

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY LEE TREVINO,

Defendant-Appellant.

UNPUBLISHED

November 19, 1996

No. 180015

LC No. 85-3032-FH

Before: Reilly, P.J., and Sawyer and W.E. Collette,* JJ.

PER CURIAM.

Defendant appeals as of right his sentence of ten to fifteen years of imprisonment imposed for violating probation. We affirm.

On December 13, 1985, defendant pleaded guilty of breaking and entering an occupied dwelling with intent to commit larceny, MCL 750.110; MSA 28.305. In exchange for the plea, the prosecutor dismissed three other larceny charges. Defendant was sentenced to five years of probation on March 7, 1986. On July 7, 1987, defendant pleaded guilty of violating probation and was sentenced to sixty days in jail. On August 31, 1988, defendant again pleaded guilty of three counts of violating his probation. On October 14, 1988, defendant was sentenced to ten to fifteen years of imprisonment by Lenawee Circuit Court Judge John C. Timms. Defendant appealed his sentence as of right. In *People v Trevino*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 1989 (Docket No. 116254), this Court remanded for an explanation of the sentence, and retained jurisdiction. After the sentencing court entered an opinion setting forth the reasons for the sentence, this Court affirmed the sentence in a memorandum opinion issued December 14, 1989. Defendant's application for leave to appeal was denied by the Supreme Court on July 31, 1990.

Defendant thereafter brought a motion for relief from judgment on the basis that the sentence violated *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). In an order dated September 10, 1991, Judge Harvey Koselka denied the motion. Defendant's applications for leave to

* Circuit judge, sitting on the Court of Appeals by assignment.

appeal filed with this Court and the Supreme Court were denied on April 14, 1992, and August 31, 1992, respectively.

On June 21, 1994, United States District Judge Nancy Edmunds conditionally granted defendant's petition for writ of habeas corpus, and ordered him released unless the court resentence him within ninety days of the date of the order. Defendant has provided no information to us concerning the reasons for the district judge's decision.

On September 7, 1994, defendant appeared before Judge Koselka for resentencing. The court verified that defendant had had an opportunity to read the presentence report and discuss it with his attorney. The prosecutor noted that the presentence report included a "progress report that's recent." Defense counsel stated that the defense did not challenge "the accuracy of the information in the report" but would like "one addition" concerning the counseling he received. The court then specifically addressed defendant and asked if he wanted to challenge "the accuracy or the relevancy of any information" in the presentence report. Defendant responded that he did not. After the prosecutor, defense counsel and defendant were given the opportunity to address the court, the court stated as follows:

In determining the appropriate sentence in this – in this case, the Court has considered the seriousness of this offense, your history, the principle of proportionality, the statutory penalty, the costs of confinement, the report and recommendation of the probation department, and what has been said upon the record at this hearing. The criteria and the reasons for the sentence are the nature and the gravity of this offense, the discipline appropriate to its commission, deterrence against repetition by you and by others, your potential for reformation, vindication of the law and the protection of society.

Mr. Trevino, nobody likes to send anybody to prison if for no other reason than because it costs the taxpayers money. I look at your record. You have a breaking and entering of an occupied dwelling. In fact, I look and see that [sic] various violations of probation that you had before this Court. Moved, left no forwarding address. In essence, just disappeared. Consumed intoxicants to excess. Broke and entered an occupied dwelling while you're on probation. You have serious abuse – substance abuse problem [sic.] While you're on probation, you didn't do anything to correct it. You apparently have done well in prison. The problem with that is when we sent you to prison, we expected you to do well. You've done well in a structured environment. Hopefully, when you're released, you can become a responsible citizen. I think you need a little more time to make sure that that happens. I think the sentence given was an appropriate sentence then. I think it's an appropriate sentence now.

The court sentenced defendant to ten to fifteen years of imprisonment, and defendant was given credit for 2412 days (approximately six years and seven months) served.

Defendant first contends that resentencing is required because the presentence report did not contain a sentence recommendation. As noted by defendant, an updated presentence investigation report must be prepared in connection with a resentencing. *People v Triplett*, 407 Mich 510; 287 NW2d 165 (1980). The “Resentencing Update” prepared in this case, dated August 31, 1994, does not contain a specific written recommendation for disposition. See MCL 771.4; MSA 28.1144. However, defendant and his attorney were given ample opportunity to raise this issue before defendant was resentenced. Just as review of the accuracy or relevancy of any information in the presentence report is waived unless the issue is raised at sentencing, *People v Sharp*, 192 Mich App 501, 504; 481 NW2d 773 (1992), an error regarding the omission of a recommendation in an updated report is waived when the issue is not raised before the trial court. *People v Hart*, 129 Mich App 669, 675; 341 NW2d 864 (1983).

Defendant contends that resentencing is required because the court failed to recognize and exercise its discretion. This argument has several subparts, all of which with, we disagree. Contrary to defendant’s assertion, the court considered defendant’s post-sentencing conduct. Although the court did not give that conduct the weight that defendant feels it deserves, that does not mean that the court failed to recognize and exercise its discretion. Defendant also argues that the court failed to prepare a sentencing information report, which defendant characterizes as an “essential component of a proper exercise of discretion.” However, the second edition of the Michigan Sentencing Guidelines does not require completion of a SIR when the defendant is being sentenced for a probation violation.¹ Furthermore, the guidelines do not apply to probation violations. *People v Peters*, 191 Mich App 159; 477 NW2d 479 (1991). We recognize that this Court has held that the guidelines for the underlying offense are to be used as a starting point for determining whether a sentence is appropriate. *Id.* In this case, the court had the benefit of the guidelines for the underlying offense as they were originally prepared. Therefore, we are not persuaded that the court lacked an essential component for its exercise of discretion.

Defendant argues that resentencing is required because the resentencing was “a sham,” “a charade to legitimize a sentence previously held to be illegitimate.” Initially, we note that we are uncertain by whom the sentence and on what basis the sentence was “previously held to be illegitimate.” Because the original sentence was previously upheld by this Court, we presume that defendant is referring to the federal court proceedings. As previously stated, defendant has not supplied us with the necessary information concerning those proceedings for us to determine the basis of the federal court’s ruling. In any event, we have reviewed defendant’s argument on this issue, and do not agree that the resentencing was a “sham.”

Defendant argues that the sentence was excessive, disproportionate and an abuse of discretion. Defendant first received the ten to fifteen year prison sentence because of his repeated failure to comply with the conditions of probation. He was given an opportunity to turn his life around when he was placed on probation, yet, less than three years after he was sentenced to probation, he pleaded guilty of another charge of breaking and entering an occupied dwelling. Although defendant focuses on his positive accomplishments since he has been imprisoned, we note that the update to the presentence report also indicates that he received six major misconducts, three of which occurred within the year

preceding his resentencing on September 7, 1994. Although we commend defendant for his apparent attempts to rehabilitate himself and prepare to be a productive member of society, we are not convinced that the sentence was an abuse of discretion.

Affirmed.

/s/ Maureen Pulte Reilly

/s/ David H. Sawyer

/s/ William E. Collette

¹ Under the Basic Information and General Instruction, subsection B indicates that completion of the SIR is required if the offense is listed in the Crime List or if the offender is being sentenced as an habitual offender.