

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERBERT CLEVELAND DANIELS,

Defendant-Appellant.

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UNPUBLISHED

October 14, 2010

No. 293587

Oakland Circuit Court

LC No. 2009-224913-FH

Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver 50 or more but less than 450 grams of heroin, MCL 333.7401(2)(a)(iii), possession of marijuana, MCL 333.7403(2)(d), and disobeying a police officer, MCL 257.602. He was sentenced as a fourth habitual offender, MCL 769.12, to a prison term of 8 to 40 years for the possession with intent to deliver heroin conviction and to time served of 31 days for each remaining conviction. After defendant filed a motion for resentencing, the trial court agreed to amend the judgment of sentence to reflect that defendant was only a third habitual offender, MCL 769.11, but denied defendant's request for resentencing. Defendant appeals as of right. For the reasons set forth in this opinion, we remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The notice of sentence enhancement indicated that defendant had three prior felony convictions, one of which was a 1978 conviction for possession of cocaine. At sentencing, the trial court accepted defendant's argument that the prior conviction was only a misdemeanor, which resulted in a change to the scoring of prior record variable (PRV) 2 of the sentencing guidelines, MCL 777.52. In ruling on defendant's motion for resentencing, the trial court agreed that because the prior conviction was a misdemeanor, it could not be used for purposes of sentence enhancement and that defendant should therefore be deemed a third habitual offender. However, the trial court denied resentencing because the sentence it originally imposed did not exceed the statutory maximum sentence for a third habitual offender. Although defendant also challenged the accuracy of other information in the presentence report in his motion for resentencing, the trial court declined to consider those challenges because defendant had not raised them at sentencing.

A trial court's sentencing decision is reviewed for an abuse of discretion. *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008). The trial court's ruling on a

motion for resentencing is also reviewed for an abuse of discretion. *People v Puckett*, 178 Mich App 224, 226-227; 443 NW2d 470 (1989).

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 and may be relied on by the trial court unless effectively challenged by the defendant. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997); *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.* “The sentencing court must respond to challenges to the accuracy of information in a presentence report; however, the court has wide latitude in responding to these challenges.” *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). In responding to the challenge, the court “may determine the accuracy of the information, accept the defendant’s version, or simply disregard the challenged information.” *Id.* If the court elects to determine the accuracy of the information, the prosecutor “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), remanded 447 Mich 984 (1994). 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. *Spanke*, 254 Mich App at 649; MCL 771.14(6).

The trial court properly responded to defendant’s challenge regarding his habitual offender status. The court indicated that the alleged inaccuracy would not have changed its original sentence, but agreed to amend the presentence report and the judgment of sentence to reflect that defendant was a third habitual offender. *Spanke*, 254 Mich App at 648-649; *People v Thompson*, 189 Mich App 85, 87-88; 472 NW2d 11 (1991) (resentencing is not required if the disputed information did not affect the defendant’s sentence).<sup>1</sup>

However, the trial court abused its discretion by declining to consider defendant’s other challenges to the presentence report. Although defendant did not raise the challenges at sentencing, he was permitted to challenge the accuracy of information relied upon in determining a sentence in a proper motion for resentencing, MCR 6.429(B)(2) and (C). Defendant made those challenges in this case and thus, the trial court erred by failing to consider defendant’s challenges. Accordingly, we remand for further proceedings in accordance with *Thompson*, 189 Mich App at 87-88. On remand, the trial court shall clarify whether the disputed information was considered in its sentencing decision. If the court determines that it did, defendant shall be resentenced and the court shall resolve the challenges pursuant to MCR 6.425(E)(2). If the court determines that the disputed information did not affect its sentencing decision, defendant’s

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<sup>1</sup> We note that the cover page of the presentence report submitted to this Court still reflects defendant’s status as a fourth habitual offender. On remand, the trial court should ascertain whether the copy submitted to the Department of Corrections was amended to reflect defendant’s status as a third habitual offender and correct it if necessary. *People v Carino*, 456 Mich 865-866; 568 NW2d 683 (1997).

sentence is affirmed and the trial court shall correct the presentence report or strike the disputed information from the report as appropriate. *Id.*

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello

/s/ Mark J. Cavanagh

/s/ Donald S. Owens