

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY PERRY,

Defendant-Appellant.

UNPUBLISHED

July 1, 2008

No. 278484

Macomb Circuit Court

LC No. 06-003234-FC

Before: Meter, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for consideration as on leave granted. On appeal, defendant challenges his sentences of nine to 40 years in prison imposed on his plea-based convictions of kidnapping, MCL 750.349, and carjacking, MCL 750.529a. We vacate those sentences, and remand for resentencing on those convictions only. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded nolo contendere to kidnapping and carjacking.¹ The parties entered into a *Cobbs*² agreement whereby defendant would be sentenced at the low end of the recommended sentencing range. The trial court used the warrant authorization as the basis for the plea. Defendant got into the driver's side of a car occupied by the victim and her three young children. Defendant drove off with the car and its occupants. Defendant only stopped after the car was hit by another vehicle. Defendant attempted to run from the scene of the accident, but the police apprehended him. One of the victim's children was transported to the hospital for treatment of minor injuries.

The statutory sentencing guidelines provided for a minimum sentence of 108 to 180 months for kidnapping and carjacking. At sentencing, defendant objected to the scoring of ten

¹ Defendant also pleaded nolo contendere to resisting and obstructing a police officer, MCL 750.81d(1), but has not challenged his sentence for that crime.

² *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

points for Offense Variable (OV) 4, MCL 777.34,³ which is scored for psychological injury to a victim. Ten points are to be scored for OV 4 if a victim suffered serious psychological injury requiring treatment. The fact that a victim might not yet have sought treatment is not conclusive in making the scoring decision. MCL 777.34(2). Defendant argued that there was no record evidence that a victim had suffered serious psychological injury. The trial court rejected the challenge, noting that the agent's description of the offense in the presentence investigation report indicated that a series of events occurred that "would result in some effect on the victim's psychological condition." The guidelines remained at 108 to 180 months. The trial court sentenced defendant to concurrent terms of nine to 40 years (108 to 480 months) in prison for kidnapping and carjacking with credit for 245 days,

In calculating the sentencing guidelines the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review a trial court's scoring of the guidelines to determine whether the court properly exercised its discretion and whether the evidence supports the scoring decisions. The trial court's findings of fact are reviewed for clear error. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004).

Defendant argues on appeal that the trial court abused its discretion by scoring OV 4 at ten points because no record evidence supported that decision.⁴ We agree.

The scoring of ten points for OV 4 requires evidence that the victim suffered serious psychological injury. MCL 777.34(1)(a). The trial court concluded that the nature of the incident—defendant entering the victim's car and driving off with the victim and her young children—was such that it would have "some effect on the victim's psychological condition." Although the victim sought restitution for medical bills related to the injuries sustained by one of her children in the accident, she did not make any statements regarding the possible psychological impact that the incident had on her or her children. Further, the victim did not speak at sentencing, and the sentencing transcript does not indicate whether the victim was present for the hearing. The trial court's assumption that the victim suffered psychological injury was reasonable, but was not supported by the required record evidence. *Hornsby, supra* at 468.

Had OV 4 been scored at zero points, the recommended guidelines range for defendant's convictions of kidnapping and carjacking would have been 81 to 135 months. MCL 777.62.

³ Defendant also raised other objections to the scoring of the guidelines. Those objections are not at issue in this appeal.

⁴ Defendant also argues that the trial court erred by scoring the guidelines in contravention of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant's argument that the trial court imposed sentence in contravention of *Blakely* is without merit. Our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006).

Defendant's minimum terms of 108 months are within this range, but do not conform to the agreement that defendant be sentenced at the low end of the guidelines. Under the circumstances, defendant is entitled to resentencing. However, during resentencing, the trial court may accept evidence concerning the psychological effect of defendant's actions on the victims and, if there is record evidence that any victim suffered a serious psychological injury, the trial court may elect to again score OV 4 at ten points.

Defendant's sentences for kidnapping and carjacking are vacated, and this case is remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter

/s/ Michael R. Smolenski

/s/ Deborah A. Servitto