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STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff/Appellee

SC No. 161589
COA No. 344603
Macomb County CC. 2015-003884- FC

vs.

ROBERTO DUPREE,

Defendant/Appellant.
_____/

Defendant/Appellant's AMENDED Brief

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Statement of Jurisdiction

Roberto Dupree was sentenced on June 28, 2018. The Court of Appeals affirmed on February 6, 2020. Mr. Dupree filed a timely application for leave in this Court. On April 2, 2021, the Court directed the prosecuting attorney to answer the application for leave to appeal, which was filed. On January 14, 2022, by order of the Court, Appellant's application for leave to appeal was again considered and Appellant was directed to file a supplemental brief limited to the issues in the Court's order.

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Statement of Question Presented

Did the trial court violate Dupree's due process rights at sentencing by mis-scoring offense variables 1 and 2?

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Statement of Facts

Defendant-Appellant, Roberto Dupree was charged and convicted, at trial, of armed robbery. The charges stemmed from a robbery that occurred at a store, Smokers Only, on December 12, 2012. (TR 3 at 119)[1]. Mohamed Zamzami (Mr. Zamzami) was working that day. (*Id.*) The store has a surveillance system. At some point, a black male wearing a hat and sunglasses came in the store inquiring about cigars. (*Id.* at 122). While Mr. Zamzami was trying to show the man where the cigars were located, the man was talking on the phone about the brand of cigar the person wanted. As soon as Mr. Zamzami tried to show the man the cigars, the man pointed a gun at his face and told him not to move. (TR 3 at 123– 24). Two more men entered the store, who Mr. Zamzami identified one as a white, heavier set, bald male, who did not have a mask, and the other as black who's mouth was covered, but he was able to see his eyes. (*Id.* at 137, 140). The men restrained Mr. Zamzami with duct tape and pulled him to the back of the store. (*Id.* at 126-127). Mr. Zamzami also testified that the white male accessed the cash register. (*Id.* at 142).

One of the men stayed with him and asked him for the keys to the back door. After the men were unable to get out the back door, the man who had first entered the store hit Mr. Zamzami in the head with a gun. The men left out the front door and Mr. Zamzami eventually got the tape off and called the police. (TR 3 at 129–130).

[1] Transcripts referenced in the brief are attached as Appendix A, and referenced as follows: TR1 5-15-18; TR2 5-16-18; TR3 5-17-18; TR4 5-18-18, TR5 5-2-18, TR6 5-23-18, TR7 5-24-18, TR8 6-28-18.

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When the police arrived at the scene, Mr. Zamzami did not know how to transfer the surveillance video from the security system and eventually an officer used a cell phone to film the video as it played on the computer monitor. The recorded video was played for the jury at trial. (TR 3 at 146).

A K-9 unit was called to the scene who trailed a scent from the front door of the store, heading northeast, and eventually hit a pair of gloves. (TR 4 at 60, 151, 197). DNA was collected from the gloves and tested by the Michigan State Police (MSP), which was consistent with DNA from more than one person. Mr. Zamzami's DNA was not on that swab. A major DNA profile was found from an unidentified male. (TR 5 at 130). The officer in charge obtained a lead that Dupree was a possible suspect. (TR 5 at 154-155). A search warrant for Dupree's DNA his swabs were forwarded to the lab. (TR 5 at 160–161, 202). Dupree's buccal swab was obtained and compared it with the DNA, and Dupree matched the major donor type from the rubber glove swab. (TR 6 at 14–15). Dupree was arrested and charged with armed robbery. (TR 5 at 160–161, 202).

Julie Anne Howenstine, a biology DNA specialist on behalf of the defense, analyzed the DNA data differently. She testified that she observed at least two and possibly three DNA donors. (TR 7 at 31). She did not agree that Dupree's DNA was present on the gloves, rather his "genetic markers." (*Id.*). She believed that while MSP interpreted the data, her laboratory would not report out the data, and she could not "say there's a conclusive association." (*Id.*). She testified that she had done a lot of testing with secondary transfers. She no longer takes the position that the presence of a person's DNA means that they actually had contact with the sample. (*Id.* at 40.) Additionally, the forensic scientist in the biology unit of the MSP testified that she had no way of knowing when DNA was deposited on an item. (TR 6 24-25).

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Mr. Zamzami was unable to identify Dupree. (TR 3 at 125.). While fingerprints were collected from the scene, and none belonged to Dupree. (TR 4 at 266). Neither Dupree's DNA nor his fingerprints were found at the scene. (TR 5 at129). There was no evidence presented that showed Dupree wearing a glove. There was no direct evidence that Dupree was at the store when the robbery occurred. Dupree was convicted as charged.

At Dupree's sentencing hearing there were no objections to the guideline calculation of 135–450 months. (TR 8 at 3). The calculations included the scoring of offense variable (OV) 1 at 15 points, and OV 2 at 5 points, which will be discussed in detail below. (Presentence Ivnestigation Report, Appendix B). The judge noted that because Dupree was a 4th habitual, the MDOC was recommending a minimum of 25 years. The prosecutor also asked that the judge follow the mandatory minimum of 25 years. (TR 8 at 14). The judge sentenced Dupree to 30 - 60 years. He was also sentenced to an additional (concurrent) 93 days and fined $7500 for contempt of court. (*Id.* at 18).

The trial court violated Dupree's due process rights at sentencing by mis-scoring offense variables 1 and 2.

Standard of Review

In *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), this Court held that "[u]nder the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *Id.* "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Antwine*, 293 Mich App 192, 194, 809 NW2d 439 (2011). "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." *Hardy, supra,* at 438.

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Argument

The Due Process Clause of US Const, Am XIV requires that a trial court impose a sentence based on accurate information. *Townsend v Burke*, 334 US 736; 68 S Ct 1252 (1948). Points under the guidelines should be scored only with respect to the specific conduct that supports the particular conviction for which a sentence is being imposed. *People v Chesebro*, 206 Mich App 468, 470; 522 NW2d 677 (1994). As set forth in *People v Francisco*, 474 Mich 82, 86; 711 NW2d 44 (2006), any information used to impose a sentence must be absolutely accurate.

The trial court clearly erred in scoring OV-1 at 15 points.

Dupree was assessed 15 points under OV-1 which requires a finding that "a firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL 777.31(1)(c). OV-1 states that "in multiple offender cases, if one offender is assigned points for the presence or use of a weapon, all offenders must be assigned the same number of points." MCL 777.31(2)(b).

There was no evidence that Dupree pointed a gun at Mr. Zamzami. Mr. Zamzami testified that it was the first man who entered the store that pointed a gun at him. (TR 3 at 123– 24). Testimony confirmed that the person with the gun was a black male in his thirties. (TR 3 at 96). The man with the gun appeared to be a black male who was not wearing gloves or a mask. (*Id.*) The other suspect was between 250-300 pounds and based on the surveillance video he may have been black, and the third man was also a black male and wore a white glove. (TR 4 at 97, 122). Mr. Zamzami was unable to identify Mr. Dupree. There is no video footage showing Dupree with a gun.

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There was no evidence that any other offender was prosecuted, let alone scored 10 points under OV-1. The plain and unambiguous language of OV-1 requires multiple offenders to be at least charged before points can be assed with Dupree as an aider and abettor. "The primary goal of statutory construction is to give effect to the intent of the Legislature." *People v Light*, 290 Mich App 717, 722; 803 NW2d 720, 723–24 (2010); *In re MCI Telecommunications Complaint,* 460 Mich 396, 411; 596 NW2d 164, 174 (1999). To ascertain that intent, this Court begins with the statute's language. *People v Morey,* 461 Mich 325, 330; 603 NW2d 250 (1999). When that language is unambiguous, no further judicial construction is required or permitted, because the Legislature is presumed to have intended the meaning it plainly expressed. *Id.*

To discover legislative intent, provisions of a statute must be read in the context of the entire statute to produce, if possible, a harmonious and consistent whole. *Michigan ex rel Wayne Co Prosecutor v Bennis,* 447 Mich 719, 732 (1994), *aff'd Bennis v Michigan,* 516 US 442; 116 S Ct 994 (1996). What governs is the fair and natural import of the statute's terms, in view of the subject matter of the law. *Morey, supra*, at 330.

This Court's decision in *People v Morson*, 471 Mich 248; 685 NW2d 203 (2004) is instructive. In *Morson*, the defendant was the getaway drive for her co-defendant, Northington, as she robbed a woman of her purse, at gunpoint. *Id.* at 251. "As Northington fled the scene, she shot [an individual] who tried to stop her and recover [the stolen] purse." *Id.* Morson was convicted of armed robbery and conspiracy to commit armed robbery, and two counts of possession of a firearm during the commission of a felony." *Id.* One of the issues raised by Morson on appeal was the points assessed under OV 1. *Id.* The Court noted that when "Northington's armed robbery conviction was scored on, she was assessed fifteen points for OV 1." *Id.* at 252. However, "when [Morson's] armed robbery conviction was scored [she was assessed] twenty-five

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points for OV 1." *Id.* The Court of Appeals reversed the decision of the sentencing court on this issue, concluding that the multiple offender provision required that defendant's scores on OV 1 to be the same as those previously assessed to Northington for OV 1. *Id.* This Court affirmed the finding of the Court of Appeals. *Id.*

In affirming the Court of Appeals, this Court focused on the language of MCL 777.31(2)(b), MCL 777.33(2)(a), mainly that "all offenders shall be assessed the ***same number*** of points." *Id.* at 259. (emphasis in original).

The *Morson* opinion thus suggests that the scoring of OV1 is only permissible when multiple offenders are charged. Accordingly, if a defendant is tried and convicted, the trial court must assess the same number of points under OV 1 and OV 2 that were assessed by the trial court in sentencing the co-defendant, unless it can be demonstrated that the number of points assessed to the co-defendant were erroneous or inaccurate. ***People v Libbett,*** 251 MichApp 353, 367; 650 NW2d 407 (2002).

The same analysis was applied in ***People v Johnston,*** 478 Mich 903, 903-904; 732 NW2d 531 (2007), where this Court ruled as follows in its order:

> We reverse that part of the Court of Appeals decision analyzing defendant's sentence and we remand this case to the Wayne Circuit Court for resentencing. The sentencing court in this case scored defendant's offense variables 1, 2, and 3 identically to the scores given to his co-defendants because each of these variables directs that for "multiple offender cases," if one offender is assessed points under the variable, "all offenders shall be assessed the same number of points." MCL 777.31(2)(b); MCL 777.32(2); MCL 777.33(2)(a). However, defendant was the only offender convicted of larceny from the person and conspiracy to commit larceny from the person [co-defendants had robbery convictions]. Thus, his was not a "multiple offender case" for either of these crimes. Accordingly, the multiple offender provision does not apply to the scoring of defendant's guidelines in this case. See ***People v. Morson,*** 471 Mich. 248, 260 n. 13, 685 N.W.2d 203 (2004).

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Johnston therefore stands for the proposition that if the trial court scores OV 1 for a defendant based on the multiple-offender rule, there must be multiple offenders charged.

The language in the statute is clear that the legislature intended all scoring to be the same among all offenders. The facts of this case, and precedent, call for a strict adherence to the statute. The plain language of the statute prohibits scoring Dupree 15 points under OV1. While Dupree was convicted as an aider and abettor, there had to be a co-defendant charged before the trial court could score OV1 under a multiple offender theory.

The trial court clearly erred in scoring OV-2 at 5 points.

Dupree was assessed 5 points under OV-2 which requires a finding that "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d). There was no evidence showing that Dupree possessed any weapon.

Offense variables are to be scored using an offense-specific approach. *People v McGraw*, 484 Mich 120, 124; 771 NW2d 655, 657 (2009). In *People v Sargent*, 481 Mich. 346, 349; 750 NW2d 161, 163 (2008), this Court stated that usually "only conduct 'relating to the offense' may be taken into consideration when scoring the offense variables." Thus, the default procedure is to score the offense variables using an offense-specific approach. *McGraw*, *supra,* at 127. The arguments presented relative to the scoring of OV1 equally here. Dupree cannot be vicariously assessed 5 points under OV 2.

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Conclusion and Relief Requested:

"A defendant is entitled to be sentenced according to accurately scored guidelines and on the basis of accurate information." ***People v McGraw***, ***supra,*** at 131. When a sentencing court relies on an incorrectly scored guidelines range, the sentence imposed is invalid. ***Id.*** The trial court erred in assessing 15 points for OV 1 and 5 points for OV 2, when no points were warranted. Consequently, this case must be remanded for resentencing as the trial court's scoring error alters the applicable guidelines range. ***Francisco, supra,*** at 89 n 8.

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