

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST STOUDEMIRE,

Defendant-Appellant.

UNPUBLISHED

April 18, 2000

No. 203627

Recorder's Court

LC No. 92-005187

Before: Cavanagh, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to twenty to thirty years' imprisonment. On appeal, this Court affirmed defendant's conviction, but remanded for further proceedings regarding his sentence. *People v Stoudemire*, unpublished opinion per curiam of the Court of Appeals, issued November 26, 1996 (Docket No. 161380). The trial court subsequently resentenced defendant, as before, to a term of twenty to thirty years' imprisonment. Defendant appeals as of right. We vacate defendant's sentence and remand for resentencing.

Defendant first argues that the trial court violated his Sixth Amendment right to counsel by resentencing him in the absence of his attorney. This issue presents a question of constitutional law that we review de novo. See *People v Echevarria*, 233 Mich App 356, 358; 592 NW2d 737 (1999).

After reviewing the record, we conclude that the trial court improperly transformed defendant's request to be represented by his own attorney into a request to represent himself. Under MCR 6.425(F)(1)(d)(i), "the responsibilities of the appellate lawyer appointed to represent the defendant include representing the defendant . . . in available postconviction proceedings in the trial court." Because defendant already had an attorney of record, who never formally withdrew from his representation of defendant,¹ the court erred in appointing substitute counsel over defendant's objection. See *People v Evans*, 156 Mich App 68, 70-71; 401 NW2d 312 (1986).² Absent gross incompetence, physical incapacity, or contumacious conduct, the removal of a defendant's chosen counsel constitutes a violation of his Sixth Amendment right to counsel. *People v Durfee*, 215 Mich

App 677, 681; 547 NW2d 344 (1996). A harmless error analysis is not applicable where the trial court violates the defendant's Sixth Amendment right to counsel. *Id.*

In addition, the trial court's determination that defendant "has the right not to have an attorney, and apparently he's made that election" was made without substantial compliance with the waiver of counsel procedures set forth in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976) and MCR 6.005(D). See *People v Adkins (After Remand)*, 452 Mich 702, 721-723; 551 NW2d 108 (1996). Furthermore, the trial court reached its conclusion despite defendant's protests that he wanted to proceed with his appellate lawyer (who, as noted above, was still responsible for representing him). The trial court's error was not cured by its request that attorney Dean remain in the courtroom in case defendant wanted his aid; the appointment of standby counsel "does not legitimize a waiver-of-counsel inquiry that does not comport with legal standards." *People v Lane*, 453 Mich 132, 138; 551 NW2d 382 (1996). Resentencing is therefore required.

Defendant further argues both that his presentence report was not reasonably updated for the resentencing proceeding and that he was not provided with a reasonable opportunity to review the presentence report prior to resentencing. We find merit in both claims.

A defendant is entitled to be resentenced on the basis of accurate information and a reasonably updated report. See *People v Miles*, 454 Mich 90, 96-97; 559 NW2d 299 (1997). A defendant and his lawyer must also be afforded the opportunity to review the presentence report "at a reasonable time before the day of sentencing." MCR 6.425(B). The goal of the disclosure provision is to allow a defendant the opportunity to challenge the accuracy of the report at the time of sentencing. See *People v Hernandez*, 443 Mich 1, 13 & n16, 19 & n28; 503 NW2d 629 (1993). The failure to object normally constitutes a waiver of any challenges to the accuracy of the presentence report. See *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). Here, however, the record indicates that defendant was not afforded any opportunity to review the report prior to the sentencing proceedings.

Although the sentencing information report was amended, as required by this Court, the presentence report was not. Thus, the four vacated 1982 convictions, which comprised part of the basis for this Court's prior remand order, were never stricken from the presentence report or its cover sheet. Pursuant to MCL 771.14(5); MSA 28.1144(5), inaccurate information in a presentence report must be stricken. *People v Martinez (After Remand)*, 210 Mich App 199, 202; 532 NW2d 863 (1995). In addition, defendant's refusal to speak to the investigator does not justify the report's failure to include information regarding his conduct during his years in prison, as this information was available from the Department of Corrections. See *People v Triplett*, 407 Mich 510, 515-516; 287 NW2d 165 (1980). The trial court's resentencing of defendant without the benefit of a reasonably updated presentence report constitutes error requiring reversal. See *id.* at 511.

Defendant also asserts that he should be resentenced by a different judge on remand. We disagree. There is no indication, as defendant asserts, that the original trial judge would have substantial difficulty in setting aside his previously expressed views or evidence regarding the 1982 convictions. See *Evans, supra*. Despite the procedural errors, the record does not reflect a showing of actual

personal bias or prejudice against defendant. See *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Thus, resentencing before a different judge is not required.

In light of our disposition of the previous issues, we need not address defendant's claim that the trial court abused its discretion in refusing to grant him a continuance.

Defendant's sentence is vacated and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ David H. Sawyer

/s/ Brian K. Zahra

¹ Attorney Dean stated that he had contacted defendant's appellate attorney, and the latter had stated that his appointment was limited to appellate matters.

² In *Evans*, this Court addressed MCR 6.101(G)(1), now modified as MCR 6.425(D)(2).