

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EMMANUEL EDUARDO NOBOA,

Defendant-Appellant.

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UNPUBLISHED

April 17, 2008

No. 269623

Muskegon Circuit Court

LC No. 04-050471-FH

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals by leave granted from his plea-based conviction of second-degree home invasion, MCL 750.110a(3), and being a third-offense habitual offender, MCL 769.11. The trial court sentenced defendant to a prison term of 24 months to 30 years. We affirm.<sup>1</sup>

On January 12, 2005, defendant pleaded guilty to second-degree home invasion, MCL 750.110a(3), and habitual offender, third offense, MCL 769.11. At this hearing, the prosecutor stated that defendant originally was charged as a habitual offender, fourth offense, MCL 769.12. However, the prosecutor reduced the habitual offense because there was uncertainty regarding one of defendant's prior convictions that may have been based on the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.* In lieu of obtaining final confirmation regarding the HYTA

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<sup>1</sup> At oral argument, the parties agreed that defendant had been released after serving his minimum sentence and was deported. Consequently, the prosecutor stated that all issues were moot. In response, defense counsel asserted that defendant was deported because he was a legal resident, but not a United States citizen. In light of the fact that defendant was in the process of attempting to return to the United States where his family resided, defense counsel requested a resolution on the merits, indicating that it could impact his ability to return to the United States. Further, defense counsel asserted that the examination of a closed file presented an issue of public significance that was capable of repetition, but would evade judicial review. See *Morales v Mich Parole Bd*, 260 Mich App 29, 32; 676 NW2d 221 (2003). We are not convinced that this issue would evade judicial review. However, "a question is not moot if it will continue to affect a party in some collateral way." *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004). In light of the assertion that this appeal may impact the immigration status of defendant, we address the merits of the appeal.

conviction, the habitual charge was reduced. During his plea hearing, defendant acknowledged that he had prior convictions for attempted breaking and entering a motor vehicle, MCL 750.92 and MCL 750.356a, and larceny in a building, MCL 750.360.

At the sentencing hearing, a dispute arose regarding the number of prior convictions for purposes of scoring the sentencing guidelines. Defendant conceded the two convictions that formed the basis for the habitual third offense. However, he alleged that the presentence information report (PSIR) incorrectly provided that, in 1994, he had been charged with breaking and entering and then assigned the status of youthful trainee under the HYTA. The trial court adjourned the hearing to allow the probation officer to receive confirmation of the existence of the conviction.

At the rescheduled sentencing, the probation officer had received independent confirmation from Kent County that defendant had two offenses for breaking and entering in that county, one of which was granted HYTA status. Defendant had no recollection of a second breaking and entering offense. The trial court inquired why the HYTA breaking and entering conviction was not addressed at the first sentencing hearing. The probation officer stated that she relied on her interview with defendant when he asserted that the two breaking and entering convictions were one in the same offense. Based on the representations by defendant, the probation officer did not request the records from Kent County. Following the issue that arose at the first sentencing, she verified the HYTA conviction. The trial court noted that it was not obligated to delay sentencing because a defendant had no recollection of a conviction. However, defendant's second breaking and entering conviction arose while defendant was on probation with HYTA status, and the documents indicated that he successfully completed HYTA. Because there was the potential for inconsistency where HYTA status arguably should have been revoked because of the subsequent charge, the trial court adjourned the sentencing to obtain additional information.

At the third sentencing hearing, the probation officer indicated receipt of two different police reports for the two different breaking and entering convictions. The probation officer was unable to obtain a judgment of sentence for the HYTA conviction. However, she received handwritten notes from the probation department in Kent County to support the two different offenses, and in turn, defendant was scored for three prior convictions when calculating the sentencing guidelines. Defendant continued to assert that he only had one prior breaking and entering conviction. The trial court overruled defendant's objection to the scoring of three prior offenses, by stating:

Well it looks pretty clear like [defendant] got the benefit of [HYTA] treatment even by his own testimony here. He earned it. And I think it sounds like that's inhibiting our ability to be able to get to the bottom of this and get some additional paperwork. Now we've delayed this sentencing at least once to check these things out. So I think that attests to the seriousness with which I consider [defendant's] challenges to the information.

But at this point, [the probation officer], I think, has flushed it out. We've got different dates, we've got a file number, we've got contrasting sentencing dates. And at this point, I'm overruling [defendant's] objection to the re-worked

report that we now have, which contains the information in file 94-0706-FH in Grand Rapids.

Following sentencing, defendant's counsel sought access to a file in Kent County containing information concerning the HYTA matter. Counsel averred that the chief court clerk stated that she was legally prohibited from confirming or denying the existence of the file, even to defendant's own counsel. Defendant challenged the denial of access in a motion for resentencing, which the trial court denied.

With regard to sentencing, 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). The PSIR is presumed to be accurate, and the sentencing 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). When the accuracy of the information contained in the PSIR is challenged, the sentencing court may hold an evidentiary hearing to determine the accuracy of the information, accept the defendant's version, or disregard the challenged information. *People v Spanke*, 254 Mich App 642, 648-649; 658 NW2d 504 (2003). The defendant bears the burden of raising an effective challenge regarding claims of inaccurate information. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003).

Review of the record reveals that defendant failed to raise an effective challenge to the HYTA convicted offense. *Callon, supra*. The probation officer was able to obtain two different police reports and two different documents from Kent County. Although the HYTA file was closed, the probation department from Kent County forwarded handwritten documents from their notes verifying the conviction. Therefore, the trial court properly resolved the challenged information by including the conviction in the scoring of the guidelines.

Defendant asserts that he was deprived of due process of law because he was precluded from examining his HYTA file, and therefore, defendant was sentenced on the basis of "secret evidence." We disagree. The federal and state constitutions protect against the deprivation of life, liberty, or property without due process of law. US Const, Amend XIV; Const 1963, art 1, § 17. Due process means that a defendant is entitled to fundamental fairness that includes the right to notice and an opportunity to be heard. *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 705-706; 736 NW2d 594 (2007). However, due process is also a flexible concept, and the procedural protections available are based on the particular situation at issue. *Id.* When determining the procedural protections required to protect due process rights, one must examine the private interest at stake, the risk of deprivation of interests through the procedure used, the value of other procedures, and the state or government interest including the administrative burden imposed by substitute procedures. *Thomas v Pogats*, 249 Mich App 718, 724; 644 NW2d 59 (2002).

Under the circumstances of this case, we cannot conclude that defendant was deprived of due process of law. Defendant disputed the accuracy of the HYTA breaking and entering conviction. The trial court noted the prosecutor's assertion that there were three underlying convictions to support the scoring guidelines. However, the probation officer did not obtain independent verification of the three convictions. Consequently, the trial court adjourned the sentencing to obtain verification of the two distinct breaking and entering convictions. Although the probation officer received verification of the those two convictions at the next hearing, the trial court adjourned the hearing a second time for further verification when the HYTA status

should have seemingly been revoked in light of the second breaking and entering offense. After further investigation, the trial court rejected defendant's challenge that he simply could not remember a separate offense. Defendant was given notice and an opportunity to be heard. Thus, defendant was not deprived of due process of law.

Defendant contends that he was sentenced based on secret information because he was deprived access to his own file. MCL 762.14(4) limits access to the HYTA file. Specifically, the proceeding is closed to public inspection, but is open to state courts, the department of corrections, law enforcement personnel, and prosecutors. MCL 762.14(4). Defendant asserts that he should be allowed access to his own file. A defendant benefits from a plea based on the HYTA statute. If an individual successfully completes HYTA status, the court shall discharge the individual and dismiss the proceedings. MCL 762.14(1). In order to keep the dismissal of the proceedings confidential, the Legislature has limited the parties entitled to examine a HYTA file and prevents public disclosure. Indeed, because defendant was unable to review his file, the trial court adjourned the sentencing on two occasions to allow the probation officer and the prosecutor to confirm the existence of the conviction. Thus, any expansion on the parties privy to a HYTA file should be directed to the Legislature. *McAllister, supra* at 477.

Finally, defendant's challenge to the scoring of offense variable 13 is moot. Defendant served his minimum sentence and was released. See *People v Bailey (On Remand)*, 218 Mich App 645, 648; 554 NW2d 391 (1996).

Affirmed.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Deborah A. Servitto