

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Judges Donald S. Owens, William C. Whitbeck, and Karen Fort Hood.

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 142228
Plaintiff-Appellee, Court of Appeals No. 292942
v Hillsdale Circuit Court
No. 08-321794-FH
MICHAEL CARL COOLEY,
Defendant-Appellant.

**BRIEF ON APPEAL OF APPELLEE PEOPLE OF THE STATE OF
MICHIGAN**

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Appellant has declined to provide a jurisdictional statement as required by MCR 7.212(C)(4) and MCR 7.306(A). Jurisdiction for the Supreme Court to hear this appeal is conferred by MCL 770.3(6) and MCR 7.301(2).

COUNTER-STATEMENT OF QUESTION PRESENTED

1. Offense variable 19 is to be scored at 10 points when the offender has interfered or attempted to interfere with the administration of justice—which includes police investigation of crime. Here, Defendant discarded his cocaine and lied to a police officer in order to make it more difficult for the officer to determine that he had possessed the cocaine. Does this interference support the trial court's scoring of 10 points for OV 19?

Appellant's answer: No.

Appellee's answer: Yes.

Trial court's answer: Yes.

Court of Appeals' answer: Yes.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

Sec 49. 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:

* * *

(c) The offender otherwise interfered with or attempted to interfere with the administration of justice 10 points

MCL 777.49

INTRODUCTION

Defendant Michael Carl Cooley was content to possess a rock of cocaine inside a cigarette pack until police stopped the car he was driving. At that point, he decided it was prudent to abandon his cocaine by tossing it out the car window. When the police found the cocaine, Defendant denied it was his, before and after his arrest. At trial, the only issue was whether he possessed the cocaine, or whether another occupant of the car did. The jury found that he did, and convicted him of possession of a controlled substance. Defendant does not challenge his conviction or the facts supporting it. His only argument before this Court is that the trial court misscored offense variable 19 (OV 19), and that he is entitled to resentencing. The argument is without merit.

The sentencing guidelines direct a court to score 10 points under OV 19 when “[t]he offender . . . interfered with or attempted to interfere with the administration of justice,” and when the offender’s conduct does not merit a higher score under OV 19. MCL 777.49 . The administration of justice includes police work directed at the detection and investigation of crime. When Defendant threw his cocaine out the window, he did so in an attempt to make it more difficult for the police to determine who had possessed the cocaine. When he lied to the police officer about the cocaine, he did so with the same goal in mind. And when he demanded that the officer test the cigarette pack for fingerprints, implied in his demand was a false claim that he had not possessed the cocaine. Because Defendant’s conduct demonstrated an attempt to interfere with the police investigation, the plain language of OV 19 requires a score of 10 points.

COUNTER-STATEMENT OF FACTS

The relevant facts are substantially undisputed. In the early morning of October 6, 2008, Jonesville Police Officer Catherine Fase saw a car drive through a red light without stopping (15a-16a). Fase stopped the car (15a). As soon as the car came to a stop, the front passenger door opened, and Defendant Michael Carl Cooley jumped out (19a). Fase jumped out of her car and ordered Defendant back into his car, and Defendant complied (19a). Fase collected names from the occupants of the car, and went back to her car to check the names against the Law Enforcement Information Network (LEIN) to determine whether any of them were on parole or had warrants for their arrest (21a).

While Ofc. Fase was in her car, she noticed a cigarette pack near the passenger side of the stopped car, and trained her spotlight on it (21a). When Fase was finished with the LEIN checks, she went to the cigarette pack and picked it up (23a). She first noticed that there was a substance that appeared to be narcotics wrapped in aluminum foil inside the cellophane wrapping covering the cigarette pack (23a). She also noticed that the pack was only slightly wet, although it had been raining, which led her to believe that the pack had not been on the ground long (23a-24a).

Officer Fase then ordered Defendant back out of the car and searched him, finding three cigarettes and a lighter (27a). Defendant denied that the pack on the ground was his (35a). After the search, Defendant asked Fase if he could smoke a cigarette, and Fase said that he could (27a). Fase saw that the cigarette Defendant was smoking matched the cigarettes in the pack she found (28a). At this point,

Fase took Defendant into custody (28a). Defendant continued to claim his innocence, challenging Fase to test the cigarette pack for fingerprints (36a-37a).

Ryan Johnston, the driver of the car, testified that that evening, as they were driving, Defendant directed Johnston to a particular house, said, "All right, this is it," and got out of the car (1b). Defendant then "met some guy and they walked around the back of the house and came back and said, "All right, we're done, let's go" (1b). Johnston then saw Defendant holding a small item wrapped in foil (1b-2b). Defendant split the foil-wrapped item in two and gave one part to Ron Collum, the backseat passenger (3b). Johnston also testified that, after the car was stopped, Defendant told Johnston that he had thrown the cigarette pack out the car window, and that he hoped Fase wouldn't find it (5b-6b).

PROCEEDINGS BELOW

Defendant was convicted of possession of cocaine (8a). The sentencing information report reflected a total prior record variable (PRV) score of 30, making Defendant a PRV level D. Offense variable 19 was scored at 10 points, contributing to a total OV score of 25, making Defendant an OV level III. Defendant's minimum sentencing guideline range was therefore 2 to 34 months. At sentencing, Defendant did not object to any of the scoring (7b). Defendant requested a sentence within the guidelines (7b). The People made no request (9b). Defendant was sentenced within the guidelines to 34 to 180 months in prison (12b).

Defendant then filed a claim of appeal in the Michigan Court of Appeals, raising only one issue—the scoring of OV 19. Defendant then filed a motion to remand raising the same issue. The court denied the motion to remand, and later affirmed Defendant's sentence in an unpublished opinion, holding that

[g]iving the police a false impression about the ownership of the cocaine is akin to giving the police a false name, as in [*People v*] *Barbee*[, 470 Mich 283; 681 NW2d 348 (2004)]. 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 [*People v*] *Ericksen*[, 288 Mich App 192; 793 NW2d 120 (2010), lv den 488 Mich 1045]. Given these facts, the trial court did not err in assessing ten points for OV 19. [*People v Cooley*, unpublished opinion of the Court of Appeals, docket no. 292942 (October 19, 2010), slip op. at 2 (10a)].

Defendant then applied to this Court for leave to appeal, which this Court granted, directing the parties to “include among the issues to be briefed whether

offense variable (OV) 19 was properly scored at 10 points under MCL 777.49(c), because the defendant 'interfered with or attempted to interfere with the administration of justice,' based on his conduct in throwing away evidence and denying guilt" (*People v Cooley*, order of the Supreme Court, docket no. 142228 (April 8, 2011) (13b)).

ARGUMENT

I. Offense variable 19 is to be scored at 10 points when the offender has interfered or attempted to interfere with the administration of justice—which includes police investigation of crime. Here, Defendant discarded his cocaine and lied to a police officer in order to make it more difficult for the officer to determine that he had possessed the cocaine. This interference supports the trial court’s scoring of 10 points for OV 19.

A. Standard of Review

Defendant appears not to be challenging the factual findings that he threw his cocaine out of the car and lied to the police. He appears only to challenge the determination that these actions constitute interference with the administration of justice within the meaning of OV 19. This is a legal question that this Court reviews de novo. *People v Smith*, 488 Mich 193, 198; 793 NW2d 666 (2010).

B. Analysis

“Law enforcement officers are an integral component in the administration of justice.” *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). When Defendant abandoned his cocaine by throwing it out the car window, he did so in order to make it more difficult for Ofc. Fase to know whose cocaine it was, and ultimately to escape punishment. When he lied to Fase, telling her that it was not his cocaine, he was also trying to escape punishment by frustrating her investigation. And when he demanded that Fase test the cigarette pack for fingerprints, this was a bluff aimed at convincing Fase that it was not his cocaine. These actions by Defendant were all attempts to frustrate Fase’s investigation of the crime of cocaine possession. That investigation is part of the administration of

justice. Defendant attempted, therefore, to interfere with the administration of justice, and under the plain terms of OV 19, a score of 10 was appropriate.

Defendant therefore must explain why the plain language of the statute should not be applied to his behavior, but all of his arguments are meritless.

1. Defendant's discarding of his cocaine was an attempt to hinder the police investigation, and properly supported a score under OV 19.

Defendant first addresses the act of throwing his cocaine out the window when stopped by the police. He presents several meritless arguments why this attempted interference does not support a score under OV 19.

a. An offender can act to interfere with a police investigation before the investigation begins.

Defendant argues that his act of throwing the cocaine out the window of the car cannot constitute interference with the administration of justice, because the investigation of the cocaine had not begun at the time he threw it. But there is no reason why a person cannot act now to interfere with something that will begin in the future—especially, as here, the very near future. This is not a case in which a defendant discarded evidence of his crime simply because he wished to be rid of it, with no knowledge that an investigation was pending, and no intent to foil such an investigation were one to begin. Here, Defendant was in a car that had been stopped by the police, he was carrying a rock of cocaine, and he decided at that time to abandon his drugs, in the hopes that it would interfere with the imminent investigation.

Our Court of Appeals has upheld scoring of OV 19 in cases where the interference precedes the initiation of the investigation. In *People v Steele*, the defendant, convicted of fourteen counts of first- and second-degree criminal sexual conduct (CSC), was scored under OV 19 for telling his young victims “not to disclose his acts or he would go to jail.” 283 Mich App 472, 492-493; 769 NW2d 256 (2009), lv den 485 Mich 996. Citing *Barbee*, the court noted that “[t]he phrase ‘interfered with or attempted to interfere with the administration of justice’ is broad.” *Id.* at 492. The court then rejected the defendant’s argument that “he was merely stating a fact to his victims,” held that the defendant’s “admonitions to his victims were a clear and obvious attempt by him to diminish his victims’ willingness and ability to obtain justice,” and affirmed the score of 10 points. *Id.* at 493. The reasoning is analogous to the instant case: there may be a circumstance in which it is reasonable to make a factual statement like that made by the *Steele* defendant, or in which it is reasonable to dispose of contraband, like the instant Defendant. But when such actions are done in a plain attempt to interfere with police work—even if done before the police work begins—they merit a score under OV 19.

Similarly, in *People v Ericksen*, the defendant “asked one of his companions to dispose of the knife he used to stab the victim and asked others to lie about his whereabouts during the night of the crime.” 288 Mich App 192, 204; 793 NW2d 120 (2010), lv den 488 Mich 1045. The Court of Appeals affirmed the scoring of 10 points under OV 19 for this conduct that occurred in anticipation of a police investigation. *Id.* Certainly giving someone a knife is not always an act that

interferes with justice, but when done with the intent to evade justice, it supports scoring under OV 19. Again, the Court of Appeals was able to look at the intentions behind the actions, finding that, “[u]nmistakably, defendant’s actions were attempts to interfere with the administration of justice as contemplated by the plain language of MCL 777.49(c).” *Id.* The fact that the police investigation had not yet begun did not bar scoring under OV 19. See also *People v McDonald*, __ Mich App __; __ NW2d __; 2011 WL 2694430 (July 12, 2011), lv app pending (affirming OV 19 score where defendant threatened victim during kidnapping before police investigation began).

Neither the text nor any reasonable interpretation of OV 19 supports Defendant’s argument that it only encompasses acts a defendant commits after an investigation has begun. Indeed, language from this Court’s opinion in *People v Smith* (quoted by defendant in his brief), demonstrates the lack of merit of Defendant’s position: “The ‘administration of justice’ process, including the ‘actual judicial process,’ is not commenced until *an underlying crime has occurred*, which invokes the process.” 488 Mich 193, 202; 793 NW2d 666 (2010) (emphasis added). Whenever the investigation of Defendant’s crime began, the crime itself actually occurred earlier—apparently some time earlier that evening—when Defendant took the cocaine into his possession. Under *Smith*, that “invoke[d] the process,” and any attempts by Defendant to thwart an investigation—current or future—support a score of 10 points under OV 19.

b. Affirmance of defendant's score will not impose any "obligations" on the holders of illegal drugs.

Defendant also argues that, to hold that his abandonment of the cocaine constituted an interference with the administration of justice would be to hold that Defendant "had an obligation to retain possession of the drugs until the police could catch him with them" (Defendant's brief on appeal, p 9). Offense variable 19 does not seek to impose obligations on offenders. The obligations owed by those who knowingly possess cocaine are not at issue in this case. Offense variable 19 is an attempt by the Legislature to indicate that those who choose to interfere with police investigations may be deserving of greater punishment than those who do not. In fact, adoption of Defendant's interpretation would require courts to score offenders who cooperate with the police in the same way as those who actively interfere with police work—in spite of the Legislature's determination that those who interfere are more deserving of punishment.

c. Interference with police work supports a score under OV 19, whether that interference was ordinary or unusual.

Defendant is also concerned that "[t]o 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" (Defendant's brief on appeal, p 10). Defendant appears to be advocating a two-step test for scoring 10 points under OV 19: First, to determine whether the offender interfered or attempted to interfere with the administration of justice, and second, if the first question is answered in the affirmative, to determine whether the offender

did so in a way that “nearly all defendants do,” or whether there was something unusual about this interference.

If the Legislature had intended for only unusual interference to merit a score under OV 19, it could have said so. What the Legislature did intend, in part, was to “reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences.” 1998 PA 317, repealed 2002 PA 31, eff. April 1, 2002. To that end, the Legislature adopted a distinction between the offender who interferes with the police and the offender who does not. The Legislature was not required to estimate how many offenders would fall into the former category and how many into the latter.

Justice MARKMAN has also expressed doubts that scoring under OV 19 is appropriate when an offender has behaved in a typical manner. *People v Spangler*, 480 Mich 947, 948; 741 NW2d 25 (2007) (dissenting from this Court’s denial of leave to appeal). In his dissent, Justice MARKMAN notes that such scoring may be “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.” *Id.* But adopting such a course would deprive the Legislature of the ability to differentiate with those who interfere and those who cooperate—even if that latter group is very small. To simply increase the base level would require “ordinary interferers” to be scored identically with cooperators.

2. Lying to the police constitutes interference under the meaning of OV 19, and supports a score of 10 points.

Defendant next argues that his conduct in lying to the police does not support a score of 10 points. He presents no authority to directly support the proposition. He points out correctly that this Court has recognized that “[a] sentencing court cannot, in whole, or in part, base its sentence on a defendant’s refusal to admit guilt.” *People v Jackson*, 474 Mich 996, 996; 707 NW2d 597 (2006). But Defendant here did more than refuse to admit guilt. He affirmatively waived his right to silently maintain his innocence, and chose to falsely tell Ofc. Fase that the cocaine was not his.

Defendant also opposes an interpretation of OV 19 that would “provid[e] for increased punishment to defendants whose ‘interference’ with the administration of justice consists of holding the prosecution to its constitutional obligation to prove guilt beyond a reasonable doubt” (Defendant’s brief on appeal, pp 11-12). Again, this does not describe Defendant. A criminal defendant may plead not guilty, refuse to speak, and refuse to testify, all without incurring a score under OV 19. Allowing Defendant’s score to stand will not require that other offenders who, unlike Defendant, remain silent or merely refuse to admit guilt be similarly scored.

Defendant would not have been scored under OV 19 for remaining silent, or for pleading not guilty, or for putting the prosecution to its proofs. Because he chose to speak, however, there is nothing prohibiting the sentencing court from taking his statements into consideration. Because one of those statements was a lie to the police officer in an attempt to hinder her investigation, OV 19 was properly scored.

In this respect, Defendant's case does not present a meaningful distinction from the defendant this Court encountered in *People v Barbee*. In that case, the defendant gave a false name to the police officer who stopped him suspecting he was driving drunk. This Court unanimously held that "[i]t is certainly interference with the administration of justice to provide law enforcement officers with a false name," and that such a lie supported a score under OV 19. *Barbee*, 470 Mich at 288. More significantly, however, this Court made it clear that its holding was not limited to giving a false name to a police officer. This Court also ruled that, "to the extent that it is inconsistent with this opinion, an order will be issued disapproving the reasoning of [*People v Deline*], 254 Mich App 595; 658 NW2d 164 (2003)]." *Barbee*, 470 Mich at 288. Shortly thereafter, this Court issued such an order. *People v Deline*, 470 Mich 895, 895; 683 NW2d 669 (2004).

In *Deline*, the defendant, when stopped for speeding, switched seats with his apparently more sober passenger, in an attempt to mislead the police into thinking that the passenger had been driving. 254 Mich App at 596-597. The Court of Appeals held that it was error to score 10 points under OV 19 for this behavior. As noted, in *Barbee* this Court explicitly rejected the Court of Appeals' reasoning in *Deline*, and later vacated the part of *Deline* that was inconsistent with *Barbee*.¹ Thus, *Barbee* does not only stand for the proposition that a score of 10 is proper under OV 19 for giving a false name to a police officer, but also that any lie

¹ This Court did not vacate the entire judgment, because the Court of Appeals in *Deline*, despite holding that it was error to score the defendant under OV 19, affirmed the sentence, holding that the error was harmless. As such, this Court's disposition of the appeal did not affect the defendant's sentence.

(including conduct intended to deceive) to a police officer in an attempt to divert suspicion will support such a score.

Defendant only attempts to distinguish *Barbee* with respect to the conduct of throwing the cocaine out the window, and does not cite or attempt to distinguish *Barbee* with respect to the lie to Ofc. Fase. The case is indistinguishable, especially in light of this Court's application of the *Barbee* holding to the facts of *Deline*. This Court should reaffirm the holding of *Barbee* and hold that Defendant's lie supported a score of 10 points under OV 19.

3. Demanding to have the cigarette pack tested for fingerprints was a bluff aimed at deceiving the police, and also supports a score under OV 19.

Defendant argues that his "requests" to test the cigarette pack cannot support a score under OV 19, because this would "permit[] increased punishment to persons who . . . seek to test the evidence against them" (Defendant's brief on appeal, p 11). This ignores the intent behind Defendant's demands. When Defendant demanded that Ofc. Fase test the pack for fingerprints, he was not merely seeking to have the evidence tested. The implication was that if the pack were tested, Defendant's fingerprints would not be on it. Although phrased as a demand, Defendant was actually making a statement: That he had not possessed the cigarette pack. That statement was false, and it was intended to mislead Ofc. Fase and hamper her investigation. Because his demand was intended to interfere with police investigation, it properly supported a score of 10 points under OV 19.

Defendant's argument appears to be that to punish a defendant for seeking to have evidence tested would violate his right to a trial under the United States and Michigan Constitutions. This argument implies that those constitutions confer a right on criminal defendants to demand forensic testing of evidence. They do not. *Arizona v Youngblood*, 488 US 51, 58-59; 109 S Ct 333; 102 L Ed 2d 281 (1988) ("the defendant is free to argue to the finder of fact that a . . . test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests"); *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003) ("police are not required to test evidence to accord a defendant due process").

But even assuming for the sake of argument that it would offend due process to base an increased punishment on a demand to have evidence tested (a proposition Defendant cites no authority to support), such due process concerns are not at issue in this case. Upholding Defendant's score will not mean that every offender who seeks to have evidence tested will receive increased punishment for having done so. The sentencing court can distinguish between a legitimate request to have evidence tested, and a bluff aimed at interfering with a police investigation. The former, whether constitutionally protected or not, will not support a score under OV 19, simply because it is not an attempt to interfere with the administration of justice. The latter is such an attempt, and will support a score of 10 points under OV 19.

4. Defendant overstates the implications of affirming his score, by raising due process implications that do not apply to him.

Throughout his arguments, Defendant suggests that for this Court to uphold his score under OV 19 would have various negative implications. He states that to affirm his score based on his discarding his cocaine when stopped by the police would imply that Defendant “had an obligation to retain possession of the drugs until the police could catch him with them,” and by implication, that affirmance by this Court would impose a similar obligation on possessors of controlled substances in general. He also suggests that to affirm his score based on his lies and bluffs to Ofc. Fase would imply that a court can increase punishment based on refusal to admit guilt and putting the prosecution to its proofs.

None of this is correct. This case does not involve a possibility of an obligation to retain possession of illegal drugs, a possibility of future defendants being punished for remaining silent, or a possibility of future defendants being punished merely for seeking to have evidence tested; rather, affirmance will confirm the reasonable conclusions that defendants similar to the instant Defendant—that is, those defendants who choose to dispose of their drugs in an attempt to mislead the police, those who choose not to remain silent but instead lie to the police, and those who use demands for evidence testing as bluffs to deceive the police—will be sentenced differently than those who do not, all of which is consistent with the plain language of the Legislature’s command.

5. If any of Defendant's attempts at interference support a score under OV 19, his sentence must be affirmed.

Furthermore, this Court upholds scoring decisions "if there is evidence to support the score." *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993); *Steele*, 283 Mich App at 490. Defendant must therefore prevail in all of his arguments in order to prevail overall. If this Court holds that any one of Defendant's deceptive acts (the discarding of the cigarette pack, the lie about the possession, or the demands for testing) constitutes interference with the administration of justice, then the score under OV 19 was proper and must be affirmed.²

² Even if this Court holds that the OV 19 score was unsupported, it may still affirm, finding any error harmless. Although *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006), may be read to suggest that a defendant is entitled to resentencing whenever a scoring error affects the sentencing guidelines range at all, the People submit that *Francisco* should not be extended to these facts. Defendant's guidelines range is 2 to 34 months. He was sentenced to a minimum of 34 months in prison, evincing the sentencing court's intent to sentence him exactly at the top of the guidelines range. If Defendant's argument with respect to OV 19 prevails, his guidelines sentence will be 0 to 34 months. There is no reason to believe that the sentencing court will resentence Defendant to anything other than a minimum of 34 months. These facts are not comparable to the facts in *Francisco*. In that case, the defendant was sentenced near, but not at, the bottom of the guidelines range. *Francisco*, 474 Mich at 91. After the guidelines were recalculated, the defendant's sentence was still within the guidelines range, but closer to the middle. *Id.* at 91. Here, it is clear from the sentence that the trial court only considered the top of the guidelines range in sentencing. Because the top of the guidelines range will be 34 months in any event, a scoring error, if one exists, may be disregarded as harmless. See *Deline*, 254 Mich App at 598, vacated in part on other grounds 470 Mich 895.

CONCLUSION AND RELIEF REQUESTED

As soon as the car in which he was riding was stopped, Defendant acted to deceive the police about his possession of cocaine. His act of discarding the cocaine was not mere littering, but was an attempt to make it difficult for the police to determine that he had possessed the cocaine. His denial of possession was not merely a refusal to admit guilt, but an affirmative and false statement intended to deceive. And his demands for fingerprint testing were not merely a request to have evidence tested, but a bluff designed to lead the police officer to believe that the cocaine was not his.

The People respectfully ask this Honorable Court to hold that all three of these acts by Defendant constituted interference with the administration of justice under the meaning of OV 19, and to affirm Defendant's sentence. Alternatively, the People respectfully ask this Honorable Court to affirm if it holds that any of the acts constituted interference with the administration with justice, or, if it finds that there was scoring error, to hold that the error was harmless.

Respectfully submitted,

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