Order

Michigan Supreme Court
Lansing, Michigan

May 29, 2015

147675

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 147675
COA: 309245
Livingston CC: 10-018981-FH

GORDON BENJAMIN WILDING,
Defendant-Appellant.

_____/

On April 2, 2014, the Court heard oral argument on the application for leave to appeal the July 16, 2013 judgment of the Court of Appeals. By order of March 25, 2015, we directed supplemental briefing. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we VACATE those parts of the Court of Appeals judgment holding that offense variable 8 (MCL 777.38(1)(a)) and offense variable 10 (MCL 777.40(1)(a)) were scored correctly, and that trial counsel was not ineffective for failing to object to the scoring of those variables. We REMAND this case to the Livingston Circuit Court for an evidentiary hearing, pursuant to *People v Ginther*, 390 Mich 436 (1973), as to whether the defendant's trial counsel was ineffective for failing to object to the scoring of OVs 8 and 10. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 29, 2015

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 16, 2013
V	No. 309245 Livingston Circuit Court
GORDON BENJAMIN WILDING, Defendant-Appellant.	LC No. 10-018981-FH

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

This case is before this Court on remand from our Supreme Court. *People v Wilding*, 493 Mich 932; 825 NW2d 577 (2013). Defendant pleaded guilty to one count of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim at least 13 but less than 16 years old). The trial court sentenced defendant to one year in jail and three years' probation under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.* After defendant pleaded guilty to violating the terms of his probation, the trial court revoked defendant's probation and sentenced him to 7 years and one month to 15 years' imprisonment and assessed costs and fees against him totaling $3,333.60. Because defendant is not entitled to resentencing based on the scoring of the offense variables (OVs), he waived appellate review of his challenge to the majority of the costs and fees assessed against him and his remaining challenge to court costs lacks merit, and he was not denied the effective assistance of counsel, we affirm.

I. OV SCORING

Defendant first argues that the trial court erred in scoring OVs 3, 4, 8, 9, and 10. Generally, we review for an abuse of discretion a trial court's scoring of a sentencing variable. *People v Carrigan*, 297 Mich App 513, 514; 824 NW2d 283 (2012). In this case, however, defendant waived appellate review of his claims of error by explicitly stating that the sentencing guidelines range indicated on the Sentencing Information Report was correct. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (the expression of satisfaction with respect to an issue waives appellate review because one may not waive his rights and then seek appellate review based on a claimed deprivation of those rights). In any event, we will briefly address defendant's challenges to OVs 3, 4, 8, 9, and 10. We must uphold scoring decisions for which there is "any evidence" in support." *Carrigan*, 297 Mich App at 514.

Defendant argues that the trial court erred by scoring ten points for OV 3 because the victim did not suffer "[b]odily injury requiring medical treatment," as stated in MCL 777.33(1)(d). "'[B]odily injury' encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011). Here, the record shows that the victim suffered "groin pain" and "pain, swelling, and bruising" of her labia and vagina as well as vaginal discharge. At the hospital, she was administered anti-nausea medication along with azithromycin and metronidazole, antibiotics used in the treatment and prevention of infections. She was also administered the plan B "morning after pill." Therefore, the record supports the scoring of 10 points for OV 3.[1]

Defendant next argues that the trial court erred by scoring ten points for OV 4 for "[s]erious psychological injury requiring professional treatment[.]" MCL 777.34(1)(a). The record amply supports the trial court's score. The victim indicated in her victim impact statement that she was psychologically injured as a result of the incident, that she cannot look at people with blue eyes without having flashbacks, that she frequently has nightmares, that her personality has changed, that she experiences fear and anxiety on a daily basis, that she had to change schools because of shame and embarrassment, that she is scared for her safety, and that she attends psychological counseling. Thus, the record amply supports the trial court's score of ten points for OV 4.

Defendant next challenges the trial court's scoring of 15 points under OV 8 for "victim asportation or captivity." MCL 777.38(1). MCL 777.38(1)(a) directs that 15 points be scored if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." A defendant can accomplish asportation "without the employment of force against the victim." *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). In *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009), this Court affirmed the scoring of 15 points under OV 8 where the defendant took his sexual assault victims to "places where others were less likely to see [the] defendant committing crimes."

The record shows that defendant and the victim left the performing arts center and went to a van in the parking lot. There, the victim was separated from other people attending the concert and from her friend with whom she had spent the entire evening. As such, the van served as a place where defendant could commit the sexual assault without being seen. Although defendant argues that the victim, her friend, defendant, and his companion went to the van a few times during the course of the evening, the victim's friend maintained that she had to search

[1] Although defendant focuses on the victim impact statement on which the victim checked a box indicating that she was not physically injured as a result of the sexual assault, the victim impact statement is not dispositive considering that other record evidence established "[b]odily injury requiring medical treatment." MCL 777.33(1)(d). "Scoring decisions for which there is any evidence in support will be upheld." *Carrigan*, 297 Mich App at 514 (quotation marks and citations omitted).

around the parking lot for the van because it was not in the same location that it had been earlier in the evening. Thus, defendant committed the sexual assault in the van while it was parked at a location unknown to the victim's friend, which placed the victim in a situation of greater danger. The record therefore supports the trial court's scoring of 15 points under OV 8.

We next address defendant's argument that the trial court erroneously scored 15 points under OV 10 on the basis that "[p]redatory conduct was involved." MCL 777.40(1)(a). Pursuant to MCL 777.40(3)(a), "'[p]redatory conduct' means preoffense conduct directed at a victim for the primary purpose of victimization." In determining whether a defendant engaged in predatory conduct, trial courts should consider: (1) whether the defendant engaged in conduct before committing the offense, (2) whether the defendant directed that conduct toward "one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation[,]" and (3) whether the defendant's primary purpose in engaging in the preoffense conduct was victimization. *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008).

In *People v Lockett*, 295 Mich App 165, 172, 184; 814 NW2d 295 (2012), this Court upheld the scoring of 15 points for OV 10 where the defendant picked up an underage victim and her sisters in his van in the middle of the night, provided them with alcohol, and drove to an isolated location where he engaged in sexual intercourse with one of the victim's sisters. The victim testified that, at one point, the defendant attempted to convince her to go to the back of the van with him. *Id*. at 172. The Court reasoned that the victim's young age made her "susceptible to injury, physical restraint, or temptation" and that "it is a reasonable inference that victimization was [the defendant's] primary purpose for engaging in the preoffense conduct." *Id.* The same is true in this case. Defendant provided a 15-year-old girl with alcohol and escorted her away from a public place to a van in a parking lot after she consumed the alcohol. The victim was dizzy and disoriented. Her age and her physical condition rendered her susceptible to injury, physical restraint, and temptation. It may also reasonably be inferred that defendant's primary purpose was victimization, i.e., to engage in sexual intercourse with the victim. Accordingly, the record supports the trial court's scoring of 15 points under OV 10.

Finally, defendant argues that the trial court erroneously scored ten points for OV 9, pertaining to the "number of victims." MCL 777.39. MCL 777.39(1)(c) directs that ten points be scored if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death[.]" In *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009), our Supreme Court stated that "[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." Thus, the Court held that OV 9 "must be scored . . . solely on the basis of [the] defendant's conduct during [the sentencing offense]." *Id*. Here, defendant correctly argues that the only victim placed in danger of physical injury during the sexual assault was the victim herself. Accordingly, the trial court erroneously scored ten points under OV 9.

Nevertheless, resentencing is not required. "'Resentencing is an appropriate remedy where a defendant's sentence is based on an inaccurate calculation of the sentencing guidelines range and, therefore, does not conform to the law.'" *Carrigan*, 297 Mich App at 516, quoting *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008). Subtracting the ten points erroneously scored under OV 9 would reduce defendant's total OV score from 60 to 50.

The reduction would not change defendant's OV level, however, and would not change defendant's sentencing guidelines range of 51 to 85 months. See MCL 777.63. Therefore, because the scoring error would not affect the appropriate sentencing guidelines range, defendant is not entitled to resentencing. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

II. ASSESSMENT OF COSTS AND FEES

Defendant next challenges the trial court's assessment of $1,800 in court costs, $850 in attorney fees, and a 20-percent late fee. As part of defendant's assignment to HYTA status, he agreed to all terms and conditions of his probation in writing, including $850 in attorney fees, $1,200[2] in court costs, and a 20-percent late fee if he failed to pay his costs and fees within 56 days from the date of the judgment. By expressly agreeing to pay those costs and fees, defendant waived appellate review of his challenges to them. See *Carter*, 462 Mich at 215.

With respect to the additional $600 in court costs to which defendant did not expressly agree, MCL 769.1k(1)(b)(*ii*) provides that a trial court may impose "[a]ny cost in addition to the minimum state cost," if a "defendant enters a plea of guilty[.]" In *People v Sanders*, 296 Mich App 710, 715; 825 NW2d 87 (2012), this Court held that "a trial court may impose a generally reasonable amount of court costs under MCL 769.1k(1)(b)(*ii*) without the necessity of separately calculating the costs involved in the particular case . . . ." This Court remanded the case to the trial court, however, for the court to articulate why $1,000 in court costs was a reasonable amount to assess against the defendant. *Id*. at 715-716. On remand, the trial court held a hearing and received evidence regarding the cost of processing a felony case in the Berrien Circuit Court, the trial court in that case. *People v Sanders (After Remand)*, 298 Mich App 105, 107: 825 NW2d 376 (2012). After remand, this Court held that it was "satisfied that the trial court complied with [this Court's] directives on remand and did establish a sufficient factual basis to conclude that $1,000 in court costs under MCL 769.1k(1)(b)(*ii*) is a reasonable amount in a felony case conducted in the Berrien Circuit Court." *Id*. at 108.

Here, defendant argues that $1,800 in court costs is excessive given the limited amount of the trial court's time that this case consumed because defendant entered a guilty plea instead of proceeding to trial. In *Sanders*, however, this Court specifically rejected that argument. This Court stated:

> Defendant's argument in the trial court against the trial court's determination appears primarily to have been a continued objection to the trial court's failure to assess costs on the basis of the actual expenditure of time and money in a particular case. Defendant, in particular, argued for recognition of the distinction between the time invested in resolving a case by a plea and the time invested in conducting a trial, or, for that matter, between the time involved in a

[2] It is unclear from the record why defendant's order of probation lists only $1,200 in court costs rather than the full $1,800 that the trial court ordered on the record when it sentenced defendant to probation.

> one-day trial and that involved in a three-day trial. But, as the trial court observed in its opinion, defendant was repeating an argument that we had already rejected in our earlier opinion: that the costs imposed have to be particularized to the case before the court. As we thought we had made clear in our original opinion, a trial court may impose costs "without the necessity of separately calculating the costs involved in the particular case" and that is true whether a case is quickly resolved by a plea or at the conclusion of a lengthy trial.
>
> Indeed, we would be hesitant to uphold an approach that would take into account whether the case was resolved by a plea or by a trial. If we embraced defendant's argument that costs should be less in a case resolved by a plea that only took "25 minutes of court time" rather than by a trial, there would be a realistic concern that we would be penalizing a defendant for going to trial rather than pleading guilty. That is, a system where greater costs were imposed on a defendant who went to trial rather than plead guilty or nolo contendere would create a financial incentive for a defendant to plead rather than face the possibility of even greater court costs being imposed for exercising his or her constitutional right to a trial. [*Sanders (After Remand)*, 298 Mich App at 107-108 (footnoted citation omitted).]

Thus, this Court has already twice rejected the argument that defendant asserts. Because defendant offers no other argument as to why $1,800 was not a reasonable amount to assess against him, and because he waived appellate review with respect to $1,200 of the $1,800 in court costs, he is entitled to no relief.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that his counsel rendered ineffective assistance for failing to assert in the trial court the issues presented in this appeal. In order to establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for counsel's error, the result of the proceeding would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

Defendant has failed to establish that he was denied the effective assistance of counsel. With respect to the OVs that defendant challenges, only OV 9 was improperly scored. As discussed above, correcting the scoring error would not have changed defendant's sentencing guidelines range. Thus, defense counsel's failure to object to the scoring of OV 9 did not affect the outcome of the proceeding. *Id.* Further, with respect to the costs and fees assessed against defendant, defendant was initially given a dramatically reduced sentence in exchange for agreeing to the terms of probation. This Court will not second-guess defense counsel's strategic decision not to challenge the costs and fees given defendant's placement on HYTA status. See *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Moreover, defendant has failed to articulate a valid reason why $1,800 in court costs was not a reasonable amount to

assess against him. As such, he has failed to establish that there exists a reasonable probability of a different result but for counsel's purported error. *Id*.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Pat M. Donofrio