STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2009
v	No. 286047 Livingston Circuit Court
TAD SPENCER DEWULF, Defendant-Appellant.	LC No. 03-013712-FH

Before: Beckering, P.J., and Cavanagh and M. J. Kelly, JJ.

PER CURIAM.

Defendant was convicted by jury of interfering with a police investigation, MCL 750.483a(4)(b), and assault and battery (domestic), MCL 750.812. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 9 to 30 years' imprisonment for the interfering with a police investigation conviction and 93 days in jail for the assault and battery conviction. We affirmed defendant's convictions and sentence for assault, but remanded for resentencing on the conviction for interfering with a police investigation. *People v Dewulf*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2007 (Docket No. 258148). On remand, defendant was again sentenced as an habitual offender, fourth offense, MCL 769.12, to 9 to 30 years' imprisonment for his conviction of interfering with a police investigation. He again appeals as of right. We vacate defendant's sentence and remand for resentencing.

Defendant contends that PRV 2, prior low severity felony convictions, MCL 777.52(1)(a), was misscored because the trial court scored this variable on the basis of offenses that were misdemeanors at the time of commission. We agree. Defendant was convicted of six counts of resisting and obstructing a police officer in 1992 and 1993, at which time this crime was a misdemeanor. See MCL 750.479, amended 2002 PA 270, effective July 15, 2002. Thus, these convictions cannot be considered prior low severity felony convictions for the purposes of scoring PRV 2. Because this error affects defendant's placement in the sentencing grid he is entitled to resentencing. See MCL 769.34(10); *People v Francisco*, 474 Mich 82, 88-89; 711 NW2d 44 (2006).

Defendant's remaining issues, addressed below, warrant no additional relief.

Because the Michigan Supreme Court has recognized that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), is inapplicable to the Michigan indeterminate

sentencing scheme, defendant's argument based on that decision must necessarily fail. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

Defendant next argues that his sentence was cruel and unusual. A sentence that is proportionate does not constitute cruel and/or unusual punishment. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004). Because defendant's sentence was within the minimum sentence range, it was proportional and did not constitute cruel or unusual punishment.

Even though defendant's sentence was proportional, this Court may remand for resentencing if there was an error in the scoring of the sentencing guidelines or inaccurate information was relied upon at sentencing. See MCL 769.34(10); *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003). Defendant contends that the trial court improperly scored OV 3 ten points because there was no evidence that the victim suffered a bodily injury that required medical treatment. MCL 777.33(1)(d) provides that OV 3 may be scored ten points if "[b]odily injury requiring medical treatment occurred to a victim." Because there was evidence in the record that the victim suffered a facial contusion, experienced pain as a result of this injury, sought and received medical treatment, and was observed to be in pain by the investigating police officer, there was sufficient evidence to score OV 3 ten points. Additionally, contrary to defendant's claims, the trial court did not consider any evidence in the new victim impact statement to score this variable because this statement was provided at the second resentencing hearing after the trial court scored OV 3. Further, the evidence that formed the basis for scoring OV 3 did not have to be objective and verifiable because that requirement applies only to sentencing departures. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

Defendant challenges the trial court's decision to score OV 4 ten points because it was scored based on new evidence presented at resentencing and that the victim's claims in the new victim impact statement were unverified. MCL 777.34(1)(a) provides that OV 4 may be scored ten points if "[s]erious psychological injury requiring professional treatment occurred to a victim." When determining the appropriate score for OV 4, the fact that the victim did not seek professional treatment is not conclusive. MCL 777.34(2). Once this Court vacates a defendant's original sentence and remands for resentencing, the defendant's case is placed in a presentence posture. *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007); *People v Ezell*, 446 Mich 869; 522 NW2d 632 (1994). Consequently, at resentencing, "every aspect of the sentence is before the judge de novo." *People v Marlon Williams (After Second Remand)*, 208 Mich App 60, 65; 526 NW2d 614 (1994). A sentencing court may consider the contents of the presentence investigation report when calculating the guidelines. *People v Ratkov (After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993). A victim has a statutory right to submit a victim impact statement for inclusion in the PSIR. MCL 780.764; 780.765; *People v Anterio Williams*, 244 Mich App 249, 253-254; 625 NW2d 132 (2001).

Evidence presented in the victim impact statement indicated the victim was fearful of defendant and that she suffered from anxiety and stress as a result of this incident. The trial court properly considered this new information because the victim was statutorily permitted to present such a statement and the trial court could consider this information during resentencing. See MCL 780.764; MCL 780.765; *Morales v Michigan Parole Bd*, 260 Mich App 29, 45-46; 676 NW2d 221 (2003). The trial court did not abuse its discretion when it scored OV 4.

Defendant alleges he did not have adequate opportunity to review the new victim impact statement, which violated his due process rights. Because defendant failed to object on these grounds at resentencing, he must establish a plain error occurred. See *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). The record indicates defense counsel was presented with a copy of the new victim impact statement and then the resentencing hearing was adjourned until the next day. This adjournment provided defendant an adequate opportunity to review this statement and challenge it at the resentencing hearing the following day. Thus, defendant has failed to demonstrate a plain error requiring reversal occurred. See *id*. Additionally, defendant's claim that defense counsel was ineffective for failing to provide defendant a copy of the victim impact statement is meritless because there is no evidence in the record to support defendant's claim. See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant next argues that OV 19 was improperly scored because the case law in existence when he committed the crime did not permit the scoring of OV 19 for the conduct at issue in this case. Both the Michigan and federal constitution prohibit ex post facto laws. *People v Callon*, 256 Mich App 312, 316-317; 662 NW2d 501 (2003). A judicial decision that increases the authorized penalty for a crime violates the ex post facto prohibition. *People v Doyle*, 451 Mich 93, 100; 545 NW2d 627 (1996). The basic principles protected by the Due Process Clause guarantees preclude retroactive application of a judicial decision if the decision was unexpected, unforeseen, or indefensible by reference to law that had been expressed before the conduct at issue occurred. *Id*. at 101; *People v Meshell*, 265 Mich App 616, 640-641; 696 NW2d 754 (2005).

MCL 777.49 provides that fifteen points may be scored for OV 19 if "[t]he offender used force or the threat of force against another person . . . to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." On December 27, 2002,[1] this Court interpreted MCL 777.49 in *People v Deline*, 254 Mich App 595, 597; 658 NW2d 164 (2002), and reasoned the phrase "interference of justice" contained within the text of MCL 777.49 was equivalent to the phrase "obstruction of justice." This Court's decision in *Deline*, *supra* at 597-598 was overruled by *People v Barbee*, 470 Mich 283, 286-288; 681 NW2d 348 (2004), on June 23, 2004. The Michigan Supreme Court reasoned that "[w]hile 'interfere with or attempted to interfere with the administration of justice' is a broad phrase that *can* include acts that constitute 'obstruction of justice,' it is not limited to *only* those acts that constitute 'obstruction of justice.'" *Id*. at 286. This decision was not unexpected or indefensible. The *Barbee* decision was foreshadowed by a decision of this Court issued on January 3, 2003, that affirmed the scoring of OV 19 for the defendant's conduct of evading police capture. *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003), overruled in part on other grounds *People v McGraw*, 484 Mich 120, 133 n 42; 771 NW2d 655 (2009). Consequently, the *Barbee* decision may be applied retroactively and its application to the present case does not violate the constitutional prohibition against ex post facto law. See *Doyle*, *supra* 99-100; *Meshell*, *supra* at 640-641.

[1] Defendant committed the offense at issue in this case on July 6, 2003.

In addition, the decision in *People v Underwood*, 278 Mich App 334, 339; 750 NW2d 612 (2008), was also not unexpected or indefensible. In *Underwood*, this Court held on March 27, 2008, that the plain language of MCL 777.49 permitted the scoring of OV 19 for perjury when defendant was convicted of perjury. Because *Underwood*, was based on the plain and unambiguous language of the statute in effect at the time defendant committed the crime, the decision was not unexpected, unforeseeable, or indefensible. See *Doyle*, *supra* at 101-104 (When the Court interpreted "a precisely drafted statute, unambiguous on its face" for the first time, the decision does not implicate any due process or ex post facto concerns because the decision interpreting the unambiguous statute was not unforeseeable, unexpected, or constituted a change in the law.). Thus, the application of this decision to the present case did not violate the constitutional prohibition against ex post facto law. See *Doyle*, *supra* at 99-100; *Meshell*, *supra* at 640-641.

Defendant next alleges that *Underwood*, *supra*, violated defendant's double jeopardy rights. "The double jeopardy clauses of the United States and Michigan constitutions protect against governmental abuses for . . . multiple punishments for the same offense." *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). "[T]he Sentencing Guidelines allows a factor that is an element of the crime charged to also be scored when computing an offense variable." *People v Gibson*, 219 Mich App 530, 534; 557 NW2d 141 (1996). Because the score a defendant receives on an offense variable is not a form of punishment, the scoring of an offense variable does not implicate double jeopardy concerns. *Id*. at 535. Thus, defendant's argument is unpersuasive.

Defendant challenges the inclusion of three juvenile offenses in the PSIR on the basis that no evidence was presented to prove the offenses were adjudicated. A defendant is entitled to the use of accurate information during his sentencing, and a trial court must respond to a defendant's allegations that a presentence investigation report contains inaccuracies. *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000), remanded in part on other gds 465 Mich 884 (2001). A presentence investigation report is presumptively accurate. *People v Althoff (On Remand)*, 280 Mich App 524, 541; 760 NW2d 764 (2008). We recognize that defendant presented documentary evidence that purportedly showed that these crimes were not adjudicated. However, this evidence was insufficient to demonstrate the PSIR was incorrect because the violation petitions presented by defendant indicated different offense dates than those on the PSIR. Defendant fails to explain, despite this inconsistency, how the offenses indicated in both documents are the same. The PSIR indicated that defendant was committed to the Department of Social Services and that the PSIR provides an adjudication date for the challenged offenses. Consequently, defendant was not entitled to have the challenged information stricken from his PSIR and the trial court did not abuse its discretion.

Finally, defendant's argument that the resentencing judge was vindictive must fail. A presumption of vindictiveness is raised when the same judge resentences a defendant to a second sentence that is longer than the first. *People v Colon*, 250 Mich App 59, 66-67; 644 NW2d 790 (2002). In the instant case, the presumption is not raised because defendant was not given a sentence that was longer than the first and because the same judge did not resentence defendant. Additionally, while defendant is correct that "[i]t is a violation of due process to punish a person for asserting a protected statutory or constitutional right," defendant has failed to affirmatively establish that the prosecutor's decision to score variables on resentencing that were not scored at

the original sentencing was vindictive. See *People v Ryan*, 451 Mich 30, 35-36; 545 NW2d 612 (1996). Thus, defendant is not entitled to resentencing on these grounds.

Defendant's sentence for interfering with a police officer is vacated and this matter is remanded for resentencing. Jurisdiction is not retained.

/s/ Jane M. Beckering
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly