

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIM RAY BEAUMONT,

Defendant-Appellant.

UNPUBLISHED

March 3, 2000

No. 213010

Roscommon Circuit Court

LC No. 97-003424-FH

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Defendant was convicted by jury of illegally manufacturing marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii). The trial court sentenced defendant as a second habitual offender, MCL 769.10; MSA 28.1082, to three to six years in prison. Defendant appeals as of right. We affirm defendant's conviction and sentence, but remand to the trial court to strike the challenged information from defendant's presentence investigation report (PSIR).

Defendant first argues that the trial court abused its discretion because the sentence it imposed violates the principle of proportionality. We disagree. We review sentencing matters for an abuse of discretion. *People v Kowalski*, 236 Mich App 470, 475; 601 NW2d 122 (1999), citing *People v Milbourn*, 435 Mich 630, 634-636; 461 NW2d 1 (1990). "[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, *supra* at 636.

The Michigan Supreme Court has held that "a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). Here, in addition to his juvenile record, defendant has been convicted of three felonies and four misdemeanors, including prior drug-related convictions, and he has been placed on probation and parole. Furthermore, defendant admits using alcohol and drugs, including using marijuana

and cocaine shortly after his conviction in this case. This is sufficient evidence that defendant is unable to conform his conduct to the laws of society.

MCL 769.10(1)(a); MSA 28.1082(1)(a) gives the trial court discretion to sentence an habitual offender to a term of up to 1½ times the longest term allowed for the underlying conviction. Pursuant to statute, four years imprisonment is the maximum incarceration for the underlying conviction. MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii). Therefore, defendant's sentence of three to six years, which is within the statutory limits, does not violate the principle of proportionality. *Hansford, supra*; see *People v Primer*, 444 Mich 269; 506 NW2d 839 (1993).

Next, defendant contends that the trial court erred in not requiring the completion of a sentencing information report (SIR) in this case. Although this Court has held that even though the sentencing guidelines do not apply to habitual offenders the trial court must fill out an SIR for the underlying offense if that offense is included in the guidelines, *People v Edgett*, 220 Mich App 686, 691; 560 NW2d 360 (1996), citing *People v Zinn*, 217 Mich App 340, 350; 551 NW2d 704 (1996), the purpose of such was "to aid in the development of guidelines for habitual offender sentencings, rather than to [guide] the sentencing court in determining the habitual offender's sentence," *Zinn, supra* at 350, quoting *People v Strickland*, 181 Mich App 344, 346; 448 NW2d 848 (1989). This issue is moot because there is no longer a need for the compilation of sentencing information as a result of the enactment of the legislative guidelines, and remand would serve no useful purpose. See *Zinn, supra*. Further, the failure to prepare an SIR did not impact defendant's sentence.

Defendant next argues that the trial court's failure to indicate on the record whether it was sentencing defendant for the underlying conviction of manufacturing marijuana or for being an habitual offender constitutes an abuse of discretion and legal error because it is unclear whether the court understood that it had discretion regarding whether to enhance defendant's sentence. We disagree. When there is "no clear evidence that the sentencing court believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *People v Alexander*, 234 Mich App 665, 674-675; 599 NW2d 749 (1999). In this case, the trial court properly articulated the reasons for the sentence it imposed, and there is no evidence that the trial court believed that it lacked the discretion not to sentence defendant as an habitual offender. We are satisfied that the trial court had a clear understanding of its discretion in sentencing defendant.

Defendant next contends that the trial court erred in relying on inaccurate information contained in his PSIR. Again, we disagree. "[T]rial courts have a duty to respond to allegations of inaccuracy in a presentence report." *People v Barnett*, 165 Mich App 311, 319; 418 NW2d 445 (1987). Upon review of the record in the present case, we conclude that the trial court sufficiently responded to defendant's objection and it did not rely on the allegedly inaccurate information at issue when sentencing defendant. See *id.* at 319-320.

However, when a sentencing court disregards information in a presentence report that is challenged as inaccurate, the defendant is entitled to have the challenged information stricken from the report. *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993), citing *People v Newson (After Remand)*, 187 Mich App 447, 450; 468 NW2d 249, vacated in part on other grounds 437

Mich 1054 (1991). Therefore, we remand to the trial court so that the challenged information can be stricken from the PSIR. *Britt, supra; Newson, supra.*

Defendant also contends that his sentence of three to six years' imprisonment constitutes cruel and unusual punishment in violation of his federal and state constitutional rights. To the contrary, we conclude that defendant's sentence clearly does not constitute cruel or unusual punishment. This Court has held that the habitual offender statutes are not cruel and unusual. *People v Potts*, 55 Mich App 622, 634-639; 223 NW2d 96 (1974). Further, defendant's sentence is proportionate to the offense and the offender, and thus it is not cruel or unusual. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

Finally, defendant contends that he was denied the effective assistance of counsel. We disagree. Because defendant failed to raise this issue in the trial court, our review is limited to mistakes that are apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant first argues that he was denied the effective assistance of counsel because his trial attorney did not explain to him the pros and cons of an offered plea agreement and the legal effects of a second habitual offender conviction with regard to sentencing. The record contains no indication that defendant's attorney failed to properly inform him of the consequences of not accepting the plea offer and facing possible conviction and sentencing as a second-offense habitual offender. Therefore, this Court cannot find that defendant was denied the effective assistance of counsel on this ground. *Nantelle, supra; Hedelsky, supra.*

Defendant next argues that he was denied the effective assistance of counsel because his trial attorney failed to object to the nonexistence of an SIR. Although the completion of an SIR may have been required in this case, defendant was not denied a proportionate sentence as a result of his attorney's failure to object to the nonexistence of an SIR. The judicial sentencing guidelines do not apply to habitual offenders, *Edgett, supra; Zinn, supra*, and the guidelines need not be considered by the trial court and may not be considered on appeal in determining the appropriateness of a sentence for an habitual offender. *People v Cervantes*, 448 Mich 620, 625 (Riley, J.), 630 (Cavanagh, J.); 532 NW2d 831 (1995); *Edgett, supra* at 694; *People v Haacke*, 217 Mich App 434, 436-437; 553 NW2d 15 (1996). Therefore, even if defendant's attorney had requested the completion of an SIR, a different outcome would not have occurred. Defendant has shown no prejudice. Accordingly, this Court will not reverse defendant's conviction or sentence on the basis of ineffective assistance of counsel. *Pickens, supra.*

Conviction and sentence affirmed. Remanded to strike the challenged information from defendant's PSIR. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Donald S. Owens