STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

MICHAEL CARL COOLEY,

Defendant-Appellant.
_____/

Supreme Court No. 142228

Court of Appeals No. 292942

Lower Court No. 08-321794fh

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DEFENDANT-APPELLANT'S BRIEF ON APPEAL

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STATEMENT OF QUESTION PRESENTED

I. WAS OFFENSE VARIABLE 19 MISSCORED 10 POINTS FOR "INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE" BASED ON EVIDENCE THAT DEFENDANT-APPELLANT MICHAEL COOLEY TOSSED AWAY INCRIMINATING EVIDENCE, DENIED GUILT, OR ASKED FOR FORENSIC TESTING?

Court of Appeals answers, "No."

Defendant-Appellant answers, "Yes."

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Defendant-appellant Michael Carl Cooley stood trial in Hillsdale County Circuit Court on a single charge of possession of a controlled substance (cocaine) weighing less than 25 grams.[1] A jury convicted him, and Judge Michael R. Smith, who had presided over the trial, sentenced him, as a fourth felony offender, to serve a prison term of 34 months to 15 years.

Mr. Cooley appealed by right to the Michigan Court of Appeals, and sought resentencing on the ground of a sentencing guidelines-scoring error. He argued that he should not have received a 10-point Offense Variable 19 score for interference or attempted interference with the administration of justice. *See* MCL 777.49(c). The Court of Appeals rejected his argument and affirmed his conviction and sentence.

This Court granted Mr. Cooley's application for leave to appeal.

The trial

Sometime during the early morning hours of October 6, 2008, Jonesville police officer Catherine Fase saw a 1995 Oldsmobile run a red light. 16a.[2] She activated her patrol car's overhead lights and followed the Oldsmobile until it stopped, in a parking lot. 17a-18a. As soon as the Oldsmobile stopped, the car's passenger door opened and a man—Michael Cooley—"jumped out." 19a. Thinking him about to run, Officer Fase jumped out of her own car and ordered him back inside his. 19a. Officer Fase was surprised to see him comply. 19a. Before re-entering the Oldsmobile, Mr. Cooley had put both feet on the ground, but had not moved past his opened door. 19a-20a.

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[1] MCL 333.7403(2)(a)(v).

[2] References to the defendant-appellant's appendix are denoted by page number.

After conducting a LEIN[3] check by radio for warrants, Officer Fase looked on the ground near the passenger door. 21a. She spotted a pack of Marlboro Red cigarettes. 21a, 23a. She picked it up and noticed that the ground underneath it was wet, indicating that it had not been there long. 23a. Inside the cigarette pack's cellophane wrap, wrapped in another piece of cellophane, was a small white chunk of a substance (25a-26a) that testing proved to be cocaine (12a-13a, 34a).

Later, on the passenger seat where Michael Cooley had been sitting, a drug dog found a balled-up piece of aluminum foil that contained a similar white chunk. 38a. This chunk was sent to the lab for testing, too, but for some reason was not tested. 33a. Thus, no one faced charges for possessing the foil-wrapped substance.[4]

Officer Fase searched Mr. Cooley and found three loose cigarettes, Marlboro Reds, in his sweatshirt pocket. 27a-28a. However, Mr. Cooley denied responsibility for the cigarette pack on the ground. 35a. On the way to the jail, he persistently asked Officer Fase to check the cigarette pack for fingerprints. 36a-37a.

Officer Fase did indeed ask for the cigarette pack's cellophane wrap to be tested for fingerprints. A test was done, but no prints were found. 34a.

The only issue at trial was whether Michael Cooley possessed the cigarette-pack cocaine. His defense was that the pack was tossed out the window by one of the Oldsmobile's other two occupants—probably the backseat passenger, Ronald Collum. 40a-41a.

The jury rejected his defense and convicted him.

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[3] Law Enforcement Information Network.

[4] The prosecution's theory was that it was the backseat passenger, Ron Collum, not Michael Cooley, who was responsible for the foil-wrapped substance on the front passenger seat. 39a.

The appeal

Mr. Cooley argued in the Court of Appeals that the trial evidence did not support a 10-point OV 19 score for interference with the administration of justice. He had not fled from the vehicle, but instead complied with Officer Fase's demand to get back inside it.

The prosecution countered that the score was justified by other "interference": (i) Mr. Cooley's denials that the cigarette pack was his, and (ii) his act of discarding the cocaine at issue by dropping or throwing the cigarette pack in which it was hidden to the ground.

The Court of Appeals agreed with the prosecution and upheld the score. The Court compared Mr. Cooley's case to two others: *People v Barbee,* 470 Mich 283 (2004) (score justified where defendant gave false name during traffic stop); *People v Ericksen,* 288 Mich App 192, 204 (2010) (score justified where defendant asked others to dispose of evidence and lie about his whereabouts at time of crime):

> Giving the police a false impression about the ownership of the cocaine is akin to giving the police a false name, as in *Barbee.* Neither would constitute obstruction of justice, but both actions were intended to hamper the investigation of the police. Moreover, defendant engaged in self-serving deception aimed at diverting suspicion onto the other passengers in the car when he threw the cocaine out the car window or dropped it after exiting the car, denied ownership, and requested fingerprint analysis. This deception is analogous to the behavior properly scored in *Ericksen.*

Court of Appeals Opinion, 10a.

Mr. Cooley asks this Court to reverse.

I. DEFENDANT-APPELLANT MICHAEL COOLEY MUST BE RESENTENCED. OFFENSE VARIABLE 19 SHOULD NOT HAVE BEEN SCORED 10 POINTS FOR "INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE" UPON EVIDENCE THAT MR. COOLEY TOSSED AWAY INCRIMINATING EVIDENCE, DENIED GUILT, OR ASKED FOR FORENSIC TESTING.

Introduction and issue preservation

Mr. Cooley preserved objections to the 10-point scores for Offense Variables 9 and 10 by raising them in a motion to remand filed September 21, 2009. *See* MCL 769.34(10); MCR 6.429(C); *People v Kimble,* 470 Mich 305, 311-12 (2004) (raising scoring error in motion to remand preserves issue for appeal).

Standard of review

The proper interpretation and application of the statutory sentencing guidelines are legal questions that Michigan appellate courts review de novo. *People v Smith,* 488 Mich 193, 198 (2010).

Argument

The sentencing judge imposed a 10-point score for Offense Variable 19, Interference with the Administration of Justice. *See* MCL 777.49. A 10-point score is assessed for behavior that "otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c).[5]

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[5] MCL 777.49 provides as follows:

> Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. 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:

The relevant facts were not in dispute. Mr. Cooley was a passenger in a car stopped by a Jonesville police officer for running a red light. When the car stopped, Mr. Cooley started to get out of the vehicle. He opened the passenger door and put his feet on the ground. He had not gotten further than his opened door when the police officer, thinking him about to run, ordered him back into the car. To the officer's surprise, he complied. The officer later found a small chunk of cocaine in a cigarette pack on the ground near the passenger door. Though Mr. Cooley had three loose cigarettes of the same brand in his sweatshirt pocket, he denied responsibility for the cigarette pack and asked the officer to fingerprint it.

Mr. Cooley argues that these facts do not establish "interference with the administration of justice," either actual or attempted.

This Court has twice before construed the language of MCL 777.49. In *People v Barbee,* 470 Mich 283, 288 (2004), the Court ruled that the "administration of justice" includes "more than just the actual judicial process," and also extends to police investigation of crimes. Accordingly, a person stopped on suspicion of drunk driving who falsely identified himself to the police officer making the stop could be, upon sentencing for driving while intoxicated, properly assigned 10

> (a) The offender by his or her conduct threatened the security of a penal institution or court.....25 points
>
> (b) The offender used force or the threat of force against another person or the property of 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.....15 points
>
> (c) The offender otherwise interfered with or attempted to interfere with the administration of justice..... 10 points
>
> (d) The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or threat of force..... 0 points.

points under OV 19. By giving a false name to the officer investigating his criminal behavior he interfered with the police investigation of his crime, and thus with the administration of justice.

More recently, in *Smith*, 488 Mich 193, the Court made clear that OV 19 concerns not just a defendant's behavior during the commission of the offense, but also behavior that occurs afterwards. Following his arrest for manslaughter and other offenses, Smith intimidated a witness to those crimes, an act that was properly scored under OV 19 as interference with the administration of justice. Though guidelines offense variables do not concern post-offense behavior unless "a variable explicitly instructs otherwise," *People v McGraw,* 484 Mich 120, 121 (2009), OV 19 expressly provides for consideration of post-offense conduct. *Smith*, 488 Mich at 202.

Mr. Cooley's case requires the Court to consider whether a person interferes with the administration of justice by discarding or attempting to conceal evidence of guilt before the police have begun to investigate his crime, see Point I(A) of this brief. It also requires the Court to decide whether he interferes with the administration of justice by denying guilt and asking the police for a forensic test of the evidence against him, see Point I(B).

A. A PERSON WHO ABANDONS EVIDENCE OF A CRIME NOT YET UNDER INVESTIGATION HAS NOT "INTERFERED WITH OR ATTEMPTED TO INTERFERE WITH THE ADMINISTRATION OF JUSTICE."

Barbee made clear that "interference with the administration of justice" encompasses, but is broader than, the common-law category[6] of crime known as "obstruction of justice." It also includes behavior (even non-criminal[7] behavior) that amounts to interference with a police

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[6] *See People v Davis,* 408 Mich 255, 288-90 (1980) (Levin, J, concurring).

[7] It should be noted that, though *Barbee* specified that conduct warranting a 10-point OV 19 score does "not have to necessarily rise to the level of a chargeable offense," 470 Mich at 287, that observation was not essential to the decision, and thus obiter dictum: the behavior at issue in *Barbee*, giving a false name to a police officer at a traffic stop, *is* a crime. MCL 257.324(h); *People v Jackson,* 262 Mich App 669, 677 (2004).

investigation of the underlying crime. *Barbee*, 470 Mich at 287-88; *see also Smith*, 488 Mich at 202.

Mr. Cooley's case asks what it means to interfere with a police investigation. He contends that a defendant does not interfere with the investigation by discarding evidence of his crime before the investigation of it has even begun.

As in *Barbee*, at issue is the meaning of the statutory phrase "interfered with or attempted to interfere with the administration of justice." This Court has articulated the starting principles of statutory construction as follows:

> The primary goal of statutory interpretation is to "ascertain the legislative intent that may reasonably be inferred from the statutory language." . . . "The first step in that determination is to review the language of the statute itself." . . . Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.

Krohn v Home-Owners Ins Co, 490 Mich 145, __ (2011) (slip op at 4) (internal citations omitted).

The plain language of the statute does not disclose a beginning point for "the administration of justice." It might be argued that there is no beginning point—that the administration of justice is an ongoing process not specific to any one offense or court case, and a process that includes a police officer's obligation to enforce the law and, to the extent possible, prevent crime. *See, e.g., People v Rivers*, 42 Mich App 561 (1972) (recognizing governmental interest in crime prevention). However, to read the term so broadly would mean that any person who broke the law would by that very act of law-breaking "interfere with the administration of justice," and thus (if he or she were later sentenced for the offense) automatically earn at least a 10-point score for OV 19. That the Legislature did not intend such a broad reading is evidenced by the fact that it specifically provided

for a *0-point* OV 19 score, applicable when "[t]he defendant did *not* threaten the security of a penal institution or court *or interfere with or attempt to interfere with the administration of justice* or the rendering of emergency services by force or threat of force." MCL 777.49(d) (emphasis added). If a defendant interfered with the administration of justice simply by committing the sentencing offense, the 0-point score could never be assessed, and the legislative language providing for a 0-point score would be superfluous. Such an interpretation is to be avoided, because "statutory provisions should not be construed in a manner that renders language within those provisions meaningless." *Robinson v City of Lansing,* 486 Mich 1, 17-18 (2010).

The Legislature, then, evidently meant the term "administration of justice" to be a case-specific one. And, indeed, this Court seems to share that view, characterizing the administration of justice as a "process" that is "invoked" by the "underlying crime." *Smith*, 488 Mich at 202 ("[t]he 'administration of justice' process, including the 'actual judicial process,' is not commenced until an underlying crime has occurred, which invokes the process"). In other words, it is interference with the investigation of the underlying crime, not crime generally, that warrants a 10-point score for OV 19.[8]

Mr. Cooley did not interfere with the investigation of the underlying drug offense by abandoning the drugs before the investigation had even started. It was not until the police officer found the cigarette pack, looked inside it, and saw the suspected cocaine that the investigation of a drug offense (and the administration of justice process for it) began. Abandonment of the drugs thus did not *interfere* with the administration of justice, but instead *triggered* it.

This is not a case in which the defendant flouted an obligation not to tamper with evidence already under investigation. It is not a case, for example, in which the police suspected the defendant of drug possession and lawfully sought to search him, only to have him destroy the evidence before the police could seize it. In such a case, the defendant would have interfered with the search, and thus the investigation, and thus the administration of justice. Here, though, Officer Fase did not suspect Mr. Cooley of drug possession and did not try to search him. Because the drugs were not the object of investigation, Mr. Cooley's act of abandonment was not interference.

To hold otherwise would necessarily imply that Mr. Cooley had an obligation to retain possession of the drugs until the police could catch him with them. Such a conclusion would contradict the legislative intent and, more generally, "'our preference for an accusatorial rather than an inquisitorial system of justice.'" *People v Bender,* 452 Mich 594, 623 (1996) (quoting *Murphy v Waterfront Comm'n of New York Harbor,* 378 US 52, 55; 84 S Ct 1594, 1596–1597; 12 L Ed 2d 678 [1964]). The plain language of the statute does not require a defendant to help the police capture or convict him; instead, it requires him only to refrain from "interfering with or attempting to interfere with" with police efforts to investigate his crime. A defendant who abandons evidence before the police know of his crime in hopes that the crime will go undetected has not "interfered

[8] The Court of Appeals has more than once held that a 10-point score is warranted for efforts by a defendant to intimidate potential witnesses or encourage false testimony even before the underlying crime is reported. *See People v Ericksen,* 288 Mich App 192, 203-04 (2010); *People v Steele,* 283 Mich App 472, 492-93 (2009). Those scores might be warranted for obstruction of justice, even if not for interference with a police investigation. *See, e.g., People v Vallance,* 216 Mich App 415, 418-19 (1996) (recognizing that witness intimidation supports obstruction-of-justice charge).

with" (or attempted to interfere with) the investigatory process related to his crime; he has only failed to assist the police to apprehend him.[9]

Moreover, the Legislature plainly did not intend such routine occurrences as pre-investigation attempts to conceal criminal behavior to count as aggravating factors in its guidelines sentencing scheme. OV 19 is part of a guidelines scheme enacted to "reduce unjustified disparities in sentencing." *People v Babcock*, 469 Mich 247, 267 (2003). The guidelines scheme pursues that goal by starting with a baseline term of punishment for each category of crime, and then using aggravating factors (both those related to the defendant's personal history and those related to the offense itself) to add to that baseline. Each variable attempts to identify a particular aggravating factor. None, by its terms, applies to every offense. To interpret OV 19 as permitting increased punishment for something that nearly all defendants do would deprive the variable of its meaning by making a 10-point score nearly automatic. As Justice Markman has observed,

> [g]iven that it would be extraordinary for a criminal perpetrator not to attempt to hide evidence of his or her crime or to make such crime less detectable, it would seem that OV 19 would almost always be scored under the trial court's interpretation. Perhaps this is consistent with OV 19, but, if that was the Legislature's intention, it would seem that it would have simply increased the base level for theft offenses and other criminal offenses involving contraband.

People v Spangler, 480 Mich 947, 948 (2007) (dissenting from denial of leave to appeal).

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[9] In Mr. Cooley's case, ironically, the crime likely would have gone undetected had the drugs *not* been abandoned. An occupant of a car stopped for a traffic violation would not normally be subjected to a search. *See Knowles v Iowa,* 525 US 113, 117-18, 119 S Ct 484, 142 L Ed 2d 492 (1998). Only if the officer reasonably suspected that he was armed and dangerous could the officer have frisked him for weapons, *Arizona v Johnson,* 555 US 323, __, 129 S Ct 781, 784, 172 L Ed 2d 694 (2009), and only if that frisk's "plain feel" made the cocaine's identity

B. A SUSPECT DOES NOT INTERFERE WITH THE ADMINISTRATION OF JUSTICE BY DENYING GUILT OR ASKING TO TEST THE EVIDENCE AGAINST HIM.

Mr. Cooley's denial that the drugs belonged to him and his requests to fingerprint the cigarette pack came after the cigarette pack was discovered and the drug-possession investigation had begun. Nevertheless, those acts cannot constitute interference (or attempted) interference with the administration of justice. To read the statute as permitting increased punishment to persons who proclaim their innocence, seek to test the evidence against them, and insist upon a judicial determination of guilt or innocence would offend those persons' state and federal constitutional right to trial and to put the prosecution's evidence to the test through confrontation and compulsory process. US Const, Am VI; Const 1963, art 1, § 20. As this Court has recognized,

> [a] sentencing court, cannot, in whole, or in part, base its sentence on a defendant's refusal to admit guilt. *People v Wesley,* 428 Mich 708, 711 (1987); *People v Yennior,* 399 Mich 892 (1977). Nor can a defendant be punished for exercising his right to trial. *United States v Jackson,* 390 US 570; 88 S Ct 1209; 20 L Ed 2d 138 (1968); *People v Courts,* 401 Mich 57 (1977).

People v Jackson, 474 Mich 996 (2006). Moreover, "[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Gate Pharmaceuticals,* 468 Mich 1, 6 (2003). OV 19 cannot be interpreted as providing for increased punishment to defendants whose

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"immediately apparent" could the officer have then seized it, *Minnesota v Dickerson,* 508 US 366, 375-76, 113 S Ct 2130, 124 L Ed 2d 334 (1993).

"interference" with the administration of justice consists of holding the prosecution to its constitutional obligation to prove guilt beyond a reasonable doubt.[10]

* * * *

OV 19 should have been scored 0 points.

The proper remedy is resentencing. Changing the score for OV 19 from 10 to 0 points reduces the total OV score from 25 to 15 points, the OV level from III to II, and the guidelines range from 2-34 months to 0-34 months. *See* MCL 777.68. Correction of the guidelines range would thus entitle Mr. Cooley to resentencing. *People v Francisco,* 474 Mich 82, 89, 91-92 (2006) (defendant entitled to resentencing where scoring error changed applicable guidelines range, even where sentence imposed was within corrected range).

[10] The brief of amicus curiae Prosecuting Attorneys Association of Michigan (PAAM) contends that Mr. Cooley's request for fingerprints constitutes an interference with the administration of justice because it "created more . . . expense . . . for law enforcement personnel." PAAM brief at 5. That argument ignores (i) that nothing in the record shows that the police tested for fingerprints *because of* Mr. Cooley's request (and there is no basis for inferring they did when fingerprint analysis in a case such as this is a routine investigative procedure); and (ii) the state would have had to bear the expense of testing in any event because Mr. Cooley, who is indigent, had the right to test the evidence on his own if the police refused to do so. *See Ake v Oklahoma,* 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53 (1985); MCL 775.15; *People v Tanner,* 469 Mich 437 (2003).

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court reverse the decision of the Court of Appeals and grant resentencing.

Respectfully submitted,

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