

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 11, 2012

v

DANIEL JOSEPH WOLGAST II,
Defendant-Appellant.

No. 305401
Saginaw Circuit Court
LC No. 10-034000-FH

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Daniel Joseph Wolgast II appeals as of right his jury trial conviction of possession of less than 25 grams of a controlled substance,¹ and operating while intoxicated (“OWI”).² Wolgast was sentenced as a fourth habitual offender³ to 30 months to 15 years’ imprisonment for the possession conviction, and 93 days time served for the OWI conviction. We affirm.

Wolgast asserts that the trial court erred when it sentenced him as a fourth habitual offender without the requisite evidence in support.⁴ We disagree. We review this unpreserved sentencing issue for plain error affecting Wolgast’s substantial rights.⁵

¹ MCL 333.7403(2)(a)(v).

² MCL 257.625(1)(a).

³ MCL 769.12.

⁴ Because defense counsel indicated at sentencing that Wolgast agreed with the information contained in the body of the Presentence Investigation Report (“PSIR”) and did not object to the sentencing guidelines described therein, this issue is waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). This Court, however, will review the issue as Wolgast also purportedly claims a violation of his due process rights.

⁵ *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501 (2003).

A defendant can be sentenced as an habitual offender under the relevant statute, “[i]f a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, . . . and that person commits a subsequent felony within this state[.]”⁶

The existence of the defendant’s prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing. The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:

- (a) A copy of a judgment of conviction.
- (b) A transcript of a prior trial or a plea-taking or sentencing proceeding.
- (c) A copy of a court register of actions.
- (d) Information contained in a presentence report.
- (e) A statement of the defendant.⁷

The information contained in the presentence investigation report (“PSIR”) is presumed to be accurate “unless the defendant raises an effective challenge.”⁸ “Due process requires that a sentence be based on accurate information and that a defendant have a reasonable opportunity at sentencing to challenge the information.”⁹

At sentencing, although the trial court did not expressly state on the record that Wolgast was being sentenced as a fourth habitual offender and did not outline the convictions underlying his habitual offender status, the trial court acknowledged the PSIR, which contains Wolgast’s prior convictions and his habitual offender status. Additionally, Wolgast did not challenge the information included in the PSIR. Rather, before Wolgast’s sentence was imposed, defense counsel represented to the court that he and Wolgast had reviewed the PSIR and had “no corrections to the body of the report.” Defense counsel further indicated that after a final review of the guidelines, they had “no objections to it.” Accordingly, the trial court did not err and there was no violation of Wolgast’s due process rights.¹⁰

Wolgast additionally contends that the factual findings in support of his sentence enhancement were not proved to the trial court beyond a reasonable doubt, thus his sentence was

⁶ MCL 769.12(1).

⁷ MCL 769.13(5).

⁸ *People v Lloyd*, 284 Mich App 703, 704; 774 NW2d 347 (2009).

⁹ *People v Zinn*, 217 Mich App 340, 347-348; 551 MW2d 704 (1996).

¹⁰ MCL 769.13(5); *Lloyd*, 284 Mich App at 704; *Zinn*, 217 Mich App at 347-348.

improper. Proof of Wolgast's prior convictions beyond a reasonable doubt is not necessitated as Wolgast bears the burden of rebutting the presumption of the accuracy of the factual information contained in the PSIR.¹¹ Therefore, resentencing is not warranted.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

¹¹ *Lloyd*, 284 Mich App at 704.