

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TEJUAN LAWRENCE,

Defendant-Appellant.

UNPUBLISHED
December 6, 2005

No. 255574
Wayne Circuit Court
LC No. 03-014112

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals by right his sentences for carjacking, MCL 750.529a, third-degree fleeing and eluding, MCL 257.602a(3), possession of a firearm by a felon, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a fourth-habitual offender, MCL 769.12, to 30 to 45 years in prison for carjacking, and to concurrent terms of three years, four months to five years in prison for fleeing and eluding, felon in possession, and CCW. He received a consecutive five-year sentence for felony-firearm. We affirm defendant's sentences.

I. FACTS

Prior to trial, the prosecutor provided defendant with a notice of intent to charge him as a fourth-felony offender. The information listed two 1989 convictions and a 1990 conviction. These offenses were also listed in presentence information report (PSIR). During sentencing, defense counsel stated that defendant challenged the inclusion of the 1989 offenses in the PSIR on the ground that he had not committed the listed offenses and that someone else, probably his brother, had committed the crimes and then used his name. The trial court stated that it would continue to use the offenses in scoring because the probation department had provided that information and defendant had not provided any other information to the contrary. Defendant now challenges his scoring as a habitual offender and raises a related claim of ineffective assistance of counsel.

II. PRE SENTENCE INVESTIGATION REPORT

A. Standard of Review

A defendant is entitled to the use of accurate information during his sentencing, and a trial court must respond to a defendant's allegations that a presentence investigation report contains inaccuracies. *People v McAllister*, 241 Mich App 466, 473; 616 N.W.2d 203 (2000), remanded in part on other grounds 465 Mich 884 (2001). We review the sentencing court's response to a defendant's claim of inaccuracies in his PSIR for an abuse of discretion, *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003), and review the trial court's factual findings at sentencing for clear error. MCL 2.613(C); *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004). Any necessary statutory interpretation is reviewed de novo. *Houston*, *supra* at 471.

B. Analysis

The existence of a defendant's prior convictions for purposes of sentencing under the habitual offender statutes¹ must be determined by the trial court at sentencing or a scheduled hearing. MCL 769.13(5). Any relevant evidence, including information contained in the PSIR, may establish the existence of a prior conviction. MCL 769.13(5)(c). A PSIR is presumed to be accurate, and a trial court is entitled to rely upon factual information therein unless the defendant effectively challenges it. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). It is defendant's initial burden to show that the prior conviction information is inaccurate:

The defendant shall bear the burden of establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid. If the defendant establishes a prima facie showing that information or evidence is inaccurate, the prosecuting attorney shall bear the burden of proving, by a preponderance of the evidence, that the information or evidence is accurate. [MCL 769.13(6).]

Here, defendant challenges the trial court's decision not to delay sentencing and schedule a separate hearing to decide the validity of the prior convictions. However, according to the plain language of the statute, a defendant can present evidence or challenge prior convictions either "at sentencing *or* at a separate hearing scheduled for that purpose *before sentencing*." MCL 769.13(5) (emphasis added). Defendant did not raise his challenge before sentencing; therefore, we find that the trial court did not abuse its discretion by deciding the challenges at sentencing.

We find that defendant failed to meet his burden under MCL 769.13(6). He has presented nothing to support his allegations that the 1989 convictions were actually those of his brother or another individual. He has not explained why he could not have committed the previous offenses, and has provided no explanation as to why he could not obtain such information. This Court has previously held that, depending on the nature of the disputed matter, a flat denial may be sufficient to mount an effective challenge to items in the PSIR. See *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003), citing *People v Walker*, 428 Mich 261, 267-268; 407 NW2d 367 (1987). However, given the statutory obligation of MCL 769.13(6) that a defendant make a "prima facie showing" of the inaccuracy of prior conviction information,

¹ MCL 769.10, MCL 769.11, and MCL 769.12.

we find that some “affirmative factual showing” is required to meet this burden. *Walker, supra*.² Defendant has failed to establish a prima facie showing of the inaccuracy of the PSIR, and we find that the trial court did not clearly err in relying on the information in the PSIR to sentence him as a habitual offender. *Grant, supra* at 233-234.

III. EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Because there was no *Ginther*³ hearing held in the trial court, this Court’s review is limited to mistakes that are apparent from the lower court record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

B. Analysis

In order to demonstrate ineffective assistance of counsel, a defendant must demonstrate that counsel’s performance was objectively unreasonable, and that the outcome would probably have been different but for the attorney’s error. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant has presented no evidence that he did not commit the crimes listed in the habitual offender notice and the PSIR. Thus, there is no basis for his claim that counsel either committed an objectively unreasonable error by failing to challenge the sentence enhancement, or that the alleged error deprived him of a shorter sentence. *Carbin, supra*.

Affirmed.

/s/ Michael R. Smolenski

/s/ Bill Schuette

/s/ Stephen L. Borrello

² MCL 769.13(6) was substantially rewritten in 1994.

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).