

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WILLIAM CHRISTOPHER DAVIS,

Defendant-Appellee.

UNPUBLISHED
February 11, 2021

No. 352489
Macomb Circuit Court
LC No. 2019-002309-FH

Before: CAVANAGH, P.J., AND SERVITTO AND CAMERON, JJ.

PER CURIAM.

Defendant, William Christopher Davis, pleaded *nolo contendere* to failing to stop at the scene of an accident resulting in death, MCL 257.617(3), reckless driving causing death, MCL 257.626(4), and lying to a peace officer, MCL 750.479c(2)(d). After entering into a *Cobbs*¹ agreement with Davis, the trial court imposed a sentence of one year in the Macomb County Jail and five years' probation, which was a downward departure from the guidelines minimum sentencing range. For the reasons discussed in this opinion, we vacate Davis's sentences and remand for proceedings consistent with this opinion.

I. BACKGROUND

This case arises from a hit-and-run accident that occurred on Groesbeck Highway on February 3, 2019. At about 6:30 p.m., the victim began crossing Groesbeck Highway on his bicycle. The victim was traveling east. The parties agree that the traffic light for motor vehicles that were traveling north on Groesbeck Highway was green at the time. Before the victim could make it across the highway, Davis, who was traveling north on Groesbeck Highway, hit the victim

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

with his car. The parties agree that Davis was speeding at the time.² After striking the victim, Davis kept driving and did not call 911. The victim was pronounced dead at the scene.

The following day, Davis asked a friend to help him hide his car, which was badly damaged. Davis towed his car to his friend's residence and covered the car. About 10 days after the accident, police arrested Davis. When first confronted, Davis lied to the police about his involvement, but he soon broke down into tears and admitted that he had hit the victim. Davis wrote a statement for the police, in which he confessed his guilt and apologized to the victim's family.

Davis requested a *Cobbs* evaluation and an agreement from the trial court in exchange for him pleading to the crimes. At the hearing, the prosecution and defense agreed that the sentencing guidelines recommended a minimum sentence range of 29 to 57 months' imprisonment. After hearing the positions of both the prosecution and defense, the trial court stated it would consider a downward departure to a jail term, rather than a prison term, and a long-term probationary period if Davis pleaded guilty or *nolo contendere*. The trial court expressed hesitation, noting that it had not yet heard impact statements from the victim's family members. The trial court informed Davis that it could withdraw its offer after hearing the statements and reviewing all other relevant information. In response, Davis pleaded *nolo contendere* to all three counts.

At Davis's sentencing hearing, the victim's family provided statements, and the parties disputed how many points should be assigned to Offense Variable ("OV") 5 and OV 17. Over the prosecutor's objection, the trial court declined to assign any points to OV 5 and assessed five points to OV 17. Ultimately, the trial court honored the *Cobbs* agreement. The trial court imposed a sentence of one year of imprisonment in the Macomb County Jail and five years' probation. This appeal followed.

II. ANALYSIS

The prosecutor challenges the trial court's scoring of OV 5 and OV 17. This Court reviews de novo whether a trial court properly interpreted and applied the sentencing guidelines. *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009). "We review for clear error the trial court's factual determinations, which must be supported by a preponderance of the evidence." *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Blevins*, 314 Mich App 339, 348-349; 886 NW2d 456 (2016). "'Preponderance of the evidence' means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008) (citation omitted).

"A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report,

² When the trial court was considering Davis's request for a *Cobbs* evaluation, the prosecutor indicated that his expert witness would testify that Davis was traveling "around 65 miles an hour," which was 20 mph over the posted speed limit on Groesbeck Highway.

admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial.” *People v Allen*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 342999), slip op at 4, vacated in part on other grounds by ___ Mich ___ (Docket No. 161605, entered January 27, 2021) (quotation marks and citation omitted; emphasis added).

A. OV 17

The prosecutor argues that the trial court erred by assessing five points for OV 17, which requires a showing that “[t]he offender failed to show the degree of care that a person of ordinary prudence in a similar situation would have shown[.]” MCL 777.47(1)(b). The prosecutor argues that the trial court should have assessed 10 points for OV 17 because Davis “showed a wanton or reckless disregard for the life or property of another person” during the commission of the sentencing offense. MCL 777.47(1)(a). We agree that the trial court erred by failing to assess 10 points for OV 17.

A “[d]efendant’s *nolo contendere* plea is an admission of all the essential elements of a charged offense and, thus, is tantamount to an admission of guilt for the purposes of the criminal case.” *People v Patmore*, 264 Mich App 139, 149; 693 NW2d 385 (2004). An essential element of the crime of reckless driving causing death is operating a vehicle in “willful or wanton disregard for the safety of persons or property.” MCL 257.626(2). Hence, by pleading *nolo contendere*, Davis admitted that he operated a vehicle in willful or wanton disregard for the safety of persons or property. As noted by the prosecutor, “[t]o show that a defendant acted in wilful and wanton disregard of safety, something more than ordinary negligence must be proved.” *People v Crawford*, 187 Mich App 344, 350; 467 NW2d 818 (1991). By ignoring Davis’s admission, the trial court erred. The trial court should have assessed 10 points for OV 17. While perhaps the trial court believed that adding 10 points to Davis’s OV score did not accurately reflect the seriousness of Davis’s conduct, the proper procedure would be to consider this as grounds for departure from the minimum sentencing range—not to assess points for OV 17 without regard to Davis’s admission.³

B. OV 5

The prosecutor argues that the trial court erred by assessing zero points for OV 5, which “is scored when a homicide or homicide-related crime causes psychological injury to a member of a victim’s family.” *People v Calloway*, 500 Mich 180, 184; 895 NW2d 165 (2017) (footnote omitted). OV 5 is to be scored “for homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder.” MCL 777.22(1). “Homicide” is defined as “any crime in which the death of a human being is an element of that crime.” MCL 777.1(c).

³ Whether the guidelines give adequate weight to the circumstances of an offense may be grounds for departure from the guidelines. *People v Dixon-Bey*, 321 Mich App 490, 525; 909 NW2d 458 (2017). Still, trial courts must take the guidelines into account when fashioning a sentence. *People v Steanhouse*, 500 Mich 453, 470; 902 NW2d 327 (2017).

Additionally, MCL 777.35 provides:

(1) Offense variable 5 is psychological injury to a member of a victim's family. Score offense variable 5 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Serious psychological injury requiring professional treatment occurred to a victim's family 15 points

(b) No serious psychological injury requiring professional treatment occurred to a victim's family 0 points

(2) Score 15 points if the serious psychological injury to the victim's family may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

“In this context, ‘serious’ is defined as ‘having important or dangerous possible consequences.’ ” *Calloway*, 500 Mich at 186 (citation omitted).

In this case, the trial court concluded that OV 5 was inapplicable because Davis was not charged with a homicide. Specifically, the trial court stated, in relevant part, “[t]his is not a homicide. It is not a second[-]degree murder. This is not that type of case. This is not scored.” However, as already stated, “homicide” is defined as “any crime in which the death of a human being is an element of that crime.” MCL 777.1(c). “An ‘element’ of a crime is any ‘fact[] that increase[s] the prescribed range of penalties to which a criminal defendant is exposed.’ ” *People v Dumback*, 330 Mich App 631, 641; 950 NW2d 493 (2019), quoting *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000).

MCL 257.626 provides, in relevant part, as follows:

(2) Except as otherwise provided in this section, a person who operates a vehicle upon a highway . . . , in willful or wanton disregard for the safety of persons or property is guilty of a misdemeanor[.]

* * *

(4) . . . a person who operates a vehicle in violation of subsection (2) and by the operation of that vehicle causes the death of another person is guilty of a felony[.]

Thus, to convict a defendant of reckless driving causing death under MCL 257.626(4) the prosecution must prove that the accused operated a vehicle “in willful or wanton disregard for the safety of persons or property” and that the accused caused “the death of another person.” If the prosecution proves the latter, then the accused is subject to greater punishment than he or she would have been otherwise. Because “the death of another person” is an element of reckless driving causing death, it follows that reckless driving causing death is a homicide offense, at least in the context of scoring the sentencing guidelines. Consequently, the trial court erred by ruling that OV 5 was inapplicable to this case.

Thus, the question becomes whether the trial court should have assessed 15 points to OV 5. As already stated, “‘serious’ is defined as ‘having important or dangerous possible consequences.’” *Calloway*, 500 Mich at 186 (citation omitted). “In scoring OV 5, a trial court should consider the severity of the injury and the consequences that flow from it, including how the injury has manifested itself before sentencing and is likely to do so in the future, and whether professional treatment has been sought or received.” *People v Baskerville*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 345403); slip op at 7 (quotation marks and citation omitted). However, “the fact that treatment has not been sought is not conclusive.” MCL 777.35(2).

At sentencing, several members of the victim’s family presented statements to the trial court. The victim’s mother stated that she had received “a life sentence” as a result of the victim’s death, noting that she missed the victim “terribl[y]” and that she had “nightmares every night.” The victim’s mother further stated that she would “never get over” the victim’s death and noted “the brutality” and “the crushing of” the victim. The victim’s son indicated that it was “terrible” that the victim, who was a dedicated father, would be unable to attend important events in his life, such as his wedding. The victim’s son expressed that this “caused so much pain” and noted that Davis would get to carry on with the rest of his life while the victim’s family continued to be “lost.” The victim’s sister, who indicated that she was also speaking on behalf of other family members, stated that the manner in which the victim died was “savage[,]” “brutal[,] and horrif[ic]” and that it had caused “irreparable damage[.]” The victim’s sister also described her “excruciating” “mental anguish” as a result of watching a video of the accident, which was played by local news stations. Specifically, the victim’s sister stated as follows:

The psychological trauma and physical ailment results of it are real, present and unrelenting. No one should ever have to watch their loved one’s life [be] brutally taken.

Had Mr. Davis not run there would have—

They would not have to put that on the media to catch him. We would not have seen the horrific death of my brother on TV, which is now forever seared in our brain[s].

Although the statements made before the trial court at the sentencing hearing were more than sufficient to support assessing 15 points to OV 5, several of the victim’s family members also wrote letters to the trial court before sentencing. The letters outline how Davis’s crimes and the death of the victim caused them grief and despair. In sum, we conclude that these statements provide a reasonable basis to conclude that the victim’s family members suffered serious psychological injury. Consequently, the trial court should have assessed 15 points to OV 5.

C. EFFECT OF SCORING ERRORS

The trial court erred by failing to assess 10 points to OV 17 and by failing to assess 15 points to OV 5. Davis’s Prior Record Variable (“PRV”) score of 20 points placed him in PRV Level C, and his total OV score of 40 points placed him in OV Level IV. Adding 20 points to Davis’s OV score of 40 changes the recommended guidelines minimum sentencing range to 36 to

71 months' imprisonment. See MCL 777.64. Therefore, resentencing is warranted. See *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006).

Although Davis argues that we need not order resentencing because the trial court would have imposed the same sentence regardless of how OV 5 and OV 17 are assessed points, this argument is unavailing. In *People v Mutchie*, 468 Mich 50, 52; 658 NW2d 154 (2003), our Supreme Court declined to order resentencing when a trial court "clearly expressed its view that the sentences imposed . . . were the proper sentences," regardless of an errantly scored OV. Although the *Mutchie* Court's discussion of the facts in *Mutchie* is brief, it appears that the trial court explicitly remarked on the record that it would have imposed the same sentence regardless of how the challenged OV was assessed. *Id.*

In contrast, in this case, the trial court did not explicitly express that it would have imposed the same sentence regardless of how many points were assessed to OV 5 and OV 17. Indeed, when the trial court was deciding whether a *Cobbs* agreement was appropriate, it was noted that the recommended minimum sentence range was 29 to 57 months' imprisonment. Admittedly, the fact that the trial court agreed to impose a departure sentence under a *Cobbs* agreement does suggest that the trial court might impose the same sentence on remand. However, the trial court is by no means bound by the terms of a *Cobbs* agreement. See *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). In fact, the trial court has the authority to withdraw its offer. See *id.* ("The judge's preliminary evaluation of the case does not bind the judge's sentencing discretion, since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources."). Armed with the knowledge that OV 5 is applicable to this case and that it should have been assessed 15 points and that OV 17 should have been assessed 10 points, the trial court could decide that a different sentence is appropriate.

In sum, the trial court erred by failing to assess 10 points to OV 17 and by failing to assess 15 points to OV 5. Therefore, we vacate Davis's judgment of sentence and remand for further proceedings consistent with this opinion. In light of this decision, we need not address the prosecutor's second claim of error concerning the proportionality of Davis's sentences.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Thomas C. Cameron