STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES RANDOLPH ROBERTS,

Defendant,

and

DEAN C. METRY,

Appellant.

UNPUBLISHED
February 22, 2000

No. 213325
LC No. 91-002045-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES RANDOLPH ROBERTS,

Defendant-Appellant.

No. 214277
LC No. 91-002045-FH

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

In Docket No. 214277, defendant pleaded guilty to one count of concealing a motor vehicle with the intent to mislead, MCL 750.415(2); MSA 28.647(2), and one count of receiving stolen property exceeding $100, MCL 750.535(1); MSA 28.803(1). He was sentenced to thirty-two to

forty-eight months' imprisonment for concealing with the intent to mislead and forty to sixty months' imprisonment for receiving stolen property exceeding $100 with credit for 906 days served. As part of a plea agreement, an habitual offender charge was dismissed. Defendant appeals as of right. We affirm. In Docket No. 213325, defendant's attorney, Dean Metry, appeals from an order holding him in contempt of court for failing to prepare a writ of habeas corpus authorizing defendant's presence at sentencing. We reverse.

Defendant's sole claim in Docket No. 214277 is that the trial court considered inaccurate information in imposing sentence. A claim that a sentence is based on inaccurate information is a due process claim. *People v Potts*, 55 Mich App 622, 639; 223 NW2d 96 (1974). We review constitutional claims de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). Defendant contends that in sentencing him, the trial court considered information regarding a pending charge in the state of Tennessee for theft over $10,000. This information was contained in defendant's presentence investigation report and objected to by defendant at his sentencing hearing. According to defendant, this charge had been dismissed.

A defendant is entitled to be sentenced based on accurate information. *People v Smith*, 423 Mich 427, 448; 378 NW2d 384 (1985). The purpose of the presentence investigation report is to give the sentencing court as much information as possible so that the sentence can be tailored to both the offense and the offender. *People v Miles*, 454 Mich 90, 97; 559 NW2d 299 (1997). The sentencing court is permitted to consider facts underlying uncharged offenses, pending charges, and acquittals. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). When a defendant claims that a presentence report contains an error, and a sentencing court disregards information challenged as inaccurate, the court effectively determines that the information is irrelevant and the defendant is entitled to have the information stricken from the report. *People v Swartz*, 171 Mich App 364, 381; 429 NW2d 905 (1988). The failure to strike disregarded information can be harmless error. *People v Fisher*, 442 Mich 560, 567 n 4; 503 NW2d 50 (1993).

In this case, we conclude the trial court did not consider the pending Tennessee charge alone but, rather, considered defendant's entire pattern of past criminal behavior as set forth in the PSIR. Although there was some dispute on the record, defendant admitted that he had at least five prior felony convictions and the PSIR demonstrated that defendant had "an extensive criminal record that span[ned] more than 20 years." Further, at the time of his sentencing, defendant was serving a two-to-twenty-year state sentence for intent to pass a false title and a concurrent federal sentence of fifteen months for fraud. The record indicates defendant had no employment except that of a "career criminal," and that his life had been one of "stealing, cheating, and sponging off anyone who's available." Moreover, even if the trial court did consider the disputed information and failed to strike it, this error was harmless; minus the pending Tennessee charge, defendant's criminal history remained "extensive" and his sentence was not disproportionate. See *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

We next turn to defense counsel's challenge in Docket No. 213325 to the trial court's decision to hold counsel in contempt for failing to writ defendant for sentencing on two separate occasions and the court's order that counsel pay $400 to a charity of counsel's choice. Defense counsel argues that

the trial court abused its discretion when it found him in contempt of court. We agree. MCL 600.1701; MSA 27A.1701 states, in pertinent part:

> The supreme court, circuit courts, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
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> * * *
>
> (c) All attorneys . . . for any willful neglect or violation of duty, for disobedience of any process of the court, or any lawful order of the court . . . .

Contempt of court is a willful act, omission, or statement tending to impair the authority or impede the functioning of a court. *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995). The power to punish for contempt is awesome and carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown. *People v Kurz*, 35 Mich App 643, 651; 192 NW2d 594 (1972).

All contempt is either direct or indirect. *Williams Int'l Corp v Smith*, 144 Mich App 257, 262; 375 NW2d 408 (1995), rev'd on other grounds sub nom *In re Contempt of Dougherty*, 429 Mich 81; 413 NW2d 392 (1987). Contempt is direct if committed in the immediate view and presence of a sitting court and may be punished summarily. *Robertson*, *supra* at 437-438; *Williams*, *supra* at 262. Direct contempt occurs when all the facts necessary to find the contempt are within the personal knowledge of the judge. *Id.* Indirect contempt is committed outside the immediate view of the court and cannot be punished summarily. *Id.* Here, we conclude that defense counsel's contempt was direct. In the trial court's presence, defense counsel admitted to being aware of the court's expectation and of having knowledge of the court's procedure, yet he chose not to initiate a writ of habeas corpus for his client's sentencing hearing. Furthermore, contempt may be civil or criminal, depending on the purpose sought to be achieved. *Spalter v Wayne Circuit Judge*, 35 Mich App 156, 160; 192 NW2d 347 (1971). "If it is to punish the offender for his disobedience or contumacious behavior, then it is criminal contempt. If, however, the purpose is to compel obedience to an order of the court, then it is civil contempt." *Id.* at 160-161. On review of the record, we conclude that defense counsel was found in criminal contempt.

The record shows that the prosecuting attorney attempted to address the issue of who was responsible for ensuring that an incarcerated defendant was present at sentencing by implementing an administrative policy placing this responsibility on defense counsel. The record also shows that no written order or general or local court rule existed directing defense attorneys practicing in St. Clair County to writ their clients in for sentencing. However, the record does demonstrate that on two separate occasions, the trial court verbally directed defense counsel to produce his client and that defense counsel failed to do so. In our view, the real question in this matter is whether defense counsel *should have* been cited for contempt. Administrative policies are permitted only for the limited purpose of governing internal court management. *Schlender v Schlender*, 235 Mich App 230, 232; 596 NW2d 643 (1999). Where an administrative policy extends beyond court management, it is

considered more an attempt at promulgating a local court rule. *Id.* Circuit courts are permitted to adopt local court rules, but the rules must be submitted to and approved by the Supreme Court if they are to be enforced. *Id.* See also MCR 8.112(A)(2).

We conclude that the prosecuting attorney's letter to the judges and court administrators informing them of the county's policy regarding writs exceeded the limited purpose of governing internal court management. The policy not only affected the procedural operation of the prosecutor's office but also directly impacted every defense attorney practicing within St. Clair County. Because the prosecuting attorney's policy extended beyond internal court management, it must be considered an attempt at promulgating a local court rule. However, the record is devoid of any indication that this policy was submitted to and approved by the Supreme Court. It was therefore unenforceable as a local court rule.

Moreover, the record shows that on each occasion the trial court directed defense counsel that it was his responsibility to writ his client in for sentencing, the directive was oral. The record further shows that the trial court refused to issue a written order requiring defense counsel to take the requested action. However, a court speaks through written judgments and orders rather than oral statements or written opinions. *People v Jones*, 203 Mich App 74, 82; 512 NW2d 26 (1994). Although defense counsel's actions in defying the trial court's requests were clearly and unequivocally shown, we conclude that the trial court acted without judicious responsibility in relying on the prosecuting attorney's administrative policy and in refusing to enter a written order directing defense counsel to writ in his client. In doing so, the trial court abused its discretion in summarily punishing defense counsel. The absence of a lawful written order, court rule, or other authority should have been considered by the trial court before finding counsel in contempt. While the trial court's frustration with defense counsel's inaction in producing his client may be understandable, it was incumbent on the court to invoke proper and responsible authority in concluding that counsel was in contempt.

We therefore conclude that the trial court abused its discretion and reverse its contempt order against defense counsel. Docket No. 214277 affirmed; Docket No. 213325 reversed.

/s/ Harold Hood
/s/ Michael R. Smolenski
/s/ Michael J. Talbot