

*P051

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellant,

vs.

JOSEPH FRANK HERSHEY,

Defendant-Appellee.

SC No.

COA No. 309183

Lower Court File No. 10-059331-FH
Muskegon County Circuit Court

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PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF DECISION APPEALED FROM AND RELIEF SOUGHT

The People seek leave to appeal from the published decision of the Court of Appeals in *People v Joseph Frank Hershey*, ___ Mich App ___; ___ NW2d ___; 2013 WL 6331801; 2013 Mich App LEXIS 1988 (COA Docket No. 309193, issued December 5, 2013) (Appendix A).

Although the trial court factually determined that Defendant had waived the scoring of Offense Variable 16 and Offense Variable 19 (Appendix D), the Court of Appeals, without applying the clearly erroneous standard of review (that it had a definite and firm conviction that a mistake had been committed, see *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 [1976]), found that no waiver occurred. It also ruled as a matter of law that

MCL 769.34(10) provides a defendant with three separate opportunities in which to raise a scoring error: at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. The statute's provision of multiple opportunities to raise the issue implicitly assumes that the defendant may miss a scoring error at the first opportunity: sentencing. [Appendix A, slip op, p 12.]

Thus, the Court of Appeals holds that a defendant never waives the scoring of guidelines at sentencing.

This Court, however, has indicated that a motion for resentencing under MCL 769.34(10) does not "'revive' an issue that the defendant had, indeed, already expressly waived." *People v McGraw*, 484 Mich 120, 131 n 36; 771 NW2d 655 (2009). In addition the Court of Appeals misinterpreted MCL 769.34(10), which states that, "[a] party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a *proper* motion for resentencing, or in a *proper* motion to remand filed in the court of appeals." (Emphasis supplied.) Thus, the Legislature modifies the term "motion" with the adjective "proper". This term cannot be read

out of the statute because, “[w]hen parsing a statute, [the Court] presume[s] every word is used for a purpose.” *Pohutski v Allen Park*, 465 Mich 675, 683-684; 641 NW2d 219 (2002).

“Where a nontechnical undefined word is used in a statute, the Legislature has directed that the term should be ‘construed and understood according to the common and approved usage of the language....’ MCL 8.3a.” *Chandler v Co of Muskegon*, 467 Mich 315, 319-320; 652 NW2d 224 (2002). “As might be expected, in undertaking to give meaning to words this Court has often consulted dictionaries.” *Id.*, 320. See also *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005).

The term “proper” is defined in part in *The Random House College Dictionary* (rev ed, 1984), p 1061, as follows:

adj. 1. adapted or appropriate to the purpose or circumstances; fit; suitable. 2. conforming to established standards of behavior or manners; correct or decorous. 3. belonging or pertaining to a particular person or thing. 4. strict; accurate....

Black's Law Dictionary (6th ed), p 1216, in turn, defines the term “proper” as follows:

That which is fit, suitable, appropriate, adapted, correct. Reasonably sufficient. Peculiar; naturally or essentially belonging to a person or thing; not common; appropriate; one's own. *See also* Reasonable.

Thus, only a fit, suitable, appropriate or correct motion may be filed on the subject of the scoring of the sentencing guidelines. Where the defendant has already expressly passed on the issue at sentencing, it follows that a motion to pursue the issue that has already been waived would not be fit, suitable, appropriate or correct. This view is certainly consistent with this Court's explanation in *McGraw* that a motion for resentencing would not “‘revive’ an issue that the defendant had, indeed, already expressly waived.” *McGraw*, 484 Mich at 131 n 36.

In addition, the Court of Appeals holds that a Defendant actually has a fourth means by which to raise an issue on appeal although waived at the time of sentencing:

Furthermore, pursuant to [*People v*] *Kimble*, [470 Mich 305; 684 NW2d 669 (2004),] if the scoring error results in a sentence that is outside the appropriate guidelines range, a defendant has a fourth opportunity to raise the issue, as he may appeal the issue “regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand,” albeit under a plain error analysis. *Kimble*, 470 Mich at 310, 312. [Appendix A, slip op, pp 12-13.]

This is a misreading of *Kimble*. In *Kimble*, the defendant challenged the scoring of Offense Variable 16. He argued at sentencing that OV-16 should be scored at one point instead of five points. *Kimble*, 470 Mich at 309. Thus, he did not waive the scoring of OV-16. He specifically challenged the scoring of OV-16 at sentencing. Had he prevailed in the trial court, his sentence would have been outside the appropriate guidelines range. Accordingly, under MCL 769.34(10), the defendant could appeal the scoring of OV-16. However, on appeal, the defendant in *Kimble* raised a different reason why OV-16 had been misscored. *Kimble*, 470 Mich at 309. Accordingly, because he had not raised *that* issue at the time of sentencing, the “plain error” standard of review applied:

Because defendant’s sentence is outside the appropriate guidelines sentence range [because a score of 1 for OV-16 would have made it so], his sentence is appealable under § 34(10), even though his attorney failed to raise the precise issue at sentencing, in a motion for resentencing, or in a motion to remand. However, because defendant failed to raise the argument that OV 16 is not applicable at all until his application for leave to appeal with the Court of Appeals, defendant must satisfy the plain error standard set forth in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). [*Kimble*, 470 Mich at 312.]

The circumstance in *Kimble* is thus entirely different than is now before the Court.

Finally, on the merits, the Court of Appeals clearly erred in finding that Offense Variable 16 and Offense Variable 19 were misscored and in remanding the case for resentencing.

Offense Variable 16. There are two reasons why Defendant’s contention is without merit. First, Defendant “obtained” the money by failing to pay it on behalf of his child or children as ordered by the Family Court. In other words, any money he chooses to retain is

“obtained”. Second, this money is “lost” to the children because it was not available to them to pay their support at the critical time that the payment was due. In other words, the children went without because Defendant did not pay his child support. Therefore, this money was “lost” to the victims and, as a consequence, there was no error in the scoring of OV-16 at 5 points.

Offense Variable 19. There are two ways that Defendant “interfered with or attempted to interfere with the administration of justice”. First, he was under court order to pay child support. He failed to do so. Hence, he interfered with or attempted to interfere with the administration of justice. Second, Defendant was on probation. He violated that probation and, as a consequence, he “interfered with or attempted to interfere with the administration of justice”. Accordingly, there was no error in the scoring of OV-19 at 10 points.

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STATEMENT OF THE QUESTIONS PRESENTED

- I. DID DEFENDANT WAIVE THE SCORING OF OFFENSE VARIABLES 16 AND 19 BY INFORMING THE TRIAL COURT AT THE TIME OF SENTENCING THAT HE HAD NO ADDITIONS OR CORRECTIONS TO MAKE TO THE PRESENTENCE INVESTIGATION REPORT—THAT INCLUDED THE SENTENCING INFORMATION REPORT THAT PROMINENTLY INDICATED THE SCORES OF 5 AND 10 POINTS, RESPECTIVELY, FOR OFFENSE VARIABLE 16 AND OFFENSE VARIABLE 19?

Plaintiff-Appellant says, “Yes.”

Defendant-Appellee says, “No.”

The trial court says, “Yes.”

The Court of Appeals says, “No.”

- II. ON THE MERITS, WERE OFFENSE VARIABLE 16 AND OFFENSE VARIABLE 19 PROPERLY SCORED?

Plaintiff-Appellant says, “Yes.”

Defendant-Appellee says, “No.”

The trial court says, “Yes.”

The Court of Appeals says, “No.”

STATEMENT OF JURISDICTION

The Supreme Court may review by appeal a case after decision by the Court of Appeals. MCR 7.301(A)(2). The procedures for such appeal are outlined in MCR 7.302 *et seq.* The Court of Appeals' decision was entered on December 5, 2013. An application for leave must be filed within 56 days of an opinion of the Court of Appeals. MCR 7.302(C)(2)(b). This application is being filed on or before January 30, 2014. Accordingly, it is timely.

STATEMENT OF THE FACTS

Defendant applies for leave to appeal from the December 5, 2013, published Court of Appeals opinion (Appendix A) that reversed the judgment of sentence entered by the 14th Judicial Circuit Court for the County of Muskegon (Appendix B), the Honorable JAMES M. GRAVES, JR., presiding.

Defendant was convicted following a guilty plea of felony nonsupport, MCL 750.165, and by the trial court of being a habitual offender, fourth offense, MCL 769.12.

During the period between September 26, 2006, and December 16, 2009, Defendant was under an order of the 14th Judicial Circuit Court for the County of Muskegon in File No. 2006-033357-DM to pay child support each month. (07/08/2010 Plea Tr, p 9.) He paid less than the minimum amount required by the order in the divorce action. (*Id.*) According to his ex-wife, Christy Hershey, “in four years I’ve gotten ... maybe \$100 towards child support, and he’s in jail all the time for drug abuse, alcohol.” (10/25/2010 Sentence Tr, p 5.) He thus accumulated an arrearage of several thousand dollars—\$6,418.68.00. (07/08/2010 Plea Tr, p 9; 10/25/2010 Sentence Tr, p 9.)

He was originally sentenced on October 25, 2010, to 24 months’ probation with 5 months in the county jail as a condition of probation and he was ordered to pay restitution in the amount of \$6,418.68.00, Crime Victim’s Rights fee of \$68.00, an oversight fee of \$960.00 and \$200.00 in court costs. (10/25/2010 Sentence Tr, p 9.)

Almost immediately after his release from jail on July 28, 2011, Defendant violated the terms of his probation by failing to report to his probation agent, having contact with his children, and consuming alcohol. (08/29/2011 Probation Violation Plea [“PVP”] Tr, pp 3-4, 6-8.) Defendant pled guilty to these probation violations on August 29, 2011 (*id.*), and was

resentenced on September 13, 2011, to three years six months to 15 years' imprisonment (09/13/2011 Sentence Tr, p 7).

Felony nonsupport is a Public Order and a Class F offense. MCL 777.16i. Thus, the following Offense Variables are to be scored: 1, 3, 4, 9, 10, 12, 13, 14, 16, 19, and 20. MCL 777.22 (4). Only two Offense Variables were scored in Defendant's case, to wit: OV-16 at 5 points and OV-19 at 10 points. (Appendix C.) This was prominently indicated on the Sentencing Information Report that is part of the Presentence Investigation Report. (*Id.*)

Accordingly, the Total Offense Variables score was 15 points making Defendant a Level II. (*Id.*) With his Total Prior Record Variable (PRV) score of 25 points, his PRV Level was D. (*Id.*) Thus, his minimum sentence range was 5 to 46 months. (*Id.*) Without OV-16 and OV-19 being scored as they were, the minimum sentence range would be 2 to 34 months.

At sentencing, the following colloquy between the trial court, defense counsel and Defendant occurred:

THE COURT: Has Defense Counsel had an opportunity to read the presentence – well, there's actually two presentence reports. I think they're almost identical, but they cover both files.

MR. SWANSON: Yes, Your Honor. No additions or corrections.

THE COURT: Mr. Hershey, have you had an opportunity to read the two presentence reports and discuss that with your attorney?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And do you have any additions or corrections?

THE DEFENDANT: No, sir. [09/13/2011 Sentence Tr, pp 3-4.]

Accordingly, defense counsel and Defendant were fully aware at sentencing that OV-16 and OV-19 were scored at 5 points and 10 points, respectively, and understood that the minimum

sentence range was 5 to 46 months. Nevertheless, neither defense counsel nor Defendant sought to make any additions or corrections to these scores.

On January 25, 2012, Defendant filed a motion for resentencing, challenging the scoring of OV-16 and OV-19. The trial court denied Defendant's motion, stating in its February 24, 2012, opinion and order the following:

On September 13, 2013, defendant, Joseph Hershey was sentenced to a term of 3[-1/2] to 15 years in prison for a probation violation conviction, the underlying conviction being Failure to Pay Child Support, habitual offender, 4th conviction. Defendant moves the court for correction of the sentencing information report and for resentencing on the grounds that offense variable 16 was erroneously scored at five points, and offense variable 19 was erroneously scored at 10 points. After a review of the motion and briefs, the court denies the motion for the reasons stated in the prosecutor's brief in opposition dated February 2, 2012, i.e., that defendant waived the issue of the scoring of the guidelines, and that OV 16 and OV 19 were correctly scored.... [Appendix D.]

Defendant filed a delayed application for leave to appeal to the Court of Appeals, which was denied on September 14, 2012. (Appendix E.) He filed an application for leave to this Court. On March 4, 2013, in lieu of granting leave to appeal, this Court remanded the case to the Court of Appeals to consider—as on leave granted—whether Offense Variable 16 (OV-16) and Offense Variable 19 (OV-19) were correctly scored and whether Defendant either waived or forfeited the scoring of these variables at sentencing. (Appendix F.)

On remand, the Court of Appeals issued a published opinion on December 5, 2013. (Appendix A.) It held that “defendant did not waive these scoring errors; and because he raised the errors in a motion for resentencing before the trial court, he did not forfeit the issue, and the matter is preserved.” (Appendix A, slip op, p 1.) Thus, the Court of Appeals concludes that a defendant never waives or forfeits the scoring of an offense variable so long as he or she files a motion for resentencing under MCL 769.34(10).

On the merits, the Court found that OV-16 and OV-19 were erroneously scored and remanded the case for resentencing.

Additional facts will be provided in the Law and Argument section as relevant to the issues.

LAW AND ARGUMENT

I. **DEFENDANT WAIVED THE SCORING OF OFFENSE VARIABLES 16 AND 19 BY INFORMING THE TRIAL COURT AT THE TIME OF SENTENCING THAT HE HAD NO ADDITIONS OR CORRECTIONS TO MAKE TO THE PRESENTENCE INVESTIGATION REPORT—THAT INCLUDED THE SENTENCING INFORMATION REPORT THAT PROMINENTLY INDICATED THE SCORES OF 5 AND 10 POINTS, RESPECTIVELY, FOR OFFENSE VARIABLE 16 AND OFFENSE VARIABLE 19.**

A. *Standard of review*

A trial court's determination regarding whether a defendant waived the scoring of sentencing guidelines is a mixed question of fact and law. What constitutes a waiver is a question of law that is reviewed de novo. See *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000) (the meaning of a "knowing and intelligent" waiver of *Miranda*¹ rights is a question of law that is reviewed de novo). A trial court's decision whether the facts of a particular case demonstrate a valid waiver is reviewed for clear error. MCR 2.613(C); see also *Daoud*, 462 Mich at 629 (a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights are reviewed for clear error). A finding is clearly erroneous where, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976).

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

B. Analysis of the issue

At sentencing, Defendant and his trial counsel reviewed the Presentence Investigation Report (PSIR) before sentencing. Included with the PSIR is the Sentencing Information Report (Appendix C) that outlined the scores for the various Prior Record Variables and Offense Variables. The Offense Variables scored in this case were OV-16 at 5 points and OV-19 at 10 points. (*Id.*) At sentencing, the trial court inquired whether defense counsel and Defendant had reviewed the PSIR and, upon receiving affirmative responses, inquired whether either had any additions or corrections to make. The following colloquy occurred:

THE COURT: Has Defense Counsel had an opportunity to read the presentence – well, there’s actually two presentence reports. I think they’re almost identical, but they cover both files.

MR. SWANSON: Yes, Your Honor. No additions or corrections.

THE COURT: Mr. Hershey, have you had an opportunity to read the two presentence reports and discuss that with your attorney?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And do you have any additions or corrections?

THE DEFENDANT: No, sir. [09/13/2011 Sentence Tr, pp 3-4.]

In *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), this Court explained:

Waiver has been defined as “the ‘intentional relinquishment or abandonment of a known right.’” ... It differs from forfeiture, which has been explained as “the failure to make the timely assertion of a right.” ... “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.” ... Mere forfeiture, on the other hand, does not extinguish an “error.” [Citations omitted.]

This Court, in *People v McGraw*, 484 Mich 120, 131 n 36; 771 NW2d 655 (2009), rejected the notion “that defendant’s filing of a motion for resentencing would ‘revive’ an issue that the defendant had, indeed, already expressly waived.” Thus, the Court of Appeals has taken

a contrary view to what this Court stated in *McGraw* by holding that MCL 769.34(10) is a mechanism for preserving an issue (i.e., “reviv[ing]’ an issue that the defendant had, indeed, already expressly waived.” (Appendix A, slip op, p 1, 12.)

Without even mentioning *McGraw*, the Court of Appeals opined that “MCL 769.34(10) provides a defendant with three separate opportunities in which to raise a scoring error: at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. The statute’s provision of multiple opportunities to raise the issue implicitly assumes that the defendant may miss a scoring error at the first opportunity: sentencing.” The People disagree.

When interpreting MCL 769.34(10), the Court’s “fundamental obligation ... is ‘to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute.’” *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007), quoting *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002); see also *People v Williams*, 491 Mich 164, 172; 814 NW2d 270 (2012). “This task begins by examining the language of the statute itself. The words of a statute provide ‘the most reliable evidence of its intent....’ If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written [and] ... [n]o further judicial construction is required or permitted....” *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) (citations omitted); *Williams*, 491 Mich at 172. “When parsing a statute, [the Court] presume[s] every word is used for a purpose. As far as possible, [it] give[s] effect to every clause and sentence.” *Pohutski v Allen Park*, 465 Mich 675, 683-684; 641 NW2d 219 (2002). “A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the

statute itself[.]” *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002), and “[o]nly where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent.” *Sun Valley Foods Co v Ward*, 460 Mich at 236. Finally, “[o]nce the Court discerns the Legislature’s intent, no further judicial construction is required or permitted ‘because the Legislature is presumed to have intended the meaning it plainly expressed.’” *People v Lowe*, 484 Mich 718, 722; 773 NW2d 1 (2009) (citation omitted).

MCL 769.34(10) reads as follows:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a *proper* motion for resentencing, or in a *proper* motion to remand filed in the court of appeals. [Emphasis supplied.]

Again, the Court of Appeals reads the last sentence of this statutory provision as granting a defendant three bites at the apple:

MCL 769.34(10) provides a defendant with three separate opportunities in which to raise a scoring error: at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. The statute’s provision of multiple opportunities to raise the issue implicitly assumes that the defendant may miss a scoring error at the first opportunity: sentencing. [Appendix A, slip op, p 12.]

The Legislature, however, modifies the term “motion” with the adjective “proper”. This term cannot be read out of the statute because, “[w]hen parsing a statute, [the Court] presume[s] every word is used for a purpose.” *Pohutski*, 465 Mich at 683-684.

“Where a nontechnical undefined word is used in a statute, the Legislature has directed that the term should be ‘construed and understood according to the common and approved usage of the language....’ MCL 8.3a.” *Chandler v Co of Muskegon*, 467 Mich 315, 319-320; 652

NW2d 224 (2002). “As might be expected, in undertaking to give meaning to words this Court has often consulted dictionaries.” *Id.*, 320. See also *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005).

The term “proper” is defined in part in *The Random House College Dictionary* (rev ed, 1984), p 1061, as follows:

adj. 1. adapted or appropriate to the purpose or circumstances; fit; suitable. 2. conforming to established standards of behavior or manners; correct or decorous. 3. belonging or pertaining to a particular person or thing. 4. strict; accurate....

Black’s Law Dictionary (6th ed), p 1216, in turn, defines the term “proper” as follows:

That which is fit, suitable, appropriate, adapted, correct. Reasonably sufficient. Peculiar; naturally or essentially belonging to a person or thing; not common; appropriate; one’s own. *See also* Reasonable.

Thus, only a fit, suitable, appropriate or correct motion may be filed on the subject of the scoring of the sentencing guidelines. Where the defendant has already expressly passed on the issue at sentencing, it follows that a motion to pursue the issue that has already been waived would not be fit, suitable, appropriate or correct. This is certainly the view of this Court in *McGraw* that explained that a motion for resentencing would not “‘revive’ an issue that the defendant had, indeed, already expressly waived.” *McGraw*, 484 Mich at 131 n 36.

The Court of Appeals added a fourth mechanism for appellate review by misreading *People v Kimble*, 470 Mich 305; 684 NW2d 669 (2004), stating, “[f]urthermore, pursuant to *Kimble*, if the scoring error results in a sentence that is outside the appropriate guidelines range, a defendant has a fourth opportunity to raise the issue, as he may appeal the issue ‘regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand,’ albeit under a plain error analysis. *Kimble*, 470 Mich at 310, 312.” (Appendix A, slip op, pp 12-13.)

In *Kimble*, the defendant challenged the scoring of Offense Variable 16. He argued at sentencing that OV-16 should be scored at one point instead of five points. *Kimble*, 470 Mich at 309. Thus, he did not waive the scoring of OV-16. He specifically challenged the scoring of OV-16 at sentencing. Had he prevailed in the trial court, his sentence would have been outside the appropriate guidelines range. Accordingly, under MCL 769.34(10), the defendant could appeal the scoring of OV-16. However, on appeal, the defendant in *Kimble* raised a different reason why OV-16 had been misscored. *Kimble*, 470 Mich at 309. Accordingly, because he had not raised *that* issue at the time of sentencing, the “plain error” standard of review applied:

Because defendant’s sentence is outside the appropriate guidelines sentence range [because a score of 1 for OV-16 would have made it so], his sentence is appealable under § 34(10), even though his attorney failed to raise the precise issue at sentencing, in a motion for resentencing, or in a motion to remand. However, because defendant failed to raise the argument that OV 16 is not applicable at all until his application for leave to appeal with the Court of Appeals, defendant must satisfy the plain error standard set forth in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). [*Kimble*, 470 Mich at 312.]

The circumstance in *Kimble* is thus entirely different than is now before the Court. Defendant waived any challenge he might otherwise have to the scoring of Offense Variables 16 and 19 at the time of sentencing. When addressing the question of “waiver”, a court does not concern itself with the question whether error might have occurred. This is true because any error that might have occurred is *extinguished* by the waiver. *Carter*, 462 Mich at 215 (“[o]ne who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error”):

When the scoring of the guidelines is *waived*, the defendant affirmatively accepts the scoring of the guidelines. This explains why there was no discussion of the guidelines scoring at the time of sentencing. The Court of Appeals sees this lack of discussion at sentencing as proving there is something awry, stating:

Sentencing variables, however, do not always undergo the same degree of scrutiny by the parties and the trial court as do jury instructions. Indeed, the sentencing variables were not even mentioned during sentencing in the instant case. At sentencing, the trial court asked defendant and his counsel if they had any “additions or corrections” to the presentence report. Both defendant and his counsel responded that they did not. Although either defendant or his counsel should have objected had they realized there was a scoring error at that time, at no point during the hearing was there any actual discussion about the scoring variables....

When defendant and his counsel responded that they did not have any additions or corrections to the presentence report, the court had not made any decision regarding the scoring of OV 16 and OV 19; indeed, it cannot be said from the record that the court was even considering the scoring of the sentencing variables at the time.... [Appendix A, slip op, p 12.]

With all due respect to the Court of Appeals, it should be rather obvious that the trial court would not discuss sentencing guidelines issues unless an issue about them is raised. This is why the trial court asked whether either defense counsel or Defendant had any additions or corrections to make to the PSIR.

It is also absurd to say that, “[a]lthough either defendant or his counsel *should have objected* had they realized there was a scoring error at that time, at no point during the hearing was there any actual discussion about the scoring variables....” (Appendix A, slip op, p 12 [emphasis supplied].) First, as a matter of record, both defense counsel and Defendant knew that OV-16 and OV-19 were scored at 5 points and 10 points, respectively. They acknowledged this by informing the trial court that each read the PSIR and neither had any additions or corrections to make. (09/13/2011 Sentence Tr, pp 3-4.) Thus, they were satisfied with the scoring of these offense variables. It is not up to the Court of Appeals to decide that they “should have objected.” There could be any number of reasons why no objection was lodged. Recall that this was a re-sentencing following a probation violation. As acknowledged by the Court of Appeals, the trial court was free to depart from the guidelines. See, e.g., *People v Schaafsma*, 267 Mich App 184,

186; 704 NW2d 115 (2005), which was referenced by the Court of Appeals in footnote 11 to its opinion. (Appendix A, slip op, p 9.) Hence, would it have been a good idea to emphasize whether OV-16 and OV-19 were properly scored? Going into the details of how Defendant had deprived his children of support (paying only \$100 over four years) and how he violated not only the sentencing court's probation order but also the family court's divorce order would have been an interesting colloquy while the trial court was pondering what sentence to impose. This is especially true given that Defendant chose to violate the sentencing court's probation order the day he left the jail. It thus comes as no surprise that, even if there was an argument to be made that Offense Variables 16 and 19 were misscored, neither Defendant nor his trial counsel decided to embark down that path at the time of sentencing.

The Court of Appeals also suggests that there is not enough on the record to support that a waiver occurred: The trial court disagreed, stating, specifically, that Defendant's challenges to OV-16 and OV19 were waived when it denied Defendant's motion for resentencing. (Appendix D.) This Court explains that, "if resolution of a disputed factual question turns on the credibility of witnesses or the weight of the evidence, we will defer to the trial court, which had a superior opportunity to evaluate these matters.'" *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000) (citation omitted). Indeed, the trial court was present during the sentencing proceedings and was quite familiar with defense counsel (who was the public defender for his courtroom at the time) and defense counsel was certainly privy to the manner in which sentencing proceedings were conducted by the Honorable JAMES M. GRAVES, JR. Defense counsel obviously discussed these sentencing proceedings with Defendant (and there is nothing of record to suggest otherwise) and, therefore, the trial court could properly conclude on what it knew and observed that this issue was, indeed, waived when both defense counsel and Defendant

told the trial court that neither had any additions or corrections to make. Where defense counsel says he has no additions or corrections to make and Defendant confirms the same, it follows that each are satisfied with the guidelines score. To suggest otherwise ignores the record and ignores what the trial court specifically found and there certainly should not be a definite and firm conviction that a mistake was made in this regard. *Tuttle*, 397 Mich at 46.

Indeed, in the present case, the trial court was clearly prepared to deal with any objections Defendant might have to the scoring of any of the guidelines. Defendant, however, affirmatively waived the scoring of the guidelines. Thus, the trial court proceeded in a manner acceptable to Defendant. It would be a complete waste of judicial resources to thereafter conclude that a defendant should be able to revive claims of error when the trial court acted consistently with the defendant's wishes when it was most important and relevant to address the issue.

Accordingly, because Defendant waived this issue at sentencing, it follows that any claimed error was extinguished and is not subject to consideration.

II. **ON THE MERITS, OFFENSE VARIABLE 16 AND OFFENSE VARIABLE 19 WERE PROPERLY SCORED.**

A. *Standard of review*

When reviewing a trial court's scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

B. Analysis of the issue

1. Offense Variable 16

Even if not waived, Defendant's contention that OV-16, MCL 777.46, was misscored is without merit. It was properly scored at 5 points. OV-16, MCL 777.46, provides:

(1) Offense variable 16 is property obtained, damaged, lost, or destroyed. Score offense variable 16 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:

- | | |
|---|-----------|
| (a) Wanton or malicious damage occurred beyond that necessary to commit the crime for which the offender is not charged and will not be charged | 10 points |
| (b) The property had a value of more than \$20,000.00 or had significant historical, social, or sentimental value | 10 points |
| (c) The property had a value of \$1,000.00 or more but not more than \$20,000.00 | 5 points |
| (d) The property had a value of \$200.00 or more but not more than \$1,000.00 | 1 point |
| (e) No property was obtained, damaged, lost, or destroyed or the property had a value of less than \$200.00 | 0 Points |

(2) All of the following apply to scoring offense variable 16:

(a) In multiple offender or victim cases, the appropriate points may be determined by adding together the aggregate value of the property involved, including property involved in uncharged offenses or charges dismissed under a plea agreement.

(b) In cases in which the property was obtained unlawfully, lost to the lawful owner, or destroyed, use the value of the property in scoring this variable. If the property was damaged, use the monetary amount appropriate to restore the property to pre-offense condition in scoring this variable.

(c) The amount of money or property involved in admitted but uncharged offenses or in charges that have been dismissed under a plea agreement may be considered.

Defendant did not challenge whether "money" is included under OV-16. If he had, it would have been without merit. See, e.g. MCL 777.46(2)(c) ("[t]he amount of *money* or

property involved in admitted but uncharged offenses or in charges that have been dismissed under a plea agreement may be considered” [emphasis supplied]).

Neither did Defendant challenge that the money involved is “\$1,000.00 or more”. Instead, he claims that this money was not ““obtained, damaged, lost or destroyed”” and, therefore, “the amount of support owed ... does not apply to the facts of this case.” (Defendant’s COA Brief, p 9.) Defendant is incorrect.

There are two reasons why Defendant’s contention is without merit. First, Defendant “obtained” the money by failing to pay it on behalf of his child or children as ordered by the Family Court. In other words, any money he chooses to retain is “obtained”. Second, this money is “lost” to the children because it was not available to them to pay their support at the critical time that the payment was due. In other words, the children went without because Defendant did not pay his child support. Therefore, this money was “lost” to the victims.

2. Offense Variable 19

Even if not waived, Defendant’s contention that OV-19, MCL 777.49, was misscored is without merit. OV-19, MCL 777.49, provides:

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:

- | | |
|---|-----------|
| (a) The offender by his or her conduct threatened the security of a penal institution or court | 25points |
| (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

Of course, when the language of a statute is plain and unambiguous, the statute is enforced as written, following the plain meaning of that language, “giving effect to the words used by the Legislature.” *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004). Under the plain language of MCL 777.49(c), ten points are to be scored when the “offender otherwise interfered with or attempted to interfere with the administration of justice.”

In construing the plain language of the statute, this Court has already ruled that interference with the administration of justice means “*more than just* the actual judicial process.” *Barbee*, 470 Mich at 287-288 (emphasis supplied). To be “more than just the actual judicial process” means, of course, that the “the actual judicial process” is included within the rubric of the administration of justice. Establishing and overseeing child support is an integral part of the administration of justice as is the decision whether to place a defendant on probation. And, the terms and conditions that apply to the probationer are outlined in a court order. Clearly, what interferes with the administration of justice more than actually disobeying a court order?

This Court ruled that, giving law enforcement officers a false name constitutes interference with the administration of justice. *Barbee*, 470 Mich at 287-288. This Court expressly rejected the reasoning of the Court of Appeals in *People v Deline*, 254 Mich App 595; 658 NW2d 164 (2002), holding that OV-19 “could only be scored when the conduct interfered with the judicial process.” *Barbee*, 470 Mich at 287. This Court explained that police “are an integral component in the administration of justice, regardless of whether they are operating directly pursuant to a court order.” *Id.* at 288. As this Supreme Court reasoned, the

“investigation of crime is critical to the administration of justice.” *Id.* at 288. The Court affirmed the assessment of ten points for OV-19 for giving the law enforcement officer a false name.

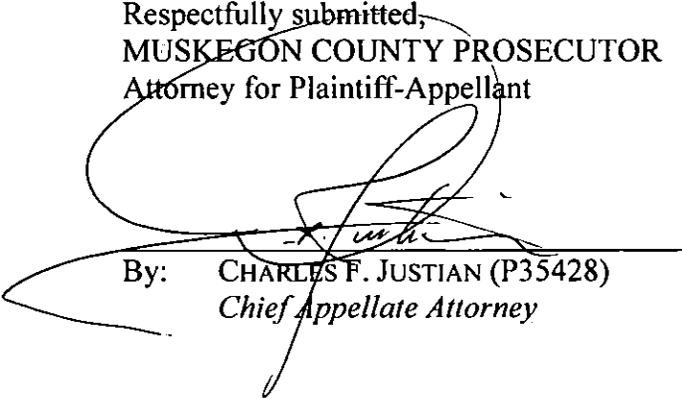
There are two ways that Defendant “interfered with or attempted to interfere with the administration of justice”. First, he was under court order to pay child support. He failed to do so. Hence, he interfered with or attempted to interfere with the administration of justice. Second, Defendant was on probation. He violated that probation and, as a consequence, he “interfered with or attempted to interfere with the administration of justice”. Accordingly, there was no error in the scoring of OV-19 at 10 points.

CONCLUSION

For the foregoing reasons, this Court should either grant leave or summarily reverse the Court of Appeals.

Respectfully submitted,
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