

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REYNALDO HERNANDEZ

Defendant-Appellant.

UNPUBLISHED

July 25, 1997

No. 188864

St. Clair Circuit Court

LC No. 95-000425 FC

Before: Jansen, P.J., and Young and R.I. Cooper*, JJ.

PER CURIAM.

Defendant pleaded guilty to one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (sexual contact with another person under age thirteen), and one count of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a) (sexual penetration with another person at least age thirteen but under age sixteen). He appeals as of right from his eight to fifteen year prison sentence. We affirm.

Defendant first argues that the trial court relied on constitutionally infirm, prior misdemeanor convictions when sentencing him. Specifically, defendant maintains that the record does not show that he was represented by counsel or that he validly waived counsel for those convictions. However, defendant failed to provide this Court with a copy of his presentence investigation report as required by MCR 7.212(C)(7). He has therefore waived this issue on appeal. *People v Rodriguez*, 212 Mich App 351, 355; 538 NW2d 42 (1995); *People v Oswald*, 208 Mich App 444,446; 528 NW2d 782 (1995). In any event, we note that defendant has the initial burden of establishing that the prior convictions in question were obtained without counsel or without a proper waiver of counsel. *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994); *People v Zinn*, 217 Mich App 340, 343; 551 NW2d 704 (1996). Defendant has failed to make such a prima facie showing and, therefore, is not entitled to remand for a *Tucker*¹ hearing.² For this reason, we likewise reject defendant's claim that the trial court improperly scored prior record variable 5 (PRV 5) (prior misdemeanor convictions).

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant also contends that the trial court improperly scored offense variable 12 (OV 12) (criminal sexual penetrations). Defendant essentially argues that the guidelines were misapplied because the trial court did not properly interpret the instructions concerning multiple criminal sexual penetrations. Defendant does not contend that the underlying factual predicates for the sentence are false nor does defendant contend that the sentence is disproportionate. As such, defendant's challenge does not state a cognizable claim for relief. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997). Because the sentencing guidelines do not have the force of law, "[t]here is no juridical basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guidelines variables." *Id.* Defendant is not entitled to resentencing.

Affirmed.

/s/ Kathleen Jansen

/s/ Robert P. Young, Jr.

/s/ Richard I. Cooper

¹ *United States v Tucker*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

² We note that the Supreme Court in *Carpentier*, *supra* at 32 n 7, criticized this Court's decision to remand for a *Tucker* hearing in *People v Hannan (After Remand)*, 200 Mich App 123; 500 NW2d 189 (1993). In *Hannan*, the defendant presented evidence that the court reporter was unable to locate any documentary materials relating to the prior conviction. *Hannan*, *supra* at 129. Consequently, we conclude that the mere absence of records from St. Clair County is insufficient evidence that defendant's prior convictions were obtained in violation of his right to counsel. *Carpentier*, *supra* at 32-34.