

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALTON JONES,

Defendant-Appellant.

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UNPUBLISHED

November 24, 2009

No. 281663

Wayne Circuit Court

LC No. 04-007485-FC

Before: Talbot, P.J., and O’Connell and Davis, JJ.

PER CURIAM.

After a jury trial, defendant Alton Jones was convicted of one count of armed robbery, MCL 750.529, one count of felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent sentences of 270 to 480 months’ imprisonment for the armed robbery conviction and to 2 to 10 years’ imprisonment for the felon in possession conviction. He received a consecutive sentence of two years’ imprisonment for the felony-firearm conviction. Defendant was also ordered to pay \$980.00 in attorney fees. He appeals as of right. We affirm defendant’s convictions, vacate his sentence for armed robbery, and remand for resentencing on that conviction. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first claims that prior record variable (PRV) 2 (prior low severity felony convictions) was erroneously scored at 30 points, and PRV 5 (prior misdemeanor convictions) was erroneously scored at five points. Defendant argues that correcting the scores for both PRV 2 and PRV 5 would reduce the guidelines range to 81 to 202 months and render his minimum sentence of 270 months outside the guidelines range.

When scoring the guidelines, “[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision “for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). We review scoring decisions “to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The interpretation and application of the sentencing guidelines present questions of law subject to de novo review on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

Defendant argues that a number of his former convictions should not have been used for scoring PRV 2 and PRV 5 because of the gap between the convictions. The prosecution concedes this to be the case. We agree. Under MCL 777.50(1), for the scoring of PRVs 1 through 5, the trial court cannot use “any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant’s commission of the next offense resulting in a conviction or juvenile adjudication.”<sup>1</sup> In addition, once a ten-year gap is found, any conviction or juvenile adjudication before that gap should not be used in scoring either PRV in question. MCL 777.50(2). If a discharge date for a conviction is unknown, one should be calculated by adding “either the time defendant was sentenced to probation or the length of the minimum incarceration term to the date of the conviction and [using] that date as the discharge date.” MCL 777.50(3).

Here, defendant alleges that a ten-year gap occurred between his November 6, 1977, conviction for assault and battery and the commission of the next offense, which resulted in a conviction for breaking and entering on February 11, 1990. The presentence investigation report (PSIR) does not indicate a discharge date for the 1977 conviction, because defendant received a suspended sentence. Thus, a gap of 12½ years appears to exist. However, even if the discharge date were calculated by adding either the time defendant could have been sentenced to probation or the minimum incarceration term of the offense to the date of the conviction, defendant can show a ten-year gap. Defendant’s 1977 conviction for assault and battery carried a maximum sentence of 90 days in jail or two years’ probation. See 1970 CL 750.81; 1970 CL 750.504; 1970 CL 771.2. Even adding the two together, the latest discharge date possible for the 1977 conviction appears to be February 4, 1980, more than ten years before the February 11, 1990, commission of the next offense. The existence of a ten-year gap in defendant’s criminal history removes the 1977 assault and battery conviction and all prior convictions from consideration when scoring PRV 1 through 5. Therefore, PRV 2 and PRV 5 were misscored. Only defendant’s two offenses committed after 1990 could be used in scoring; they consisted of one high-severity felony and one low-severity felony, with no prior misdemeanors. Therefore, PRV 2, which concerns prior low-severity felonies, should have been scored at five points, MCL 777.52(1)(d), and PRV 5, which concerns prior misdemeanor convictions or prior misdemeanor juvenile adjudications, should have been scored at zero, MCL 777.55(1)(f). Because the rescoring of these PRVs changes the recommended guidelines range, defendant is entitled to resentencing on his armed robbery conviction. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

Next, defendant argues that the trial court erred when it ordered him to pay his court-ordered attorney fees without making a determination on the record regarding his ability to pay court costs and attorney fees, as required by *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), rev’d in *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009). Because defendant did not challenge the trial court’s attorney fee order below, we review this issue for

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<sup>1</sup> “‘Discharge date’ means the date an individual is discharged from the jurisdiction of the court or the department of corrections after being convicted of or adjudicated responsible for a crime or an act that would be a crime if committed by an adult.” MCL 777.50(4)(b).

plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In *Jackson*, our Supreme Court overruled *Dunbar*'s requirement that a trial court perform an assessment of a defendant's ability to pay before sentencing. The *Jackson* Court ruled that a "defendant is not entitled to an ability-to-pay assessment until the imposition of the fee is enforced." *Jackson, supra* at 292. The Court reasoned that the relevant United States Supreme Court decisions "do not require a presentence ability-to-pay assessment[,]" that "*Dunbar*'s ability-to-pay rule frustrates the Legislature's legitimate interest in recouping fees for court-appointed attorneys from defendants who eventually gain the ability to pay those fees[,]" and that *Dunbar* conflicts with MCL 769.1k and MCL 769.1l, which allow the trial court to impose a fee for a court-appointed attorney and operate irrespective of a defendant's ability to pay. *Id.* at 287, 289-290. The Court also held that "there is a substantive difference between the imposition of a fee and the enforcement of that fee" and stated that "trial courts should not entertain defendants' ability-to-pay-based challenge to the imposition of fees until enforcement of that imposition has begun." *Id.* at 290. Here, there is no evidence that there has been an attempt to enforce the order requiring defendant to pay attorney fees. Once such enforcement is undertaken, defendant can make a timely objection based on his claimed inability to pay. *Id.* at 292. At that time, defendant will be entitled to an evaluation by the trial court to determine whether he "is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time*." *Id.* at 293 (emphasis in original).

Defendant's convictions are affirmed, his sentence for armed robbery is vacated, and this case is remanded for resentencing on that conviction. We do not retain jurisdiction.

/s/ Michael J. Talbot  
/s/ Peter D. O'Connell  
/s/ Alton T. Davis