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STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERREIK JAYLEL LATHAM,

Defendant-Appellant.

FOR PUBLICATION

October 29, 2020

9:15 a.m.

No. 338891

Wayne Circuit Court

LC No. 16-009739-01-FC

ON RECONSIDERATION

Before: RIORDAN, P.J., and SAWYER and JANSEN, JJ.

RIORDAN, P.J.

Defendant appeals as of right his bench trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b (multiple variables). Defendant was sentenced to 4 to 10 years of imprisonment for first-degree criminal sexual conduct. We affirm.

I. FACTS & PROCEDURAL HISTORY

Defendant contacted the victim, a prostitute who advertised her services online, and after agreeing on a price and specific services, they met up at a gas station and walked together to a nearby abandoned house. Before engaging in any sexual acts, the victim asked to be paid. Defendant refused to pay, held a sharp object to the victim's throat, and forced her to engage in oral and vaginal sex.

Defendant was found guilty of CSC I. His recommended sentencing guidelines range was 51 to 85 months, and he was assigned 10 points for Offense Variable (OV) 1, 5 points for OV 2, 10 points for OV 4, and 25 points for OV 11. In total, defendant was assigned 50 OV points which equated to an OV level III. Defendant was sentenced to 4 to 10 years of imprisonment.

Defendant then filed a motion to correct an invalid sentence in the trial court and argued that he is entitled to resentencing because OV 11 was incorrectly scored at 25 points when, he said, it should have been assigned 0 points pursuant to MCL 777.41(2)(c). Defendant asserted that if OV 11 was properly scored, he would have been sentenced at OV level II not OV level III. He

contended that the recommended guidelines range would have been 42 to 70 months, rather than 51 to 85 months which was used at sentencing. Therefore, defendant argued, he was entitled to resentencing. The prosecution responded that OV 11 was properly scored and, even if the guidelines were initially improperly scored, defendant's sentence should not be altered because defendant's sentence was below the original recommended guidelines range and was tailored to defendant.

The trial court granted defendant's motion to rescore OV 11 at 0 points, but denied defendant's motion for resentencing. The trial court corrected defendant's original sentencing information report and the recommended minimum guidelines range was lowered to 42 to 70 months. The trial court's order states that resentencing was not required because defendant's original sentence of 48 to 120 months of imprisonment is within the recalculated recommended minimum guidelines range. Defendant now appeals.

II. ANALYSIS

Defendant argues that he is entitled to resentencing pursuant to *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006), because he was sentenced on the basis of inaccurate information and an inaccurate guidelines range. We disagree.

The issue of whether defendant is entitled to resentencing is a legal question which we review de novo. *Id.* at 85.

In *Francisco*, 474 Mich at 88-92, our Supreme Court held that the defendant was entitled to resentencing when the trial court erred in scoring the sentencing guidelines even though the original sentence was within the appropriate, re-scored guidelines range. The Supreme Court remanded that case for resentencing because an appellate court cannot know whether the trial court would have imposed the same sentence if the guidelines had been accurately scored. *Id.* at 49. The Supreme Court reasoned that "appellate correction of an erroneously calculated guidelines range will always present this dilemma, i.e., the defendant will have been given a sentence which stands differently in relationship to the correct guidelines range than may have been the trial court's intention." *Id.* at 91-92. "Thus, requiring resentencing in such circumstances not only respects the defendant's right to be sentenced on the basis of the law, but it also respects the trial court's interest in having defendant serve the sentence that it truly intends." *Id.* at 92.

The matter before us presents us with circumstances that are unlike those described in *Francisco*. We know the trial court would impose the same sentence for defendant under the now accurately scored guidelines range. The trial court's order states that resentencing was not required because defendant's original sentence of 48 to 120 months of imprisonment is within the recalculated recommended minimum guidelines range. The trial court had the opportunity to resentence defendant and it expressly declined to do so. After rescoring OV 11 and recalculating the correct guidelines range, the trial court decided to maintain defendant's original sentence. Thus, the trial court's explanation, its familiarity with this matter, particularly in light of the procedural posture and its ultimate disposition of the case, demonstrates the trial court's intent to maintain the same sentence, regardless of the prior scoring error. Thus, "[r]esentencing is . . . not required [because] the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines

range.” *Id.* at 89 n 8, citing *People v Mutchie*, 468 Mich 50, 51; 658 NW2d 154 (2003). Therefore, resentencing is not required.¹

III. CONCLUSION

We are not confronted with a *Francisco* error. There was no remand for resentencing to the trial court. Here, the trial court only decided a post-trial motion, corrected the applicable guidelines range, and then maintained defendant’s original sentence. Affirmed.

/s/ Michael J. Riordan

/s/ David H. Sawyer

¹ Defendant raised for the first time at oral argument the claim that the trial court violated his due process right to be sentenced on the basis of accurate information. He did not raise this issue in his written brief on appeal, nor did he provide any supplemental briefing on it. He cited only *Francisco*, 474 Mich at 48-49, 91 n 6, for the proposition that “[a] defendant is entitled to be sentenced by a trial court on the basis of accurate information.” However, *Francisco* considers only the issue of resentencing pursuant to MCL 769.34(10) and MCR 2.613(A), and its analysis does not consider any due process implications. Although this issue presents a purely legal question, we nonetheless decline to consider the it further because it was not properly raised by defendant, nor was it briefed by the parties. *Paschke v Retool Industries (On Reh)*, 198 Mich App 702, 705; 499 NW2d 453 (1993) (“The court is *obligated* only to review issues that are properly raised and preserved; the court is *empowered*, however, to go beyond the issues raised and address any issue that, in the court’s opinion, justice requires be considered and resolved.”), rev’d on other grounds 445 Mich 502; 519 NW2d 441 (1994). Because the issue is insufficiently briefed, we now decline to craft defendant’s argument for him. *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002); *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

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JANSEN, J. (*dissenting*).

I would conclude that the trial court erroneously denied defendant's motion for resentencing where defendant is entitled to be resentenced on the basis of accurate information under *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). Therefore, I respectfully dissent.

I. RELEVANT FACTUAL BACKGROUND

On September 5, 2016, between 4:00 a.m. and 4:30 a.m., defendant contacted the victim, a prostitute who advertised her services on backpage.com. Defendant agreed to pay \$60 for vaginal and oral sex with the victim. Defendant and the victim met at a Citgo gas station located on Patton Street and Seven Mile Road in Detroit. When the victim asked to be paid, defendant held a sharp object to her throat and forced her to have vaginal sex.

Defendant was found guilty of first-degree criminal sexual conduct. Defendant's recommended sentencing guidelines range was 51 to 85 months. Defendant was assigned 10 points for Offense Variable (OV) 1, 5 points for OV 2, 10 points for OV 4, and 25 points for OV 11. Defendant was assigned a total of 50 OV points which equated to an OV level III. Defendant was sentenced to 4 to 10 years' imprisonment.

On November 27, 2017, defendant filed in the trial court a motion to correct an invalid sentence and argued that he is entitled to resentencing because OV 11 was incorrectly scored at 25

points. Defendant argued that OV 11 should have been scored zero points in accordance with MCL 777.41(2)(c). Defendant asserted that if OV 11 was properly scored, his minimum sentencing guidelines range would have been reduced from 51 to 85 months to 42 to 70 months, which would have placed him on the sentencing grid at OV Level II, rather than OV Level III. Thus, defendant argued, he was entitled to be resentenced based on accurate information.

The trial court granted defendant's motion, in part, agreeing that OV 11 was incorrectly scored. The trial court ordered that OV 11 be scored at zero points, thus reducing the minimum sentencing guidelines range to 42 to 70 months. However, the trial court denied defendant's motion for resentencing. The trial court stated in its order that defendant's "original sentence of 48 to 120 months falls within the guidelines of the advisory guideline minimum range." This appeal followed.

II. MOTION FOR RESENTENCING

Defendant argues that the trial court erroneously denied his motion for resentencing where he is entitled to be resentenced on the basis of accurate information under *Francisco*, 474 Mich at 88. I agree.

The issue of whether defendant is entitled to resentencing is a legal question which this Court reviews de novo. *Francisco*, 474 Mich at 85.

Under MCL 769.34(10),¹ "[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Moreover, in *Francisco*, our Supreme Court concluded that it would be "in derogation of the law, and fundamentally unfair, to deny a defendant . . . the opportunity to be resentenced on the basis of accurate information." *Francisco*, 474 Mich at 89-90. This Court continues to affirm the legal principle that regardless of whether a defendant's sentence falls within the minimum sentencing guidelines range, a defendant is entitled to resentencing where the sentence was calculated from erroneously scored guidelines, or the trial court relied on inaccurate information when sentencing defendant. See *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016); *People v Sours*, 315 Mich App 346, 350-351; 890 NW2d 401 (2016); *People v Carpenter*, 322 Mich App 523, 532; 912 NW2d 579 (2018).

A small caveat does exist, as outlined in *People v Mutchie*, 468 Mich 50; 658 NW2d 154 (2003). If a trial court indicates that, "it would have imposed the same sentence, regardless of the scoring error," resentencing is not required. *Id.* at 51. However, I would conclude that his caveat does not apply here, because the trial court did not indicate in its order that it would have imposed the same sentence. Rather, in its order denying defendant's motion for resentencing, the trial court stated that it was denying defendant's motion because the "original sentence" imposed "falls within the guidelines of the advisory guideline minimum range." I would conclude that this

¹ This Court explicitly held in *Schrauben*, 314 Mich App at 196 n 1, that MCL 769.34(10) was not altered or diminished by the Michigan Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015) (holding that the guidelines are only advisory).

reasoning is legally deficient. I believe defendant's original sentence is invalid, as it was based on inaccurate information, i.e., the incorrect scoring of OV 11. *Francisco*, 474 Mich at 89. Because defendant is constitutionally entitled to be sentenced on accurate information, I would conclude that a remand for resentencing is required.

/s/ Kathleen Jansen