STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 6, 2004
v	No. 243815 Wayne Circuit Court
MELVIN JACKSON, a/k/a EUGENE BROWN, Defendant-Appellant.	LC No. 97-010118

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from jury convictions of possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv), carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was later sentenced to concurrent prison terms of two to twenty years on the controlled substance conviction and two to five years on the CCW conviction, to be served consecutively to the mandatory two-year term for felony-firearm. We affirm defendant's convictions and sentences but remand for correction of the presentence report. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court erred in denying his motion to dismiss for lack of a speedy trial. Whether a defendant was denied his right to a speedy trial is a constitutional issue that is reviewed de novo on appeal. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). However, the trial court's factual findings are reviewed for clear error. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997).

A criminal defendant has a right to a speedy trial. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). Whether a defendant has been denied his right to a speedy trial involves consideration of four factors: (1) the length of the delay, (2) the reasons for the delay, (3) defendant's assertion of the right, and (4) prejudice to the defendant. *Cain, supra* at 112. If the delay is less than eighteen months, the burden is on the defendant to prove that he was prejudiced by the delay. A delay of eighteen months or more is presumptively prejudicial and the burden is on the prosecutor to rebut the presumption. *Id*.

Charges were issued against defendant in November 1997. He was not actually tried until May 2001, a delay of forty-two months. Although the delay is substantial, "[t]he length of

the delay is insufficient in and of itself to require dismissal." *People v Simpson*, 207 Mich App 560, 564; 526 NW2d 33 (1994).

The reasons for the delay were mostly the fault of defendant. The first trial date in August 1998 had to be adjourned because defendant failed to appear for the special conference scheduled two weeks earlier. He failed to appear for the new conference date and was missing for a month. Defendant failed to appear for the final conference in November 1998 and was missing for seven months. Trial was rescheduled for March 20, 2000 but could not go forward because defendant discharged his attorney. Trial was rescheduled for January 2001 and defendant failed to appear. Trial was rescheduled for February 22, 2001 but could not go forward because defendant discharged his attorney.

Defendant waited until the day of trial to assert his right to a speedy trial. Defendant's failure to assert his right in a timely manner weighs against a finding that he was denied a speedy trial. *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993).

The right to a speedy trial protects "three interests of the defendant: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused; (3) limitation of the possibility that the defense will be impaired." *People v White*, 54 Mich App 342, 351; 220 NW2d 789 (1974). "In considering the prejudice to the defendant, the most serious inquiry is whether the delay has impaired the defendant's defense." *Simpson*, *supra* at 564.

The record indicates that defendant was out on bond at times while the case was pending. He was also incarcerated at various times, but there is some indication in the record that his incarceration was due in part to a sentence imposed in another case rather than his failure to post bond in this case. According to the presentence report, he was only incarcerated pending trial in this case from January 30, 2001 forward. In his motion, defendant did not assert that his defense was prejudiced in any manner due to the delay and there is nothing in the record to indicate otherwise.

Although the delay was substantial, it was mostly attributable to defendant's actions. Because defendant did not assert his right in a timely manner and there is no indication that his defense was prejudiced by the delay, we find that the trial court did not abuse its discretion in denying defendant's motion. *Simpson*, *supra*.

Defendant next contends that he is entitled to resentencing because he was not given the proper number of days' credit for time served.

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing. [MCL 769.11b.]

This statute authorizes credit for time served on the offense of which the defendant is ultimately convicted. If a defendant is incarcerated because of a sentence on another conviction, he is not entitled to credit. *People v Givans*, 227 Mich App 113, 125-126; 575 NW2d 84 (1997).

The presentence report indicated that defendant was jailed pending trial on the instant charges from January 30, 2001 onward. The trial court found that any other periods of incarceration were due to a conviction in a different case. Defendant disputes this but has presented no evidence to show that he was incarcerated during those periods due to an inability to furnish bond for the instant offenses and there is nothing in the record to show that such was the case. Therefore, defendant has failed to establish any error in the calculation of his sentence credit.

Defendant lastly contends that he is entitled to resentencing because he was sentencing on the basis of inaccurate information. The sentencing court's response to a claim of inaccuracies in the presentence report is reviewed for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

A defendant has a "due process right to be sentenced on the basis of accurate information." *People v Mitchell*, 454 Mich 145, 173; 560 NW2d 600 (1997). A presentence report is presumed accurate unless effectively challenged by the defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Whether a flat denial of an adverse factual assertion constitutes an effective challenge or whether an affirmative factual showing is required depends on the nature of the disputed matter. *Id*. Once the defendant raises an effective challenge, the prosecution must prove by a preponderance of the evidence that the facts are as asserted. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

The sentencing court must respond to a challenge to the accuracy of the presentence report, but has wide latitude in how it responds. *Spanke*, *supra*. It may determine whether the information is accurate, accept the defendant's version, or disregard the challenged information. *Id*. If the court chooses to disregard the information, it must indicate on the record that it did not consider the information in determining the defendant's sentence. If the court finds the information is irrelevant or inaccurate, the presentence report shall be amended and the inaccurate or irrelevant information must be stricken. *Id*. at 649; MCL 771.14(6).

The report indicated that defendant's prior history included a 1955 arrest for larceny in Kansas for which he was sentenced to two years and a 1961 arrest for soliciting in Canada. Defendant said the report was incorrect. The court noted that the information regarding the 1955 and 1961 charges was so vague that it did not clearly establish that defendant had been convicted and thus the information could remain as is. Defense counsel agreed. Because defense counsel agreed with the court's decision not to change the information regarding the 1955 and 1961 convictions, any claim of error has been waived. *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000).

The report also indicated that defendant had a 1993 conviction for attempted larceny in a building in Romulus for which he was sentenced to probation. He challenged the information as "incorrect" and denied "that this was him who was convicted of the attempt of larceny in a building." The court found that the Romulus conviction was in the computer records "under his name, under his date of birth" and declined to delete it. The court resolved the challenge to the 1993 Romulus conviction by verifying it in its computer records. Defendant has not shown that the records were wrong or that the information regarding the conviction was otherwise incorrect. Therefore, the trial court did not abuse its discretion in resolving that challenge.

The presentence report showed a 1985 conviction out of Troy, a 1993 conviction out of Birmingham, and a 1993 conviction out of Troy. At sentencing, defendant challenged "the offense in 1985 in Troy . . . and the conviction in Birmingham in ninety-four" as incorrect. On appeal, defendant contends that the 1993 convictions out of Birmingham and Troy "were the same case." Defendant failed to challenge the accuracy of the report regarding the 1993 Troy convictions. Defendant only challenged a 1994 conviction in Birmingham. However, the presentence report did not reference a 1994 conviction out of Birmingham and thus there was nothing for the court to resolve. Assuming defendant intended to challenge the 1993 Birmingham conviction and counsel simply misspoke when he said 1994, defendant has not shown a right to relief. While he contends that the Birmingham conviction was the same as the Troy conviction, he has not briefed the merits of this claim, which is therefore deemed abandoned. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).

The presentence report indicated on the face page that defendant had a GED. It stated on page one that defendant went through ninth grade but "stated that he earned his GED while in the Army." Defendant said the report was incorrect because he graduated from high school and had some college credits. The trial court noted the objection. It crossed out GED on the face page of the report and wrote in next to the heading Education, "High School Northern H. School Det." It failed to address defendant's claim regarding his college credits. Therefore, remand for correction of the presentence report is appropriate. MCL 771.14(6); *Spanke*, *supra* at 650. Given, however, that the court had the benefit of the appropriate information before passing sentence and that defendant does not claim that his sentence was disproportionate, resentencing is not required. *People v McAllister*, 241 Mich App 466, 474; 616 NW2d 203 (2000).

Defendant's convictions and sentences are affirmed but the matter is remanded for correction of the presentence report. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette