STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REX HENRY ROBINSON,

Defendant-Appellant.

UNPUBLISHED
December 3, 2002

No. 231390
Jackson Circuit Court
LC No. 00-002245-FC

Before: Whitbeck, C.J., and Hood and Kelly, JJ.

PER CURIAM.

The trial court, following a bench trial, convicted defendant Rex Henry Robinson of two counts of first-degree criminal sexual conduct[1] against a twelve-year-old boy, to whom we refer as John Doe. The trial court sentenced Robinson as a second habitual offender[2] to concurrent terms of 126 months to 20 years in prison, with credit for time already served. Robinson appeals as of right. We vacate his sentence and remand for resentencing.

I. Basic Facts And Procedural History

In brief, the evidence showed that Robinson paid John Doe and other young boys to perform yard work and small tasks. Once they began working for him, Robinson paid the boys for sexual favors. In particular, Robinson committed both anal and oral penetration with Doe, which Doe recalled happened at least ten times and Doe's brother witnessed on at least five occasions. Robinson denied committing any of these acts, though he did make incriminating statements to the police.

After the trial court announced its factual findings and legal conclusions at the close of the bench trial, the presentence investigator for the probation department prepared a report (PSIR) for sentencing. In the PSIR, the probation officer noted that Robinson previously had been convicted of a misdemeanor offense of operating (presumably a motor vehicle) while intoxicated and that, in 1987, the Livingston County prosecutor dropped a fourth-degree criminal

[1] MCL 750.520b(1)(a).

[2] MCL 769.10.

sexual conduct (CSC IV) charge against Robinson. Additionally, the probation officer explained on page three that Robinson had twice been convicted of sex crimes before the instant offense:

> Approximately ten years ago Mr. Robinson was convicted in Jackson County for Assault With Intent to Commit CSC, 2nd. As a result, he was sentenced to prison for two to five years, and he served that full sentence. The similarity between that event and the instant offense is disturbing. The Investigator's Version of the Offense from the previously written Pre-Sentence Investigation Report is attached to this report to demonstrate to the Court the repetitive nature to Mr. Robinson's offending. His denial today, is as it was then, complete[ly] without remorse. He denied committing either offense, choose [sic] the same age/sex victims and talked them, as now, of appealing his case. Even the way he groomed these victims fits the pattern he employed two years ago.
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> It is also worth of note that the defendant was arrested and tried in the State of Oklahoma in 1979 for Lewd Molestation of a Child Under 14 Years of Age. That matter involved two males ages ten and eleven years old. Mr. Robinson was placed on probation for that offense and the charges would be eventually dismissed in a 1989 Expunge Order (CRF-79-179). He contends that he did not touch these young boys, and only allowed them to view an adult magazine. According to the Jackson County Prosecuting Attorney, in 1990, that Oklahoma offense carried a 20 year maximum sentence. Mr. Robinson would contest the severity of this offense when interviewed by the Writer. The Jackson County Probation Department contacted the District Attorney for Washington County in Bartlesville, Oklahoma and confirmed that Lewd Molestation of a Child in Oklahoma carried a 1-20 year sentence.

According to the probation officer's research, Robinson had been sentenced to two years' probation for this lewd molestation charge. He was discharged from probation on September 4, 1981, and that conviction was expunged on December 18, 1989.

In describing the instant offense in the PSIR, the probation officer commented on page five that Robinson's 1990 conviction for second-degree criminal sexual conduct (CSC II) in Jackson County was "identical" to the instant offense "in many respects and demonstrate the threat this subject is in the community, and how little a prior prison sentence impacted his behavior." The probation officer went on to explain that Doe was

> 12 years of age. [Doe] would be only one of several victims, all young boys of a similar age. The incident came to the attention of authorities when [Doe's] mother contacted them to report accounts relayed to her from son [Doe] and [her] younger son . . . , age 10 years. The respondent had established contact with these boys by having them do yard work from [sic] him at his resident. Through that contact he groomed them by befriending them, furnishing money, and then sexually assaulting these boys. This is the same sexual preference and modus operandi demonstrated by Mr. Robinson ten years ago when last convicted of a CSC offense.

On pages six and seven, the PSIR noted instances when Robinson allegedly molested Doe's thirteen-year-old brother, Doe's ten-year-old brother, and the boys' ten-year-old friend. In this same section, the PSIR reported one instance when Robinson allegedly offered Doe and a thirteen-year-old boy money if they would perform sex acts on each other.

The trial court held a sentencing hearing on November 16, 2000. At the hearing, Robinson's trial counsel, Joseph Filip informed the trial court that the probation officer had incorrectly calculated the recommended minimum sentence range as 126 months to 262 months in prison, when it should have been 108 months to 225 months in prison. The prosecutor conceded that the lower range was correct, and that the range in the PSIR was incorrect. The trial court then changed the sentencing information report that displays the sentencing grid to reflect this lower range.

Filip, who asked the trial court to sentence Robinson within the guidelines, then proceeded to challenge some of the background information regarding Robinson in the PSIR. Filip noted that, before incarcerated on these charges, Robinson had been self-employed, not unemployed as the PSIR stated. Filip asked the trial court to strike information in the PSIR "[t]hat deals with an Oklahoma offense which was expunged – eventually dismissed and expunged in 1989." According to Filip, this expunged offense "should not . . . be in the report at all." He pointed out the multiple pages on which this information appeared. Filip included in this request to strike information from the PSIR the statements regarding the 1987 CSC IV charge that had been dismissed. Filip also objected to the portion of the PSIR in which the probation officer noted Robinson's contact with other boys and compared this offense to the offense for which he was convicted in 1990. As Filip explained, that comparison was the probation officer's "subjective" description, and therefore not "appropriate." Finally, Filip asked the trial court to strike the information on pages six and seven that detailed Robinson's "contact with other individuals of which there was no testimony at the trial."

The trial court first focused on the expunged Oklahoma conviction, asking Filip whether he had "anything" to "fortify" his "position that the expunged offense should not be" included in the PSIR. Filip simply replied, "It's expunged." When the trial court pressed him on this report, Filip explained that he did not have a record of the Oklahoma conviction and had to trust that the probation officer "got it right." The trial court replied, "It's expunged. It's expunged, but it's a part of the record." Filip then argued that the purpose of expunging a conviction is "to remove it from the record," prompting the trial court to say that it understood that purpose, but thought that the PSIR presented a "different purpose."

The prosecutor entered the debate at this point, saying that he thought the pertinent question was "whether or not the report is accurate." In the prosecutor's view, though he had no personal knowledge of whether the conviction was expunged, the report was "accurate in the sense that it reflect that it, apparently, was expunged . . . ." The trial court then said, "Let's assume it was [expunged]. But it's in the record here, and it's going to follow with him to the Department of Corrections." The prosecutor, returning to his argument that the accuracy of the information regarding the expunged conviction was the key question, added that the other consideration would be whether the expunged conviction "influence[d]" Robinson's conviction. The prosecutor conceded that a conviction "probably shouldn't influence [a] sentence, if, it's, in fact, expunged. But again, [the information regarding the Oklahoma conviction is] still accurate here." Further, the prosecutor drew an analogy between the expunged conviction and the arrests

reported in the PSIR for which the charges are ultimately dismissed. The prosecutor added briefly that he thought the other information that Filip had challenged "should remain" in the PSIR because they "are the factual determinations by the" probation officer.

Filip briefly responded that the trial court could not consider the expunged conviction at all because the "theory" was that "those are gone." In this case, Filip noted, there was no meaningful information about the expunged conviction. If this information went to the Department of Correction in the PSIR, Filip though it possible that the information was "subject to abuse later" in the sense that it might affect Robinson's "possible placement, or whatever else."

The trial court then stated:

> Right. I think, in this kind of a case, it probably is [significant]. It's significant to the Department of Corrections and I –
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> It didn't play a factor in my sentencing, and it didn't play a factor in the scoring.
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> * * *
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> But it's a matter of fact, and it was expunged, and it was – I assume it's all accurate, and so forth. Should it be in it, or shouldn't it be in it. My thinking is, it probably should be in there [in the PSIR].
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> * * *
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> [B]ut it's a good point for someone else, some other court to take up, possible, and make that – make a determination. Because we do this all the time. We even do it with juveniles. A juvenile record is supposedly not to be revealed to the public and what have you, but, yet, it follows the person –

Filip made one last reference about the information concerning the uncharged crimes against other boys mentioned in the PSIR, saying that the assistant prosecutor who had actually tried this case had agreed "that the Prosecution would proceed with only the one person involved[, Doe]. And I think that's all we did do at the trial, in terms of any activities with respect to any others, were not presented or considered." The trial court did not specifically rule on the objections to this other information in the PSIR, and only responded, "All right. Okay."

The trial court then asked whether there was "[a]ny further comment from anyone else" regarding sentencing. The prosecutor argued for a maximum sentence because of the danger to the community Robinson posed. The trial court then asked, "Anything you'd like to tell me, Mr. Robinson?" Robinson's response, presumably in the negative, was not audible. The trial court then explained why it was imposing the sentence it had chosen:

> In passing sentence, it is my duty not only to punish the person for what they've done, but also to deter others from acting this way, possibly, protect society and, maybe, reform that person.

> This is a serious matter and we can't have this kind of activity going on with young boys in our community.

After Robinson filed his claim of appeal with this Court, he filed a motion to remand for "an evidentiary hearing and for resentencing." In his brief supporting this motion, he raised two issues. First, he contended that he was entitled to resentencing because the trial court did not explicitly respond to all the challenges to the information in the PSIR and the trial court had failed to provide his lawyer an opportunity to allocute on his behalf. Second, Robinson argued that he was entitled to an evidentiary hearing concerning his ineffective assistance of counsel claim because the record required supplementation. This Court then issued an unpublished order,[3] stating:

> The Court orders that the motion to remand pursuant to MCR 7.211(C)(1) is GRANTED and the matter is remanded to the trial court so that defendant-appellant may file, within 14 days, a motion for resentencing. *Proceedings on remand are limited to this issue*.
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> Appellant is to file with the Court a copy of any motion and any supporting brief filed in the trial court within 14 days of the Clerk's certification of this order. The trial court is to hear and decide the matter within 56 days of the Clerk's certification of this order. Appellant must also file with the Clerk of this Court copies of all orders entered on remand within 14 days after entry.
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> The trial court is to make findings of fact and a determination on the record. The trial court is to cause a transcript of any hearing on remand to be prepared and filed within 21 days after completion of the proceedings.
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> This Court retains jurisdiction in the cause, and the time for proceeding with the appeal in this Court beings upon issuance of an order in the trial court that finally disposes of the remand proceedings. Nevertheless, the time or proceeding with the appeal beings 14 days from the date of certification of this order if remand pleadings are not filed in the trial court within the 14-day period.[4]

In effect, this Court sent the first issue Robinson raised in his motion for remand, concerning the information in the PSIR and allocution, to the trial court.

On remand, the trial court held a hearing on March 1, 2002. Robinson's appellate attorney, William Archer, represented him at this hearing. Archer noted the procedural posture of the case and the effect this Court's order had in placing the issues regarding the PSIR information and allocution in front of the trial court, saying:

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[3] *People v Robinson*, unpublished order of the Court of Appeals, entered January 8, 2002 (Docket No. 231390).

[4] Emphasis added.

. . . I'm simply the messenger here on this with regard to those issues. I think that if the Court of Appeals believes that there are serious enough defects in sentencing, I'm not here to argue against them. But I would say, Judge, that I don't believe that this Court can resolve this matter without having a hearing based upon the Court of Appeals order.

The Court of Appeals specifically said that the Court is to make findings of fact and a determination on the record. Included within this, Judge, is Mr. Robinson's claim of ineffective assistance of counsel. And following the filing of my motion, I filed also an affidavit by Mr. Robinson making certain allegations against his trial attorney or trial counsel [Filip].

I believe that if – that the Court should order a hearing on this resentencing, and at the same time, since Mr. Filip was the attorney of record, that he should be also given the opportunity to respond to these allegations made by Mr. Robins, which I believe are quite serious allegations in that he's indicating that Mr. Filip conspired with the Prosecutor, he improperly advised him to waive his jury trial for some reasons and so forth. And further, that Mr. Filip, while I believe he did have the opportunity, the Court did give him an opportunity to allocute, he only allocuted with respect to the presentence report.

I would also indicate that this is somewhat of a first – first type of case like this, where there has been an expungement of a criminal record in another state and the presentence report was – included that expunged record. And so I think that this Court has to determine whether or not that is a proper thing to do, to have an expunged record included in the presentence report, primarily because of the fact that the statute – the Michigan statute for expungement doesn't permit it. It permits law enforcement agencies to have records of expungement, but it doesn't specifically state that they're allowed to get this notice of expungement on the presentence report.

And I think there's a good argument that they shouldn't have it, particularly in a case of a CSC where it's well known that the Department of Corrections keeps CSC criminals much longer than their minimum sentences. In fact, in many cases they're kept until the . . . ending sentence. So – and I think that with regard to that, that it certainly requests [sic] that the prior conviction not be included in the presentence report.

I might also add that the Prosecutor has relied on People v Smith to say that those [expunged convictions] can be included [in the PSIR]. However, People v Smith deals with expunged juvenile records, which are automatic expungements. They're entirely different from expungements of adult records. I mean, there's a whole different process.

So I think all in all, Judge, I don't see how this can be resolved here today simply by argument between myself and the Prosecutor . . .

The trial court interjected, noting that the prosecutor was arguing that the court could resolve the issue simply by "denying the motion altogether." Archer, however, emphasized that the trial court was going to have to make factual findings, which meant that Robinson had to be present, "especially if his presentence report's going to be changed."

At this point, the prosecutor attempted to clarify the issues that had been remanded, saying:

> Your Honor, we have to look at the remand order from the Court of Appeals. The Court of Appeals did not remand on the ineffective assistance of counsel claim even though that was raised. It granted the motion to remand so he [Robinson] may file a motion for resentencing, claim[s] of ineffective assistance of counsel, [sic] call for a new trial. And then the Court of Appeals order says: "Proceedings on remand are limited to this issue."
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> So, therefore, even if your Honor thinks that Mr. Filip did an unbelievably awful job on the case, you really have no authority to even touch that issue. . . . .
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> * * *
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> We're talking legal issues [in this remand]. What fact findings are there? It's purely a legal issue as to allocution. And what fact findings are there as to the expungement? That also is purely a legal issue. The hearing that the Court of Appeals wants is the hearing that we're having at this moment. So, therefore, denying or granting the motion would resolve it entirely.

Turning to the substantive question whether to allow the expunged Oklahoma conviction to be included in the PSIR, the prosecutor noted that there was case law allowing expunged juvenile convictions to be included in the PSIR and the new legislative sentencing "guidelines actually include a number of expungements that are to . . . be included, including the purely discretionary motion to have the convictions set aside."

After further debate solely on the expungement issue, the trial court tried to direct the attorneys' attention to the fact that the remand also concerned other matters, saying:

> . . . You want allocution, you want a number of other things that I don't see are before me, ineffective assistance of counsel. I don't see where I would go even if I had a hearing. I just don't see anything before me to do. The man had – you know, he had an adequate opportunity, more than adequate, for allocution in this instance and I don't –

Archer interrupted, stating:

> Well, I happen to agree with you that the Court – I mean, I think that the Court of Appeals, if they were claiming that you had made some mistake by giving Mr. Filip the opportunity to be getting [sic] and they want to hang on this – your statement, well, what do you have comments about the presentence report and then somehow expect you later on to jump in there and say, well, now that

> you've talked about that, what do you have about other mitigating circumstances. I think that that duty is on the defense attorney, that if he neglects to make statements later on with regard to mitigating circumstances or the sentence or whatever, that's his fault. I don't see that the Court made the mistake there.
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> I said there was a mistake that was made, and the Court of Appeals seems to think there is, then it seems to me that it's not a mistake of the Court, but it's a mistake of the counsel. And if it's a mistake of the counsel, then it seems to me that this Court has a right to bring counsel in and see if in fact he did make a mistake or he had some reason for what he was doing or not doing. And that's why I think that we need to have a follow-up on that hearing.

The trial court expressed confusion at this Court's directions for the remand, saying:

> . . . In looking at this matter, the Court [of Appeals] is asking this Court to review the matter if you bring a motion for resentencing. You have brought a motion for resentencing. I've looked it over. I don't see anything wrong with my sentencing. He had all the opportunities to be – for allocution. He had excellent counsel, and he had the prior convictions stays in, even though I didn't consider it. This fellow's such a fiend that he's got a neon sign on his forehead.
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> And I'm not going to grant the motion. Motion is denied.

This case has now returned to this Court.

II. Clarifying The Issues

Before commencing our analysis, we think it important to define what it is the two issues presented to us require us to decide. The first issue asks us to look at two things, and two things only. First, we must decide whether the trial court erred on remand in denying the motion for resentencing because the trial court originally did not rule on Filip's objections to the information concerning: (1) his alleged molestation of other boys in connection with the molestation of Doe; (2) the dismissed CSC IV charge; (3) the probation officer's subjective assessment of the similarities between this offense and the offense in Jackson County; and (4) his self-employment. Despite his arguments in his brief on appeal, the first issue Robinson presents in this appeal does *not* ask us to decide whether the trial court erred when it rejected his argument concerning whether to include information regarding the expunged Oklahoma conviction in his PSIR. The trial court did not "fail to respond" to the challenge to the Oklahoma conviction information; the trial court ruled on that issue when it rejected Robinson's arguments that the information should be excluded from the PSIR. Having not been presented[5] with the legal issue whether expunged adult convictions may be listed in a PSIR, we will not address it. [6] Instead, because of Robinson's interest in having only accurate and relevant information in his

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[5] See MCR 7.212(C)(5).

[6] See *People v Miller*, 238 Mich 168, 172; 604 NW2d 781 (1999).

PSIR,[7] we choose[8] to look at a narrower but related issue: whether the trial court should have excluded the information about the expunged conviction from the PSIR because it ignored the information in making the sentencing decision. The other matter this first issue requires us to decide is whether the trial court erred in denying Filip the chance to "allocute" at trial.

The second issue is fairly precise. Robinson's brief delves into what he claims were Filip's errors constituting ineffective assistance of counsel. However, the Robinson presents in his appeal does not require us to decide this substantive question. The issue presented actually asks whether the trial court erred when, on remand, it refused to hold an evidentiary hearing on the ineffective assistance of counsel claim.

III. Resentencing

A. Standard Of Review

Robinson argues that the trial court erroneously denied his motion for resentencing because, at sentencing, "the trial court failed to respond to a challenge to the relevancy of certain information contained in the presentence investigation report and to provide defendant's lawyer with an opportunity to allocute on behalf of defendant." In order to decide this issue, we must apply the court rules, which is a task we undertake using de novo review.[9]

B. Challenged Information In The PSIR

MCR 6.425(D)(2)(b) affords "each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule (D)(3)." In turn, MCR 6.425(D)(3) states:

> If any information in the presentence report is challenged, the court *must* make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it *must* direct the probation officer to
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> (a) correct or delete the challenged information in the report, whichever is appropriate, and
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> (b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.[10]

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[7] See *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1991).

[8] See *Paschke v Retool Industries (On Rehearing)*, 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994).

[9] See, generally, *People v Fosnaugh*, 248 Mich App 444, 449; 639 NW2d 587 (2001).

[10] Emphasis added.

This challenge process in the court rules closely follows the process identified in MCL 771.14(6).

Filip plainly challenged the relevancy and accuracy of the expunged Oklahoma conviction. The trial court, when considering the attorneys' arguments regarding whether to include this information in the PSIR, "assumed" that this information was true and relevant. However, the trial court chose to ignore this expunged conviction when imposing sentence. As the trial court said, the Oklahoma conviction "didn't play a factor in my sentencing, and it didn't play a factor in the scoring." Case law makes clear that when a trial court chooses to ignore information in the PSIR rather than make a finding to resolve a challenge to the information's alleged inaccuracy or relevancy, it "in effect determines that the information is irrelevant to sentencing. The defendant is therefore entitled to have that information stricken [from the PSIR],"[11] but is not entitled to resentencing.[12] Thus, irrespective of whether the trial court could have resolved the challenge to this information's accuracy and relevance and included it in the PSIR on that basis, the trial court erred when it did not direct the probation officer to delete this information from the PSIR.[13]

Filip also brought the trial court's attention to the fact that the PSIR listed Robinson as unemployed on the cover sheet, but at another place mentioned that he was self-employed. Nothing in the trial court's comments at the sentencing hearing indicates that it took Robinson's employment status into consideration when it was deciding the appropriate sentence to impose. Indeed, that factors seems of little relevance to a sentencing decision in this case in comparison to the community safety issues the trial court identified when explaining the sentence it was imposing. We think it safe to conclude that the trial court also ignored this information in sentencing, and therefore erred when it did not order the probation officer to correct the PSIR to reflect consistently that Robinson was self-employed before his incarceration.

The trial court's failure to address the other challenges to the information in the PSIR concerning the crimes Robinson allegedly committed against other boys, but for which he was not convicted, presents a somewhat more complicated problem. If we were certain that the trial court disregarded this information in sentencing, we could conclude that the trial court erred, but remand for administrative correction of the PSIR on this point as well as the other issues, without ordering resentencing.[14] If the trial court had ruled that the information was accurate and relevant, and therefore properly included in the PSIR and considered during sentencing, we could consider the substance of Robinson's challenges to those pieces of information in light of the trial court's findings. However, from the trial court's statements on the record at the sentencing hearing and on remand, we cannot be certain whether it considered this information in imposing sentence, much less whether it found the information accurate and relevant.

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[11] *People v Taylor*, 146 Mich App 203, 205-206; 380 NW2d 47 (1985).

[12] See *People v Harmon*, 248 Mich App 522, 533; 640 NW2d 314 (2001).

[13] MCR 6.425(D)(3)(a).

[14] See *Harmon*, *supra* at 533; *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993).

At the heart of the matter is the trial court's statement at sentencing that Robinson's crime "is a serious matter and we can't have this kind of activity going on with young boys in our community." This statement can be interpreted in two ways. The trial court could have meant that the crime against Doe was a serious matter and that the young boys in the community could not be put at risk of another similar crime in the future, even setting aside what Robinson allegedly did to Doe's brothers and friends. Alternatively, the trial court's statement could be interpreted to mean that Robinson's crime against Doe was horrible, but especially so because he had also committed similar conduct against other "young boys in the community," which revealed his truly dangerous predatory nature. The trial court's statements on remand did nothing to clarify this matter because the trial court did not resolve the original challenges to this information in the PSIR by making findings on the record, redacting the PSIR, or stating that the information was irrelevant to the sentence imposed on Robinson. The trial court, instead, emphasized that it could not see any error in the sentencing hearing, nor how it would approach the issue differently were it to hold a new sentencing hearing. The trial court also confirmed its earlier sentiment that Robinson posed a real danger to the community, saying, "This fellow's such a fiend that he's got a neon sign on his forehead." This colorful expression did not explain whether the trial court considered the evidence of the other alleged molestations, including the probation officer's comparison between this crime and those other acts, when sentencing Robinson.

We do not discount the possibility that, as the trial court's comments at the hearing on remand suggested, the language in the remand order could have been clearer in describing what this Court specifically expected the trial court to do. Nevertheless, we are confronted with the legal reality that, regardless of the reasons behind the trial court's failure to resolve these challenges, MCR 6.425(D)(3) mandates that trial courts resolve challenges before sentencing a defendant. This is a crucial step because defendants have a constitutional right to be sentenced on the basis of accurate information.[15] Nevertheless, there are a substantial number of challenges still unresolved at this point. Having already remanded this case once, the most efficient way to handle this matter is to vacate the sentence and remand for resentencing. The probation officer will then provide[16] an updated[17] PSIR to the prosecutor, defense counsel, Robinson,[18] and the trial court.[19] This will give the probation officer an opportunity to correct any obvious inconsistencies or inaccuracies, such as the conflicting information regarding Robinson's employment status. At resentencing, each party will have a chance to challenge the accuracy and relevance of information in the updated PSIR.[20] The trial court will then rule on any challenge[21] and take the appropriate action with respect to redacting or correcting the PSIR if necessary.[22] If

[15] See *Daniels*, *supra* at 675.

[16] See MCR 6.425(A).

[17] See *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980).

[18] See MCR 6.425(B).

[19] See MCR 6.425(A).

[20] See MCR 6.425(D)(2)(b).

[21] See MCR 6.425(D)(3).

[22] See MCR 6.425(D)(3)(a) and (b).

the trial court chooses to disregard any information in the PSIR in sentencing Robinson, that information must be stricken from the PSIR.[23] If the trial court orders the probation officer to alter the PSIR in any way, it must "provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections."[24] We express no opinion on the length of any sentence the trial court should impose.

C. Allocution

Allocution is commonly understood as a criminal defendant's right to address a court that is poised to sentence the defendant, usually in an attempt to persuade the court to impose a light sentence.[25] Technically, a defense attorney does not have the right to allocute, though the case law sometimes ignores this fine-line distinction.[26] Rather, MCR 6.425(D)(2)(c) requires a trial court at a sentencing hearing to "give the defendant, *the defendant's lawyer*, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence."[27] Thus, the court rules provide a basis separate from the traditional right to allocution for a defense attorney to address a trial court before it sentences the attorney's client.

Irrespective of this terminology, the crux of Robinson's argument is that, while Filip had an opportunity to comment extensively on the PSIR, the trial court denied Filip the opportunity to make comments about the appropriate sentence to impose in this case. The record, however, does not support this argument. At the outset of the hearing, before challenging any other aspect of the PSIR, Filip brought the sentencing guideline scoring error to the trial court's attention. In doing so, Filip asked the trial court to make the correction and take that correction "into consideration in sentencing." In other words, Filip used the opportunity provided in MCR 6.425(D)(2)(c) to address the trial court and ask it to sentence Robinson within the recommended range. Further, after the trial court heard extensive arguments regarding the contents of the PSIR, it asked whether there were "[a]ny comments from *anyone else*?"[28] Filip, who had not hesitated to speak up even when not invited to do so at other points in the hearing, did not say anything. The only conclusion that we can draw from the record is that the trial court afforded Filip the opportunity to make an *additional* argument regarding the sentence, but that he chose not to do so, having already asked the trial court to consider the lower appropriate range recommended by the guidelines. The trial court did not err in denying resentencing on this basis. Therefore on remand, though the attorneys, Robinson, and the victim each will have a new

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[23] See *Britt*, *supra* at 718.

[24] MCR 6.425(D)(3)(b).

[25] See Black' Law Dictionary (6th ed, 1990), p 76 ("Allocution" is the "[f]ormality of a court's inquiry of defendant as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction; or, whether he would like to make statement on his behalf and present any information in mitigation of sentence.").

[26] See, e.g., *People v Green*, 228 Mich App 684, 698-699; 580 NW2d 444 (1998).

[27] Emphasis added.

[28] Emphasis added.

opportunity to address the trial court,[29] there is nothing about the trial court's approach to allowing this to happen that must change.

IV. Evidentiary Hearing

Robinson contends that the trial court erred in refusing to hold a hearing in which to take additional evidence concerning his claim that he was denied the effective assistance of counsel. This Court's remand order unambiguously limited the trial court to examining the grounds for resentencing Robinson presented in his motion for remand. This excluded any consideration of the ineffective assistance of counsel issue. Thus, the trial court did not err when it denied a hearing on this subject.

Sentence vacated and remanded for resentencing consistent with the instructions in this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Harold Hood
/s/ Kirsten Frank Kelly

[29] See MCR 6.425(D)(2)(c).