

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS DICKERSON,

Defendant-Appellant.

UNPUBLISHED

July 22, 2021

No. 354208

Wayne Circuit Court

LC No. 14-006051-01-FC

Before: TUKEL, P.J., and SAWYER and CAMERON, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying defendant's request for resentencing. On October 20, 2014, defendant was convicted by a jury of kidnapping, MCL 750.349(1)(c), felonious assault, MCL 750.82, being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was acquitted, however, of three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c) and (e). On November 21, 2014, defendant was sentenced, as a third-offense habitual offender, MCL 769.11, to concurrent prison terms of 144 to 337 months for kidnapping, two to four years for felonious assault, and two to five years for felon-in-possession, all of which were to be served consecutively to a prison term of two years for felony-firearm.

Defendant has raised sentencing issues in multiple appeals. Defendant now appeals again, arguing that he is entitled to resentencing because the trial court improperly relied on acquitted conduct when it assessed 50 points for offense variable (OV) 11, and the trial court previously declined to resentence defendant based on the erroneous belief that the applicable sentencing guidelines range for defendant's kidnapping conviction was 144 to 337 months' imprisonment rather than 135 to 337 months' imprisonment. In his Standard 4 brief, defendant argues that he is entitled to resentencing because there was insufficient evidence to support the trial court's assessment of 5 points for OV 3 and 10 points for OV 4, and the trial court erred by considering facts that were not found by a jury or admitted by defendant in scoring OVs 3 and 4. We vacate defendant's sentence and remand for resentencing.

I. OV 11

Defendant is entitled to resentencing because the trial court improperly relied on acquitted conduct when it assessed 50 points for OV 11.

A. STANDARD OF REVIEW

This Court reviews constitutional issues, such as due process challenges, de novo. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011).

B. SCOPE OF REMAND

At the outset, defendant's argument regarding OV 11 falls outside the scope of this Court's March 27, 2018 order for remand in order for the trial court to obtain the views of counsel before deciding whether to resentence defendant as required by *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). Generally, "where an appellate court remands for some limited purpose following an appeal as of right in a criminal case, a second appeal as of right, limited to the scope of the remand, lies from the decision on remand." *People v Kincade (On Remand)*, 206 Mich App 477, 481; 522 NW2d 880 (1994). Nevertheless, we find it appropriate to consider defendant's argument regarding OV 11.

In *People v Tyson*, unpublished per curiam opinion of the Court of Appeals, issued June 28, 2016 (Docket No. 325986), p 8, the defendant challenged the reasonableness of his departure sentence. This Court declined to review the issue, instead remanding for a hearing pursuant to *United States v Crosby*, 397 F3d 103 (CA 2, 2005), in light of *Lockridge*, 498 Mich at 392. Following a *Crosby* hearing in which the trial court declined to resentence the defendant, the defendant appealed a second time and attempted to challenge the reasonableness of his departure sentence. *People v Tyson*, unpublished per curiam opinion of the Court of Appeals, issued June 19, 2018 (Docket No. 338299), p 1. This Court again declined to address the issue, reasoning that the "defendant's challenge to the proportionality of his sentence [was] outside the scope of the remand order." *Id.* The Michigan Supreme Court subsequently granted the defendant's application for leave to appeal, vacated this Court's judgment declining to consider the defendant's challenge to the proportionality of his departure sentence, and remanded the case "to the Court of Appeals for plenary review of the defendant's claim that his sentence was not reasonable and proportionate." *People v Tyson*, 505 Mich 868 (2019).

When defendant initially appealed his convictions and sentences, this Court affirmed defendant's convictions but remanded this matter for a *Crosby* hearing "to allow the trial court to determine whether, in light of the advisory nature of the sentencing guidelines, it would have imposed a materially different sentence." *People v Dickerson*, unpublished per curiam opinion of the Court of Appeals, issued May 5, 2016 (Docket No. 324993), p 1, citing *Lockridge*, 498 Mich at 358. In doing so, this Court declined to address defendant's challenge to the trial court's assessment of 50 points for OV 11 based on acquitted conduct. *Dickerson*, unpub op at 4. In light of the Michigan Supreme Court's order in *Tyson*, 505 Mich at 868, it is appropriate to engage in a plenary review of defendant's assertion that the trial court improperly relied on acquitted conduct when it assessed 50 points for OV 11.

C. RETROACTIVITY

Defendant seeks resentencing on the basis of the Michigan Supreme Court’s opinion in *People v Beck*, 504 Mich 605, 629; 939 NW2d 213 (2019), which was decided after defendant was sentenced. In *Beck*, 504 Mich at 629, the Michigan Supreme Court held that due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted. “[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.” *People v McPherson*, 263 Mich App 124, 135 n 10; 687 NW2d 370 (2004) (quotation marks and citation omitted). The parties do not dispute that the Michigan Supreme Court’s opinion in *Beck* should be applied retroactively. We agree.

The Michigan Supreme Court’s opinion in *Beck* set forth a new rule of criminal procedure. Indeed, in *Beck*, the Michigan Supreme Court determined that existing precedent was not controlling such that it was free to “address this question on a clean slate.” *Beck*, 504 Mich at 625. Further, this Court declined to address defendant’s challenge to OV 11 when it was raised in defendant’s initial appeal. Thus, this Court may treat defendant’s challenge to OV 11 as if it is still pending on direct review. See *Tyson*, 505 Mich at 868 (directing this Court to engage in a plenary review of an issue previously unaddressed due to a *Crosby* remand). Accordingly, the Michigan Supreme Court’s opinion in *Beck* should be applied retroactively.

D. ACQUITTED CONDUCT

The trial court improperly relied on acquitted conduct when it assessed 50 points for OV 11. “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, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial.” *People v Allen*, 331 Mich App 587, 594; 953 NW2d 460 (2020), vacated in part on other grounds by ___ Mich ___ (Docket No. 161605, entered January 27, 2021) (quotation marks and citation omitted). However, “due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted.” *Beck*, 504 Mich at 629. Acquitted conduct means any conduct arising from underlying charges of which a defendant has been acquitted. *People v Stokes*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket Nos. 348471 and 348472, issued 8/20/2020); slip op at 2. “When a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard.” *Beck*, 504 Mich at 626. “But when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent.” *Id.*

OV 11 addresses criminal sexual penetration. MCL 777.41(1). OV 11 is properly assessed 50 points when “two or more criminal sexual penetrations occurred.” MCL 777.41(1)(a). At trial, defendant was acquitted of three counts of CSC-I under MCL 750.520b(1)(c) and (e). Under MCL 750.520b(1)(c), a person is guilty of CSC-I if he engages in sexual penetration with another person under circumstances involving the commission of any other felony. Under MCL 750.520b(1)(e), a person is guilty of CSC-I if he engages in sexual penetration with another person while armed

with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

Criminal sexual penetration constitutes conduct that underlies charges of CSC-I under MCL 750.520b(1)(c) and (e). Because defendant was acquitted of each count of CSC-I, due process barred the trial court from finding by a preponderance of the evidence that defendant engaged in criminal sexual penetration with another person for purposes of sentencing. Accordingly, the trial court improperly relied on acquitted conduct when it assessed 50 points for OV 11.

E. RESENTENCING

The parties do not dispute that resentencing is required because deducting the 50 points assessed for OV 11 alters the guidelines minimum sentence range. We agree.

If a scoring error alters the guidelines minimum sentence range, remand for resentencing is required. *People v Rodriguez*, 327 Mich App 573, 583; 935 NW2d 51 (2019). With a prior record variable (PRV) total score of 44 points and an original total OV score of 80 points, defendant's guidelines minimum sentence range, as a third-offense habitual offender, was 135 to 337 months' imprisonment. MCL 777.62. However, had the trial court properly assessed 0 points for OV 11, defendant's total OV score would have been 30 points, resulting in a guidelines minimum sentence range of 81 to 202 months' imprisonment. *Id.* Accordingly, remand for resentencing is required.

II. RELIANCE ON INACCURATE SENTENCING GUIDELINES RANGE

Even if the trial court correctly assessed 50 points for OV 11, defendant is still entitled to resentencing because the trial court declined to resentence defendant based on the erroneous belief that the applicable sentencing guidelines range for defendant's kidnapping conviction was 144 to 337 months' imprisonment rather than 135 to 337 months' imprisonment.

Generally, when a remand order grants discretion to a trial court in resentencing a defendant, this court reviews the trial court's decision for an abuse of discretion. *People v Babcock*, 469 Mich 247, 268-270; 666 NW2d 231 (2003). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Waterstone*, 296 Mich App 121, 131-132; 818 NW2d 432 (2012).

"If 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." MCL 769.34(10). "A defendant is entitled to be sentenced by a trial court on the basis of accurate information." *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006) (citation omitted). "[W]hen a trial court sentences a defendant in reliance upon an inaccurate guidelines range, it does so in reliance upon inaccurate information." *Id.* at 89 n 7.

Assuming for the sake of argument that 50 points were correctly assessed for OV 11, the applicable sentencing guidelines range for defendant's kidnapping conviction was 135 to 337

months' imprisonment. However, when the trial court declined to resentence defendant, the trial court misstated the applicable sentencing guidelines range for defendant's kidnapping conviction as 144 to 337 months' imprisonment. 144 to 337 months' imprisonment was the sentence initially imposed by the trial court, not the applicable sentencing guidelines range for defendant's kidnapping conviction. Accordingly, although the trial court noted that the original trial court judge already indicated that she would not have imposed a materially different sentence in light of the advisory nature of the sentencing guidelines, it appears that the trial court declined to resentence defendant based, in part, on inaccurate information. Therefore, assuming for the sake of argument that the trial court correctly assessed 50 points for OV 11, defendant is still entitled to resentencing.

III. STANDARD 4 BRIEF

Defendant is not entitled to resentencing due to the trial court's assessment of 5 points for OV 3 and 10 points for OV 4.

"A trial court's findings of fact at sentencing must be supported by a preponderance of the evidence; this Court reviews a trial court's findings of fact for clear error." *People v Maben*, 313 Mich App 545, 549; 884 NW2d 314 (2015). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Anderson*, 284 Mich App 11, 13; 772 NW2d 792 (2009) (quotation marks and citation omitted). "This Court reviews de novo whether the facts are adequate to satisfy the statutory criteria for scoring the variable." *Maben*, 313 Mich App at 549.

Defendant's arguments regarding OVs 3 and 4 fall outside the scope of this Court's March 27, 2018 order for remand in order for the trial court to obtain the views of counsel before deciding whether to resentence defendant as required by *Lockridge*, 498 Mich at 392. Generally, "where an appellate court remands for some limited purpose following an appeal as of right in a criminal case, a second appeal as of right, limited to the scope of the remand, lies from the decision on remand." *Kincade*, 206 Mich App at 481. Considering that defendant does not challenge the trial court's decision to decline to resentence defendant after obtaining the views of counsel, defendant's arguments fall outside the scope of this Court's March 27, 2018 order for remand.

Furthermore, this Court has already granted relief in regard to defendant's assertion regarding the trial court's consideration of facts that were not found by a jury or admitted by defendant in scoring OVs 3 and 4. In defendant's initial appeal, defendant argued that the trial court had engaged in judicial fact-finding when it scored OVs 3, 4, 9, 10, and 11 such that defendant was entitled to a *Crosby* remand in order for the trial court to determine whether it would have imposed a materially different sentence in light of the advisory nature of the sentencing guidelines as set forth in *Lockridge*, 498 Mich at 398. This Court held that, at a minimum, the trial court had considered facts that were not found by a jury or admitted by defendant in scoring OV 11 such that defendant was entitled to a *Crosby* remand in order for the trial court to determine whether it would have imposed a materially different sentence in light of the advisory nature of the sentencing guidelines as set forth in *Lockridge*, 498 Mich at 398. *Dickerson*, unpub op at 4. Because defendant's arguments regarding OVs 3 and 4 fall outside the scope of this Court's March 27, 2018 order for remand, and this Court has already granted relief in regard to defendant's assertion concerning the trial court's consideration of facts that were not found by a jury or

admitted by defendant in scoring OVs 3 and 4, we need not address defendant's assertions regarding OVs 3 and 4.

We vacate defendant's sentence and remand to the trial court for resentencing. We do not retain jurisdiction.

/s/ Jonathan Tukul

/s/ David H. Sawyer

/s/ Thomas C. Cameron