

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAY FRANCIS RINKE,

Defendant-Appellant.

UNPUBLISHED

January 24, 2008

No. 271756

Huron Circuit Court

LC No. 05-004469-FH

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of operating a motor vehicle while intoxicated (OWI), third offense, MCL 257.625(1), (9)(c), and operating a vehicle with a suspended license, second offense, MCL 257.904(3)(b). The trial court sentenced defendant to one and one-half to five years in prison for the OWI conviction and one year in prison for his operating a vehicle with a suspended license conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand for clarification regarding the information in the Presentence Investigation Report (PSIR) and correction of the judgment of sentence.

I. Basic Facts and Proceedings

At trial, defendant and his wife claimed that she was driving their vehicle when she drove into a ditch and the car became stuck. However, a motorist who stopped and assisted them testified that defendant told her that he had been the one driving. The motorist also observed that defendant was swaying or staggering, slurring his speech, and smelled of liquor. The arresting officer asserted that defendant stumbled, smelled of alcohol, slurred his speech, and told him that he had been the one driving. After conducting field sobriety tests, the officer arrested defendant, and a blood test revealed that defendant's blood alcohol content was .22 grams per hundred milliliters. A jury convicted defendant of OWI and operating a vehicle with a suspended license. Defendant's PSIR indicates that, in 1973, defendant was convicted of carrying a concealed weapon (CCW), waived his right to an attorney at sentencing, and was ordered to pay a \$15 fine. Defendant's PSIR detailed six other prior felony convictions and 17 prior misdemeanor convictions.

At sentencing, defendant objected to the CCW conviction, asserting that he had "no knowledge of this particular offense" and commenting that it was "odd that there would be a felony there without an attorney and with an order to pay a fine of \$15." Defendant denied going

to court on a CCW charge in 1973 and claimed that, in a different proceeding, another court had “deleted” that reference because there was no record. However, a 2005 PSIR from Monroe County also included the CCW conviction, and the prosecutor asserted that it was included in the results from a Law Enforcement Information Network (LEIN) search, as well as a computerized criminal history (CCH) search. The following colloquy ensued:

The Court: I’m gonna assume it’s in.

Defense counsel: He—he denies it. It’s not going to change the Sentencing Information Report, he denies that.

The Court: *It’s not going to change my sentence either whether it is or isn’t a conviction, but all the information that I have is that it should be there, even though he denies it. So I’m going to leave it in the report. It’s not gonna have a bearing on my sentence one way or the other.*

Defense counsel: Maybe the Court could just put in there that my client denies that one conviction.

The Court: Yes, that’s noted for the record.

Defense counsel: Okay. Thank you, Your Honor.

The Court: But he has six other felonies, 17 misdemeanors, *I got plenty to base my sentence on without even considering that one way or the other.* [Emphasis added.]

II. Information in Defendant’s PSIR

Defendant argues that the trial court abused its discretion in failing to strike the CCW conviction from the PSIR because its statements that the conviction had “no bearing” and would not change the sentence indicate that the conviction was irrelevant and would be disregarded. We review a trial court’s response to a party’s challenge to the accuracy of a PSIR for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

A criminal defendant has “the right to the use of accurate information at sentencing.” *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000). When presented with a challenge to the accuracy of information contained in the PSIR, the court must respond to the challenge. *Spanke, supra* at 648. The court has wide latitude in responding; it may “determine the accuracy of the information, accept the defendant’s version, or simply disregard the challenged information.” *Id.* If the trial court decides to disregard the challenged information, “it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence.” *Id.* at 648-649. MCL 771.14(6) provides that, if the court finds that the challenged information is inaccurate or irrelevant, the PSIR “shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly[.]” Similarly, MCR 6.425(E)(2)(a) provides that, if the court decides not to take the challenged information into account in sentencing, it must “correct or delete the challenged information[.]”

In responding to defendant's challenge in the instant case, the court stated that it would leave the CCW conviction in the report, but that it had "no bearing" on the sentence imposed, it would not change the sentence one way or the other, and it had "plenty" on which to base the sentence without considering it. Defendant contends that these statements indicate that the court disregarded the challenged information. However, the trial court did not "clearly indicate that it did not consider the alleged inaccuracy in determining the sentence." See *Spanke, supra* at 648-649. These statements could mean that the court found the conviction irrelevant and disregarded it, which would require us to remand for the limited purpose of striking the information from the PSIR. MCL 771.14(6); MCR 6.425(E)(2); see *Spanke, supra* at 650. Conversely, these remarks could indicate that the court took the conviction into account without relying on it or finding it dispositive in which case the conviction was properly included in the PSIR. Because it is not clear from the record how the trial court resolved defendant's challenge to the information, we remand for clarification and, if necessary, correction of the PSIR.

We also note that the judgment of sentence incorrectly identifies defendant's jury-trial conviction as OUIL, third offense, pursuant to MCL 257.625(1)(a) and (6)(d). Because defendant was convicted of OWI, third offense, we also remand for the ministerial purpose of correcting the judgment of sentence to reflect defendant's actual conviction of OWI, third offense, pursuant to MCL 257.625(1) and (9)(c). MCR 6.435(A); MCR 7.216(A)(7).

We affirm defendant's convictions and sentences, but remand for clarification regarding the information in the PSIR and correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Patrick M. Meter