

MSC Opinion: OV 19 may be scored based on conduct that occurred after the sentence offense was completed

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On December 29, 2010, the Michigan Supreme Court issued its opinion in the matter of *People v. Smith*, Case No. 140371. Justice Young authored the 5-2 majority opinion which held that Offense Variable 19 in the Michigan Sentencing Guidelines specifically provides for consideration of conduct that occurs after the completion of the sentencing offense. The Court vacated the Court of Appeals opinion and reinstated the trial court's sentence for defendant's manslaughter conviction.

This case arises out of a June 2007 automobile accident. Smith was driving the 1993 Cadillac which crashed into the compact car being driven by Diane Sigers. Just before the crash, Smith had been driving recklessly and at a high-rate of speed. At trial, the Smith's front seat passenger, Ms. Wolfe, testified that she saw Ms. Sigers turning left and warned Smith that Ms. Sigers' car would not clear the roadway by the time Smith reached the intersection. Smith responded by increasing the speed of his vehicle. Unfortunately, Ms. Wolfe's prediction was correct and Smith crashed into Ms. Sigers' car. Ms. Sigers died at the scene. Ms. Wolfe spent two days in the hospital recovering from her injuries.

After Ms. Wolfe was released from the hospital, Smith contacted her and told her not to speak with anyone about the accident. He noted that the police did not have any evidence against him, as long as Ms. Wolfe "kept quiet". As a result of his warnings, Ms. Wolfe was reluctant to speak with police about the accident. When she finally spoke with authorities, Ms. Wolfe discussed the accident, as well as Smith's discussions with her following her release from the hospital.

Smith was subsequently convicted of manslaughter, reckless driving and witness intimidation. The pre-sentence investigation report reflected that Smith's recommended sentencing guideline range for the manslaughter charge was 50 to 125 months. Smith objected to the guideline range and argued that he was improperly scored Offense Variable ("OV") 19. He asserted that his conviction for witness intimidation precluded scoring OV 19, based on obstruction of justice, for the manslaughter conviction. The trial court disagreed and held that obstruction of justice was a separate, cognizable consideration within the sentencing guidelines. Therefore, Smith should be scored OV 19 regardless of his witness intimidation conviction. The trial court sentenced Smith to 10 to 22 years in prison on the manslaughter charge and 5 to 15 years for witness intimidation, which would run concurrent to the manslaughter sentence.

Smith appealed and argued, under the Court's ruling in *People v. McGraw*, 484 Mich 120 (2009), that OV 19 could not be scored based on events which occurred after the completion of the sentencing offense. In *McGraw*, the Court held that "[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." The Court of Appeals concluded that OV 19 did not specifically provide for consideration of subsequent events, and therefore Smith

could not be scored OV 19 for his post-accident conversations with Wolfe. Because the corrected sentencing guideline range was 43 to 107 months, and because Smith's minimum sentence fell outside the corrected range, the Court of Appeals vacated Smith's sentence and remanded the case to the trial court for resentencing.

The Supreme Court granted leave to appeal and reversed the Court of Appeals. In reaching this conclusion, the Court noted that the aggravating factors considered in OV 19 almost always occur after the charged offense has been completed. For example, pursuant to MCL 777.49(a), 25 points may be scored under OV 19 for threats the defendant makes to the security of the court or penal systems. The Court notes that, at a minimum, the sentencing offense must be completed before the defendant enters the court system. In response, the amicus curiae Criminal Defense Attorneys of Michigan argued that a court can only assess these 25 points if the underlying sentencing offense itself threatens the security of a court or penal system. The Court rejected this argument and noted that the Legislature specifically commanded that OV 19 be scored in every category of felony. There is nothing in MCL 77.49(a) to suggest that OV 19 is limited only to crimes against a court or penal institution.

Because OV 19 specifically provides for consideration of conduct occurring after the completion of a sentencing offense, the Court held that the trial court properly scored OV 19 in this case based on the post-accident conversations between Smith and Wolfe. The Court reversed the Court of Appeals opinion and reinstated Smith's original trial court sentence for manslaughter.

Justice Cavanagh authored the dissenting opinion joined by Chief Justice Kelly. In that dissent, Justice Cavanagh noted that he disagreed with the majority's conclusion that a sentencing court may employ a transactional approach to scoring offense variables. Rather, Justice Cavanagh advocated that the general rule should apply and that variables should be scored on the basis of the sentencing offense alone.