

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON MICHAEL DAVIS,

Defendant-Appellant.

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UNPUBLISHED

February 1, 2005

No. 250869

Wayne Circuit Court

LC No. 02-006164-01

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant Damon Michael Davis appeals by delayed leave granted from his sentences, following the entry of his guilty pleas, of twenty-three months to seven years' imprisonment for his third-degree fleeing and eluding conviction, MCL 750.602a(3), and twenty-three months to five years' imprisonment for his operating under the influence of liquor (OUIL) - third offense conviction, MCL 257.625(8). As the trial court imposed an excessive maximum sentence and made several errors in scoring defendant's prior record variables, we remand for the correction of defendant's judgment of sentence and presentence report. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court erred in imposing a maximum sentence of seven years for his fleeing and eluding conviction because fleeing and eluding is only punishable by a five-year maximum sentence. A sentence that exceeds the statutory limits is invalid, *People v Shipley*, 256 Mich App 367, 378; 662 NW2d 856 (2003), and an invalid sentence is always subject to correction. MCR 6.429(A).

There is no dispute that third-degree fleeing and eluding is punishable by up to five years in prison. MCL 257.602a(3). The court imposed a seven-year maximum sentence under the habitual offender statute, MCL 769.10. However, the prosecutor never filed a notice of sentence enhancement within the time limits permitted by law, MCL 769.13(1), and thus was precluded from seeking sentence enhancement. *People v Bollinger*, 224 Mich App 491, 492-493; 569 NW2d 646 (1997). Moreover, sentencing as an habitual offender, second offense, requires that the defendant "has been convicted of a felony or an attempt to commit a felony" prior to the commission of the instant offense. MCL 769.10(1). While defendant has a lengthy record, his adult convictions are all misdemeanors. He does have a prior juvenile adjudication for the felony offense of unarmed robbery, MCL 750.530, but a juvenile adjudication cannot serve as a predicate offense for sentencing as an habitual offender. *People v McIntire*, 7 Mich App 133,

140; 151 NW2d 187 (1967). Accordingly, we remand to allow the trial court to amend the judgment of sentence to reflect the proper statutory maximum of five years and for the correction of the presentence report.

Defendant next contends that he is entitled to resentencing because the court improperly scored three prior record variables. As defendant failed to raise this issue at sentencing, it has not been preserved for appeal. MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002). However, an unpreserved plain error in the scoring of the sentencing guidelines can be raised and corrected on appeal where “the trial court’s error resulted in a sentence that was not within the appropriate legislative guidelines range.” *People v Kimble*, 252 Mich App 269, 276-277, n 5; 651 NW2d 798 (2002).

The trial court scored PRV 4 (prior low severity juvenile adjudications), MCL 777.54, at ten points; PRV 5 (prior misdemeanor convictions and juvenile adjudications), MCL 777.55, at fifteen points; PRV 6 (relationship to the criminal justice system), MCL 777.56, at ten points; and the remaining variables at zero points. Defendants total PRV score was, therefore, thirty-five and he was placed in PRV level D. Defendant contends that he should only have been scored five points for PRV 4 and ten points for PRV 5 based on the nature of his prior convictions and juvenile adjudications. Defendant also contends that his score was PRV 6 should be reduced to five points, as he is currently on probation for a misdemeanor, not a felony.

Although we do not agree with defendant’s calculation of his PRV score, we find that the trial court did improperly score several variables. Defendant’s prior record included a juvenile adjudication for unarmed robbery, which would be a high severity felony if committed by an adult. Defendant also has a lengthy record of adult convictions and juvenile adjudications for several misdemeanors, including four counts of assault and battery, one count each of assault and aggravated assault, one count of driving without a license or documentation, and four counts of driving with a suspended license. Defendant’s unarmed robbery adjudication should have been scored in PRV 3 (high severity juvenile adjudications), MCL 777.53, at ten points. As defendant has no prior adjudications for low severity offenses, he should have been scored zero points for PRV 4. Due to the high number of misdemeanor convictions and adjudications on defendant’s record, he should have been scored twenty points for PRV 5. We agree with defendant that he should only have been scored five points for PRV 6, as he was only on probation for a misdemeanor conviction.

However, if the errors are corrected, defendant’s total PRV score would remain the same. Accordingly, any error was harmless and defendant is not entitled to resentencing. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003); *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004), lv gtd 688 NW2d 509 (2004). However, defendant is entitled to the correction of these scores in his presentence report on remand.

Remanded to allow for the amendment of the judgment of sentence and presentence report to reflect a five-year maximum sentence for defendant's fleeing and eluding conviction and for the correction of the PRV scores. Jurisdiction is not retained.

/s/ Brian K. Zahra

/s/ Janet T. Neff

/s/ Jessica R. Cooper