

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OLATUNJI KEAN,

Defendant-Appellant.

UNPUBLISHED

February 5, 2009

No. 280434

Saginaw Circuit Court

LC No. 04-025108-FC

Before: Owens, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Following a jury trial in June 2005, defendant was convicted of bank robbery, MCL 750.531(a), and third-degree fleeing and eluding a police officer, MCL 750.479(a)(3). The trial court originally sentenced defendant, as a third habitual offender, MCL 769.11, to 8½ to 20 years for bank robbery and 3 to 10 years for third-degree fleeing and eluding. Defendant appealed by right, and this Court affirmed the bank robbery conviction but vacated the fleeing and eluding conviction and remanded for resentencing. *People v Kean*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2007 (Docket No 264236) (*Kean I*). This Court instructed the trial court to clarify or strike the description in the presentence investigation report (PSIR) of the circumstances surrounding finding a gun not linked to defendant, and to make a determination as to when defendant was involved in other alleged bank robberies for the purpose of scoring offense variable (OV) 13, MCL 777.43(1)(b). *Kean I, supra* at 10, 17. On remand, the trial court's successor sentenced defendant to 8½ to 20 years for bank robbery. Defendant appeals by right. We affirm but remand for administrative correction of the PSIR pursuant to MCR 6.425(E)(2).

Defendant first argues that he is entitled to be resentenced based on an updated PSIR to reflect his current circumstances. We disagree. "prior to sentencing, the probation officer must investigate the defendant's background and character, verify material information, and report in writing the results of the investigation to the court." MCR 6.425(A); see also MCL 771.14(1). The goal of the PSIR is to supply the sentencing court with sufficient information so that the sentence can be appropriately adapted to the offense and the offender. *People v Potrafka*, 140 Mich App 749, 751; 366 NW2d 35 (1985). Therefore, it is important that a PSIR is "complete, accurate, and reliable." *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980).

Defendant argues that the PSIR should have been updated to include information regarding his good behavior, positive work record, and rehabilitation progress while imprisoned. In *People v Crook*, 123 Mich App 500, 503; 333 NW2d 317 (1983), this Court held that a PSIR of a specific age may not be “inherently defective,” but a specific change in the defendant’s circumstances would require updating. See also *Triplett*, *supra* at 515 (emphasis added) (observing that its holding that the defendant was entitled to a reasonably updated PSIR “is a necessary corollary to the principle that sentencing must be individualized and tailored to the particular circumstances of the case and the offender *at the time of sentencing*”). Here, however, the record reflects that an updated presentence report, dated June 27, 2007, was prepared for the original resentencing date of June 28, 2007. On that date, the parties appeared in court and agreed to adjourn the sentencing proceeding to allow the prosecutor an opportunity to produce witnesses for an evidentiary hearing regarding the scoring of OV 13. The trial court also ordered stricken from the original PSIR that reference to a gun the police found.

On August 2, 2007, the parties again appeared in court for resentencing, and the court conducted an evidentiary hearing regarding the scoring of OV 13. After the hearing, the trial court ruled that OV-13 was properly scored at 25 points because the instant offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person (bank robberies). MCL 777.43(1)(b). Thus, the trial court determined after an evidentiary hearing that properly scored sentence guidelines recommended a minimum sentence for defendant’s offense of from 43 to 129 months.

Defendant and his attorney had ample opportunity between the originally scheduled date and the adjourned sentencing date to provide the trial court with whatever supplemental material of a positive nature that existed regarding his progress since the original sentencing. In fact, defendant filed a pro se pleading with the trial court regarding corrections, deletions, and additions that should be made to PSIR. The trial court at the resentence proceeding specially acknowledged defendant’s pleading on the record, stating it had been reviewed but the court declined to act upon it because the court thought defendant “wants to change the whole presentence report.” Moreover, defendant had ample opportunity to inform the court during allocution as to any positive progress he had made since the original sentence. Consequently, we conclude that defendant is not entitled to be resentenced for the purpose of having an updated PSIR.

Defendant also claims he is entitled to resentencing because the trial court relied on inaccurate information in the PSIR. Specifically, defendant asserts that the PSIR was inaccurate with respect how many aliases he was known by, defendant’s age on his first arrest, the date of his arrest for the instant offense, his drug usage history, his participation in substance abuse treatment programs, the number of his siblings and other childhood information, the correct number and description of his previous convictions, and information regarding his physical and mental condition. As noted already, defendant challenged these matters in his pro se filing. While the trial court did not specifically say so, our review of the record convinces us that the trial court determined that the matters defendant wished to challenge were immaterial to the court’s determination of the appropriate sentence to impose. MCL 769.34(10) provides: “If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the

sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Accordingly, we must affirm defendant's sentence.

Nevertheless, if information in a PSIR is challenged, the court must allow the parties to be heard and either make a finding as to the validity of the challenge or determine that it will not consider the information. MCR 6.425(E)(2). If the court finds that the challenged information is inaccurate or irrelevant, that finding must be made part of the record and the information must be corrected or stricken from the report. MCR 6.425(E)(2)(a). The record does not reflect that this occurred. Indeed, based on the copy of the PSIR filed with this Court, it does not appear that reference to the gun found by the police was stricken from the original PSIR as ordered by the Court. Accordingly, we remand this matter for correction of the PSIR pursuant to MCR 6.425(E)(2).

Finally, defendant argues that he is entitled to resentencing under *Blakely v Washington*, 542 US 296, 300; 124 S Ct 2531; 159 LEd2d 403 (2004). In *People v Drohan*, 475 Mich 140, 159; 715 NW2d 778 (2006), the Court held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. Accordingly, defendant is not entitled to relief on this claim.

We affirm defendant's sentence, and but remand for the administrative purpose of correcting of the PSIR pursuant to MCR 6.425(E)(2). We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ David H. Sawyer

/s/ Jane E. Markey