandatory sentencing guidelines, the statutory maximum is the maximum sentence that may be imposed under those guidelines, based solely on the defendant's prior convictions and those facts proven beyond a reasonable doubt, *Blakely, supra* at 303-304; and (3) a trial court *may* consider facts and circumstances not proven beyond a reasonable doubt in imposing a sentence within the statutory range, *McMillan, supra; Harris, supra; Booker, supra*. [*Id.* at ___ (emphasis in original).]

Thus, "the Sixth Amendment ensures that a defendant will not be incarcerated for a term longer than that authorized by the jury upon a finding of guilt beyond a reasonable doubt. However, the Sixth Amendment does not entitle a defendant to a sentence *below* that statutory maximum." *Id.* at ___, citing *Apprendi, supra* at 498 (SCALIA, J., concurring). To paraphrase the Court,

When defendant, a [fourth]-offense habitual offender, [broke and entered a building with the intent to commit larceny], he did so knowing that he was risking [10] years in prison. When defendant was, in fact, sentenced to a maximum of [10] years in prison, he received all the protections he was entitled to under the Sixth Amendment. Therefore, the trial court's exercise of discretion in imposing

a sentence greater than the “maximum-minimum,” but within the range authorized by the verdict, fully complies with the Sixth Amendment. [*Id.* at ____ (alterations added).]

Defendant additionally argues that identical scoring is required for all codefendants to the same offense pursuant to *Morson, supra* at 259, and therefore, because Clarey was not assessed points for OVs 9 or 12, defendant could not be assessed points for those variables. In *Morson*, our Supreme Court determined that the defendant was to be scored identically to her codefendant on OVs 1 and 3, each of which specifically provide that multiple offenders shall receive identical scores on those variables. MCL 777.31(2)(b); MCL 777.33(2)(a).² There is no provision calling for identical treatment of multiple offenders when scoring either OV 9 or OV 12. MCL 777.39; MCL 777.42. Thus, *Morson* does not require defendant’s scores on OVs 9 and 12 to be identical to those assessed to Clarey.

Lastly, defendant argues that the trial court erred in assessing him five points on OV 16, MCL 777.46. A score of five points is warranted for OV 16 if the property obtained, damaged, lost, or destroyed had a value of \$1,000 or more, but not more than \$20,000. MCL 777.46(1)(c). For purposes of scoring OV 16, in multiple offender or multiple victim cases, “the appropriate points may be determined by adding together the aggregate value of the property involved, including property involved in uncharged offenses or charges dismissed under plea agreement.” MCL 777.46(2)(a). And, “[t]he amount of money or property involved in admitted but uncharged offenses or in charges that have been dismissed under plea agreement may be considered.” MCL 777.46(2)(c). Thus, the trial court was permitted to consider not only the value of the property taken from, and damage done to, CJ’s General Store, but also the value of the property taken in connection with the charges that were dismissed as part of the instant plea agreement.

The record before this Court indicates that defendant and Clarey took two dispensers of lottery tickets, each of which held eight rolls of tickets, as well as unopened packs of lottery tickets, money, and several packs of cigarettes from CJ’s General Store. CJ’s owner also requested \$150 in restitution to repair the door that defendant and Clarey pried open. The owner of the establishment involved in the unrelated offense, for which the charges were dismissed as part of the instant plea agreement, requested \$4,000 in restitution for merchandise and cash stolen from his business. Accordingly, there was evidence in the record from which the trial court could conclude that, for purposes of OV 16, the value of property obtained, damaged, lost or destroyed exceeded \$1,000, but was less than \$20,000. The trial court did not err in assessing defendant five points for OV 16.

Because the trial court erred in assessing defendant ten points for OV 9, the 38-month minimum sentence imposed exceeds the appropriate recommended minimum sentencing range

² MCL 777.31(2)(b) provides that when scoring OV 1, “[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points.” Similarly, MCL 777.33(2)(a) provides that when scoring OV 3, “[i]n multiple offender cases, if 1 offender is assessed points for a death or physical injury, all offenders shall be assessed the same number of points.”

of 10 to 23 months' imprisonment under the legislative guidelines. Therefore, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

Vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Donald S. Owens

/s/ Christopher M. Murray