

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, SCt#: 144327
CofA#: 306106
Plaintiff-Appellee, Case #: 2010-233501-FC

v

DONALD MICHAEL HARDY,
Defendant-Appellant.

DEFENDANT-APPELLANT'S
BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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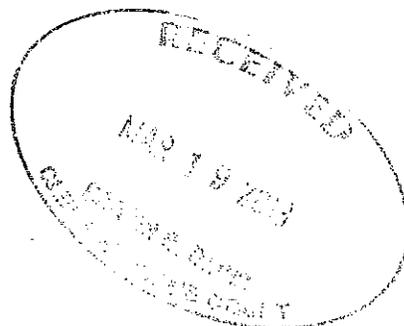


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STATEMENT OF JURISDICTION

The Michigan Court of Appeals has jurisdiction pursuant to MCR 7.301 concerning the granting of leave to appeal of a plea-based criminal conviction. Defendant-Appellant Donald Michael Hardy [hereinafter “Defendant”] pled guilty on January 19, 2011 within the Oakland County Circuit Court to carjacking. (5a) On March 3, 2011, Defendant was sentenced to imprisonment in the custody of the Michigan Department of Corrections. (Id.)

Defendant filed an application for leave to appeal in the Court of Appeals on September 12, 2011. The Court of Appeals denied leave on November 18, 2011. (7a)

On December 27, 2011, Defendant filed an application for leave to appeal within the Michigan Supreme Court, which was granted on June 8, 2012. (8a) Within the Order granting leave, the Court ordered the Oakland County Circuit Court to appoint appellate counsel if Defendant was indigent. (Id.)

On January 9, 2013, appellate counsel was appointed for Defendant. (9a)

STATEMENT OF QUESTION PRESENTED

I. IS DEFENDANT IS ENTITLED TO RESENTENCING WHEN THE STATUTORY SENTENCING GUIDELINES WERE MISSCORED AS TO OFFENSE VARIABLE 7, WHICH AFFECTED THE SENTENCING GUIDELINE RANGE, AND TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO MOUNT AN ARGUMENT AGAINST THE SCORING?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court says "no."

STATEMENT OF FACTS

Defendant-Appellant Donald Michael Hardy was charged with carjacking. (1a) The preliminary examination was waived, and Defendant was bound over to the Oakland County Circuit Court on the charge. (Id.)

The matter proceeded within the Oakland County Circuit Court. On January 19, 2011, pled guilty as charged to carjacking. (25a) In exchange for the plea, the trial court agreed to sentence Defendant to the bottom of the sentencing guideline range, plus one year. (27a-28a)

The factual basis for the plea was that on July 10, 2010 Defendant walked up to a guy who was standing outside his 2004 Pontiac Grand Prix; pulled out a gun; pointed the gun and demanded everything; got in the passenger's seat; and rode off with Edward Perkins driving. (33a-35a)

A Presentence Investigation Report was prepared. (10a) According to the report: "Hardy was pointed the shotgun at the victim. Hardy pumped the shotgun." (15a)

Defendant's sentencing was held on March 3, 2011, where the prosecution challenged the scoring of Offense Variable 7. (41a) The trial court agreed with the prosecution, and scored Offense Variable 7 at 50 points. (46a) This scoring increased the sentencing guideline range to 108 months to 180 months. (49a)

Despite the sentencing agreement of the bottom of the guidelines plus one year (which would be 10 years on the minimum sentence), the trial court sentenced Defendant to 12 years to 50 years to the custody of the Michigan Department of Corrections. (50a-51a) There appeared to be some confusion at the time of sentencing as to the sentencing agreement Defendant had with the trial court. (46a-50a)

Defendant filed an application for leave to appeal in the Court of Appeals on September 12, 2011. The Court of Appeals denied leave on November 18, 2011. (7a)

On December 27, 2011, Defendant filed an application for leave to appeal within the Michigan Supreme Court, which was granted on June 8, 2012. (8a) Leave was granted as to the following: “The parties shall address whether the trial court erroneously assessed 50 points for offense variable 7 (OV 7), MCL 777.37(1)(a), because the defendant racked a shotgun during the carjacking, and whether trial counsel was ineffective for waiving this issue.” (Id.)

Within the Order granting leave, the Court ordered the Oakland County Circuit Court to appoint appellate counsel if Defendant was indigent. (Id.) On January 9, 2013, appellate counsel was appointed for Defendant. (9a)

In this appeal, Defendant argues that Offense Variable 7 was misscored and he was denied the effective assistance of counsel.

ARGUMENT

I. DEFENDANT IS ENTITLED TO RESENTENCING WHEN THE STATUTORY SENTENCING GUIDELINES WERE MISSCORED AS TO OFFENSE VARIABLE 7, WHICH AFFECTED THE SENTENCING GUIDELINE RANGE, AND TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO MOUNT AN ARGUMENT AGAINST THE SCORING

Defendant-Appellant Donald Michael Hardy submits that Offense Variable 7 was misscored as being 50 points because Defendant's alleged action of pumping the shotgun does not amount to "aggravated physical abuse" within the meaning of Offense Variable 7, MCL 777.37. Therefore, Defendant should be resentenced.

Since this case involves a question of law and the interpretation of a statute, the standard of review is de novo. Oakland County Bd of Road Comm'rs v Michigan Property & Casualty Guaranty Ass'n, 456 Mich 590, 610; 575 NW2d 751 (1998).

When construing a statute, the Court must ascertain and give effect to the Legislature's intent. People v Zajaczkowski, 493 Mich 6, 13 (2012). The first step in that determination is to review the language of the statute itself. People v Blount, 282 Mich App 81; 761 NW2d 427 (2009). In discerning legislative intent, the Court gives effect to every word, phrase, and clause in the statute. People v Hill, 269 Mich App 505, 515; 715 NW2d 301 (2006). The Court must avoid construing a statute in a manner that renders statutory language nugatory

or surplusage. Id. The Court considers both the plain meaning of critical words or phrases used in the statute, and their placement and purpose in the statutory scheme. Id.

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).

The sentencing guideline range for the offense of carjacking was scored as being 108 months to 180 months. (46a and 49a) Of significance, is that Defendant was given 50 points under Offense Variable 7 for aggravated physical abuse. (46a-49a) Without the scoring of Offense Variable 7, the sentencing guideline range would have been 42 months to 70 months.

To be scored 50 points under Offense Variable 7, there must be finding that “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). The prosecution does not argue there was sadism, torture, or excessive brutality. (45a-46a) Rather, it argues that the conduct of pumping the shotgun was “designed to substantially increase the fear and anxiety a victim suffered during the offense.” (Id.)

The alleged conduct cannot be deemed “aggravated physical abuse” within the meaning of MCL 777.37 since it was not “designed to substantially increase the fear and anxiety a victim suffered during the offense.” To put it bluntly, it was all part of effectuating the carjacking. A carjacking, by its own terms, has a certain amount of violence or threatened violence since, according to the statute, it occurs when a person “uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle.” MCL 750.529a. The conduct in the present case does not rise to the level for scoring under Offense Variable 7.

The plain language of the statute shows that it was meant to be scored in particularly egregious cases. See, People v Glenn, 295 Mich App 529, 536 (2012). Since no aggravated physical abuse occurred as there was not conduct “designed to substantially increase the fear and anxiety a victim suffered during the offense,” Offense Variable 7 should have been assessed at zero points.

Defendant was denied the effective assistance of counsel regarding the sentence. A defendant has the right to the effective assistance of counsel on sentencing issues. People v Pubrat, 451 Mich 589, 594; 548 NW2d 595 (1996); Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); US Const Amends VI & XIV; Const 1963, art 1, § 20. Trial counsel was ineffective in two respects.

First and foremost, trial counsel did not know the terms of the sentencing agreement. The result was a sentence two more years than what should have been assessed. The sentencing agreement was the bottom of the sentencing guideline plus one year. (27a-28a) As 108 months is nine years, the minimum sentence should have been 10 years (rather than 12 years).

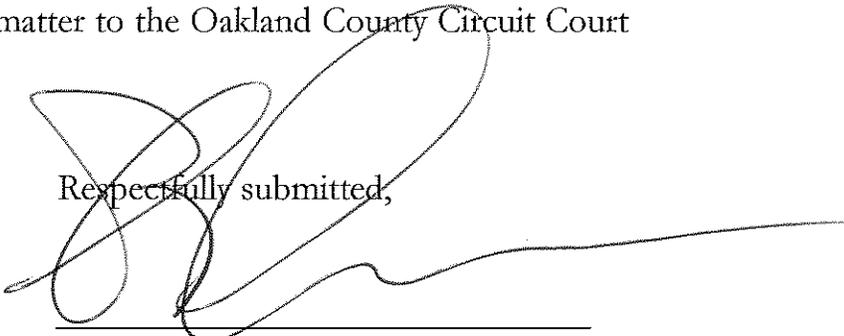
Secondly, trial counsel mounted absolutely no objection to the scoring of Offense Variable 7. Instead of objecting to the prosecution's interpretation of Offense Variable 7, trial counsel merely stated "I think it would be appropriate for the court to score that [Offense Variable 7] based on Mr. Pernick's [prosecutor] rendition of what occurred." (46a) This cannot be seen as effective advocacy, considering the fact that Defendant's conduct was not designed to substantially increase the fear and anxiety of the victim, but was motivated to effectuate the obtaining of the vehicle.

For the above reasons, this Court should remand for resentencing as Offense Variable was misscored, which affected the sentencing guideline range. See, People v Francisco, 474 Mich 82, 88 (2006). Further, the trial court did not follow the sentencing agreement; therefore, a remand is necessary.

CONCLUSION

Defendant-Appellant Donald Michael Hardy respectfully requests that this Honorable Court remand this matter to the Oakland County Circuit Court for resentencing.

Respectfully submitted,



Dated: March 18, 2013

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