S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2007
v	No. 265067 Livingston Circuit Court
JAMES VINCENT HARPER, JR., Defendant-Appellant.	LC No. 05-014998-FH

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530. He was sentenced as a habitual offender, fourth offense, MCL 769.12, to 15 to 40 years' imprisonment. He now appeals as of right. For the reasons set forth in this opinion, we remand this matter to the trial court to conduct a *Ginther*[1] hearing to determine if defendant was denied effective assistance of counsel by his trial counsel's failure to request an independent psychological evaluation or investigate and pursue an insanity defense. If, on remand, the trial court determines that defendant was not denied effective assistance of counsel following a *Ginther* hearing, we instruct the trial court to resentence defendant based on the improper scoring of offense variable (OV) 13.

On November 10, 2004, defendant entered a Walmart department store in Livingston County to return or exchange an air compressor. When the store refused to make the requested transaction, defendant reacted with angry verbal accusations and other aggressive behavior directed at employees. When he was asked to leave the store, he threw his air compressor into a shopping cart containing several, small, unpaid-for items from the store. Defendant walked to the exit doors of the store with the cart. He allegedly ignored the demands of the victim, a Walmart loss prevention guard, to turn over the store merchandise before exiting the store. When two guards stopped defendant just before he went through the exit doors, he violently resisted their attempts to detain him. During the scuffle that ensued, defendant punched the victim and scratched the inside of the victim's mouth with his fingernails.

[1] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

Following his arrest, defendant was found incompetent to stand trial by Arthur R. Marroquin, Ph.D., a certified forensic examiner. Defendant was transferred to the Center for Forensic Psychology for treatment, where he was later deemed restored to competency by his treating physicians. Subsequently, Dr. Ellen Garvey, Ph.D., certified forensic examiner, evaluated defendant for criminal responsibility and found that he was not legally insane at the time of the offense. She also concluded that defendant was "mentally ill in the form of a substantial disorder of mood during the time period encompassing the alleged offense." Despite the fact that defendant was declared incompetent to stand trial immediately following his arrest, however, defense counsel did not request an independent psychological evaluation and did not pursue an insanity defense.

Defendant claims on appeal that his trial counsel was ineffective for failing to investigate and pursue an insanity defense on his behalf. In the alternative, defendant requests that this Court remand the matter to the trial court for a *Ginther* hearing. In support of defendant's request for a *Ginther* hearing, he attaches an affidavit of Michael F. Abramsky, Ph.D., who asserts that given defendant's long history of mental illness, a second opinion should have been sought by the defense "to examine for the issue of insanity." Given defendant's long history of mental illness and the dearth of information regarding defense counsel's decisions not to request an independent psychological evaluation or to investigate and pursue an insanity defense, we remand to the trial court to conduct a *Ginther* hearing to determine whether defendant was denied effective assistance of counsel. We note that in order for defendant to establish a claim of ineffective assistance of counsel, he must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

In order to demonstrate that counsel's performance was deficient, defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. Defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, *supra* at 687. Ineffective assistance of counsel can take the form of failure to investigate and present an insanity defense only if the defense is meritorious and the failure to present it deprived the defendant of a reasonably likely chance of acquittal. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988). Defendant must also demonstrate prejudice to prevail, meaning he must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In light of Abramsky's opinion and defendant's history of mental illness, we are persuaded that remand for the purpose of holding a *Ginther* hearing is warranted in this case to ascertain why defense counsel failed to request an independent psychological examination of defendant and whether such an examination would have supported an insanity defense.

Defendant next claims on appeal that the trial court miscalculated four offense variables at the time of sentencing. We agree that resentencing is required based on the misscoring of OV 13, MCL 777.43, but we find no error in the scoring of OV 3, MCL 777.33; OV 9, MCL 777.39; or OV 19, MCL 777.49.

At the outset, we note that defendant's challenges to the scoring of OV 3, OV 9, and OV 13 were not raised at sentencing by defense counsel and are, therefore, unpreserved for appeal. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); MCL 769.34(10). Where a challenge to the scoring of an offense variable was not preserved by a timely objection, this Court's review is limited to plain error affecting defendant's substantial rights. *Kimble*, *supra* at 312. Defendant must demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A plain error in the calculation of the sentencing guidelines range that increases the length of defendant's sentence constitutes plain error affecting substantial rights. *People v Brown*, 265 Mich App 60, 66-67; 692 NW2d 717 (2005), rev'd on other grounds 474 Mich 876 (2005). A sentencing court has discretion when determining the number of points to be scored for the offense variables. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court must affirm the sentencing court's scoring decision if there is any evidence to support the given score. *Id.*

The trial court properly assessed ten points for OV 3, MCL 777.33. The victim, a Walmart loss prevention guard, testified at trial that defendant put his fingers inside his mouth and scratched the tissue. A second security guard testified at trial that the victim showed him these injuries. Furthermore, the presentence information report, to which defendant raised no objection, contains a victim impact statement from the victim, indicating that he received treatment due to his physical injuries. Therefore, there was record evidence of the victim's injury and treatment. For that reason, there was no error in the trial court's scoring of this offense variable. *Id.*

The trial court also correctly assessed ten points for OV 9, MCL 777.39, based on the number of victims. Defendant contends that, because the jury was instructed that there was only one victim, the trial court could not assess points for two or more victims. However, in assessing points for OV 9, a trial court must count each person who was placed in danger of injury or loss of life as a victim. *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004). Furthermore, in scoring OV 9, trial courts should assess the highest applicable points based on the number of victims. *Id.* at 261; MCL 777.39(1). Here, defendant was charged with unarmed robbery against one Walmart loss prevention guard. However, the record establishes that he was involved in a physical altercation with two guards. Additionally, a store customer assisted the guards in subduing and handcuffing defendant. This evidence supports a score of ten for OV 9, and we affirm that score. *Hornsby*, *supra.*

We find, however, that the trial court committed plain error requiring reversal when it assessed twenty-five points for OV 13, MCL 777.43, based on defendant's past convictions that occurred more than five years before the sentencing offense. A trial court should score twenty-five points for OV 13 if "the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person . . . ." MCL 777.43(1)(b). According to MCL 777.43(2)(a), "all crimes within a five-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." Our Supreme Court recently clarified that the pertinent five-year period for the purpose of scoring OV 13 is one that encompasses the sentencing offense. *People v Francisco*, 474 Mich 82, 86; 711 NW2d 44 (2006).

The trial court in this case did not articulate which crimes it relied on in scoring the OV 13. Presumably, however, the court relied on the rule articulated in *People v McDaniel*, 256

Mich App 165; 662 NW2d 101 (2003), that any five-year period could be used to satisfy MCL 777.43(2)(a). When defendant was sentenced on August 25, 2005, *McDaniel* was controlling, but it has since been overruled by *Francisco*, *supra* at 86.[2] Our review of the record confirms that there was no evidence of two more other crimes committed by defendant within a five-year period encompassing the sentencing offense. Therefore, defendant should have received a score of zero for OV 13. *Francisco*, *supra*. If the minimum sentence under the legislative guidelines is recalculated to account for a zero score for OV 13, defendant's recommended minimum sentence range under the guidelines is 43 to 172 months. The minimum sentence defendant actually received, 180 months, exceeds the range authorized by law. See *Brown*, *supra* at 67. Consequently, even though his challenge to the scoring of this variable was not preserved, defendant has established plain error affecting his substantial rights regarding the scoring of OV 13. *Kimble*, *supra* at 312.

We find no error in the trial court's scoring of OV 19, MCL 777.49. Defendant preserved his argument regarding the scoring of OV 19 by objecting to it at sentencing. MCL 769.34(10); MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002). Defense counsel objected to the assessment of ten points for OV 19 at sentencing because he believed that resisting private security guards did not constitute "interference with the administration of justice." We find that the trial court properly scored ten points for OV 19 pursuant to MCL 777.49(c), which states:

> Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice. Score offense variable 19 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:
>
> (c) The offender otherwise interfered with or attempted to interfere with the administration of justice.

Our Supreme Court recently addressed the type of conduct that constitutes "interference with the administration of justice." *People v Barbee*, 470 Mich 283, 286-288; 681 NW2d 348 (2004).[3] The Court held that "[c]onduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference, with the administration of justice, and OV 19 may be scored for this conduct where applicable." *Id*. at 288. Consequently, it found that the defendant's attempt to evade arrest by providing a false name to police was properly considered in the scoring of OV 19. *Id*. The Court noted that "[l]aw enforcement officers are an integral component in the administration of justice." *Id.* The *Barbee* Court suggested that "interference with the administration of justice" should be given a broad interpretation when assessing OV 19. *Id*. at 287-288.

---

[2] Our Supreme Court has remanded numerous cases for resentencing in light of *Francisco*. See e.g., *People v Olson*, 475 Mich 858; 713 NW2d 773 (2006).

[3] The *Barbee* Court overruled this Court's decision in *People v Deline*, 254 Mich App 595, 597; 658 NW2d 164 (2002), which had limited the definition of "interference with the administration of justice" to conduct amounting to obstruction of justice.

In this case, defendant resisted arrest by store security guards but was subdued by the time police arrived. Keeping in mind that we must affirm the discretionary scoring of the trial court when the record adequately supports the particular score, *Hornsby*, *supra* at 468, we conclude that there was adequate evidence on the record that defendant fought with security guards in order to evade arrest. The fact that defendant resisted arrest from private security officers, rather than from police officers, is not dispositive. He resisted the private security guards in order to avoid his ultimate arrest.

Finally, defendant also argues on appeal that the scoring of OV 3, OV 9, and OV 19 enhanced his sentence based on facts not proved at trial and therefore, the scoring of those offense variables violated his Sixth Amendment right to a jury trial under *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Michigan's sentencing scheme, however, is not affected by the cited cases. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). "As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* at 164. Consequently, we find no plain error affecting defendant's substantial rights with respect to the scoring of OV 3, OV 9, or OV 19.

Finally, defendant argues on appeal that trial counsel was ineffective for failing to object to the scoring of OVs 3, 9 and 13. Because offense variables 3 and 9 were accurately scored, any objection would have been futile, and defense counsel is not ineffective for failing to make a futile or meritless objection. Defense counsel also was not ineffective in failing to object to the scoring of OV 13 because a score of 25 was proper at the time of defendant's sentencing under *McDaniel*. Although our Supreme Court overruled *McDaniel* in *Franscisco*, at the time of defendant's sentence, the trial court was permitted to consider whether there was evidence that defendant committed two more other crimes in any five-year period. Therefore, defense counsel was not ineffective in failing to object to the scoring of OV 13.

We therefore remand this matter to the trial court to conduct a *Ginther* hearing. If the trial court concludes on remand that defendant was not denied effective assistance of counsel, we instruct the trial court to resentence defendant based on the improper scoring of OV 13. In resentencing defendant, the trial court should sentence defendant within the appropriate sentencing guidelines range or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).

Remanded for a *Ginther* hearing and, depending on the outcome of the *Ginther* hearing, resentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Stephen L. Borrello