

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY AUSTIN EPPLETT,

Defendant-Appellant.

UNPUBLISHED

October 28, 2021

No. 353093

Ottawa Circuit Court

LC No. 19-042918-FH

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

PER CURIAM.

Defendant, Gary Austin Epplett, appeals as on leave granted¹ his sentence following his jury trial conviction of second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 30 to 360 months’ incarceration.² This case arises from defendant’s involvement in taking property from a home in which three victims were either living or kept property. On appeal, defendant argues that because the trial court erred when it assessed Offense Variable (OV) 9 (number of victims), he is entitled to resentencing. We affirm.

I. BACKGROUND

As noted, defendant was involved in entering the victims’ home and taking a number of valuable items from that home. Defendant was convicted by a jury of second-degree home invasion, and that conviction is not challenged on appeal. At defendant’s sentencing, the trial court

¹ *People v Epplett*, 506 Mich 964; 950 NW2d 747 (Mich, 2020).

² Defendant was sentenced on July 29, 2019, and he was given credit for 155 days served. As of August 23, 2021, he had therefore already served his minimum sentence. However, defendant apparently remains incarcerated at this time, and his minimum sentence may affect decisions made by the Department of Corrections. Therefore, it is not obvious that defendant’s minimum sentence is moot even if that minimum sentence has already been served.

assessed 10 points for OV 9, indicating that four or more victims had been placed at risk of property loss, MCL 777.39(1)(c). However, only three victims kept property at the home from which defendant took property. Therefore, it is undisputed that OV 9 should have been assessed zero points,³ MCL 777.39(1)(d). Defendant moved for resentencing. As both parties agreed, the trial court corrected OV 9 and ordered it rescored at zero points. Defendant's original guidelines minimum sentence range had been 29 to 85 months; correcting the scoring error lowered his minimum sentence range to 19 to 57 months. However, the trial court denied defendant's motion for resentencing, determining that it was unnecessary. The trial court made clear that it was well-acquainted with this case and would, if resentencing were to occur, impose an identical 30-month minimum sentence, notwithstanding the recalculation of the defendant's minimum sentencing guidelines range.

II. STANDARD OF REVIEW

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.* "[T]he proper interpretation and application of the statutory sentencing guidelines . . . are both legal questions that this Court reviews de novo." *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). Although trial courts are required to correctly score and must consider the sentencing guidelines when imposing a sentence, the guidelines are only advisory. *People v Lockridge*, 498 Mich 358, 365, 391; 870 NW2d 502 (2015); *People v Steanhouse*, 500 Mich 453, 459-460, 474-475; 902 NW2d 327 (2017).

III. ANALYSIS

In general, "this Court is required to review for reasonableness only those sentences that depart from the range recommended by the statutory guidelines." *People v Anderson*, 322 Mich App 622, 636; 912 NW2d 607 (2018). If a defendant's minimum sentence is within the correctly-scored sentencing guidelines range, the sentence is presumptively proportionate, absent proof of unusual circumstances. *People v Posey*, 334 Mich App 338, 358; ___ NW2d ___ (2020). It is not disputed that defendant's minimum sentence of 30 months was within his original miscalculated guidelines range, and it remains within his correct recalculated guidelines range. Defendant has not seriously urged us to consider any unusual circumstances that would make a 30-month minimum sentence disproportionate. Therefore, defendant's sentence was, and remains, proportionate.

Defendant argues that he is nevertheless entitled to resentencing. We disagree. Defendant speculates that his original sentence was intended to be at the bottom of his original guidelines range, so he is entitled to a new sentence at the bottom of his revised guidelines range. This argument places undue weight on the guidelines. Although the guidelines are a highly relevant

³ Insofar as we can determine, OV 9 was scored at 10 points in defendant's PSIR, and the error simply passed unnoticed by everyone.

consideration, the proper analysis is proportionality. *Steanhouse*, 500 Mich at 474. At the hearing on defendant's motion, the trial court appropriately and unequivocally stated its familiarity with the case, and it explained that a 30-month minimum sentence is what it would have imposed originally even if defendant's sentencing guidelines had been properly scored. A trial court's sentencing decision will be upheld despite any underlying errors in scoring the guidelines if it is clear that the trial court would have imposed the same sentence irrespective of the errors and that sentence is otherwise not improper. See *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003); *People v Latham (On Reconsideration)*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 338891), slip op at pp 2-3.

Because defendant's sentence is proportionate, and the trial court clearly explained that it would have imposed the same sentence had the guidelines been correctly scored at the outset, resentencing is not required. We therefore need not consider defendant's request to order resentencing before a different judge.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Thomas C. Cameron
/s/ Michelle M. Rick