

MSC Opinion: When calculating sentencing variable OV 13, a felony statutorily designated as “a crime against public safety” cannot also be considered a “crime against a person.”

27. July 2011 By Kristina Araya

In *People v Bonilla-Machado*, No. 140510, the Michigan Supreme Court addressed three issues on appeal, reversed the judgment of the Court of Appeals in part, and remanded for resentencing. First, the Court held that the defendant was not coerced into foregoing his right to testify. Second the Court held that for the purpose of calculating sentencing variable OV 13, a felony statutorily designated as “a crime against public safety” cannot also be considered a “crime against a person.” Third, the Court held that the trial court erred by stating that it was “bound by law” to enhance defendant’s maximum sentences because enhancement is discretionary. Justice Hathaway authored the majority opinion. Justice Markman authored a concurring opinion in order to address the dissent, and Chief Justice Young authored an opinion concurring in part and dissenting to the scoring of OV 13.

This appeal arose from the defendant’s conviction and sentencing on two counts of assaulting a prison employee. The defendant did not testify at trial. At sentencing, the trial court assessed 10 points for OV 14 and exercised its discretion to enhance the maximum sentence imposed for a subsequent felony conviction. The trial court stated that it was required by statute to enhance the sentences. Defendant appealed as of right, arguing that he was coerced into not testifying, that the trial court incorrectly-scored OV 13 when calculating his sentence, and that the trial court failed to exercise its discretion when determining his maximum sentence. The Court of Appeals affirmed the conviction, but concluded that OV 13 had been incorrectly scored and directed the trial court to assess 25 points for OV 13, rather than the 10 points the trial court had initially assessed.

The Supreme Court first addressed the defendant’s argument that he was coerced into foregoing his right to testify. The Court reviewed the trial record and concluded that the defendant was not coerced. Rather, defendant’s counsel merely advised him of the risks of testifying. Specifically, counsel advised defendant that anything he might say while testifying could be used against him. The Court concluded that the defendant made his own decision not to take the stand, and the record indicates that the trial court confirmed the defendant’s decision. There was not error.

Second, the Supreme Court addressed whether the Court of Appeals erred when it ordered the trial court to increase the score for OV 13 from 10 to 25 points. The Supreme Court held that when scoring OV 13, “because the six named offense category designations used in MCL 777.5 and 777.11 through 777.19 apply to the scoring of offense variables,” a “felony designated as a ‘crime against public safety’ may not be used to establish a ‘pattern of felonious criminal activity involving 3 or more crimes against a person.’” Accordingly, the Court of Appeals erred when it used the assaults against the prison employees as “crimes against a person” for scoring the variable. This error changed the sentencing guidelines range, and therefore the Supreme Court remanded for resentencing.

Third, the Supreme Court held that the trial court committed an error by stating that it was required by law to enhance the maximum sentence. However, the Court found the issue to be moot because the Court of Appeals had already acknowledged the error and remanded to the trial court in order for the trial court to clarify whether it knew it had discretion, and the trial court already resentenced in accordance with this order.

Justice Markman concurred in the majority's analysis and holding, and filed a separate opinion in order to respond to the dissent's conclusion that 25 points should be assessed for OV 13. Markman emphasizes that the legislature statutorily classified an assault on a prison employee as a "crime against public safety" rather than a "crime against a person." Therefore, even though a "person is a person," the crime cannot be used as a "crime against a person" when assessing OV 13.

Chief Justice Young concurred with the majority's holding that defendant was not coerced into foregoing his right to testify, but dissents on the grounds that OV 13 should be assessed at 25 points. Chief Justice Young reasoned that an assault against a prison employee is an assault against a person, regardless of the offense category that the statute assigns to the crime.