

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN JAMES WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

January 28, 2003

No. 236359

Wayne Circuit Court

LC No. 94-000328

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his plea-based conviction for a probation violation on his underlying conviction of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant was sentenced to 2 to 10 years' imprisonment. We remand for recalculation of defendant's sentence credit and for correction of defendant's presentence investigation report.

We first address defendant's argument that he is entitled to additional credit for time served at the SAI boot camp program and for time served at the William Dickerson Facility. At sentencing, defense counsel requested that defendant receive credit for time served in the SAI boot camp program; however, defense counsel failed to request credit for time served in the William Dickerson Facility. "As a general rule, issues not raised before and considered by the trial court are not properly preserved for appellate review." *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Accordingly, this issue is preserved in relation to defendant's request of credit for time served in the SAI boot camp program; however, this issue is not preserved in relation to defendant's request of credit for time served at the William Dickerson Facility.

Preserved issues regarding whether a defendant has received the proper amount of credit at sentencing, in accordance with MCL 769.11b, is a question of law that this Court reviews de novo. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). However, unpreserved issues are reviewed for a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order to avoid forfeiture of an unpreserved issue, defendant must establish that an error occurred, the error was plain, i.e., clear or obvious, and the error affected defendant's substantial rights, i.e., affected the outcome of the trial court proceedings. *Id.*

We first address defendant's argument that he is entitled to sentence credit for time served in the SAI boot camp program. In *People v Hite (After Remand)*, 200 Mich App 1, 5; 503 NW2d 692 (1993), this Court held that a "defendant must be afforded sentencing credit if he was incarcerated as a condition of his probation," a rule which has its roots in the Double Jeopardy Clauses and the Michigan Constitution. The *Hite* Court concluded that the trial court erred in denying the defendant credit for time spent in the SAI program because, prior to the probation violation that led to the defendant's prison sentence, the defendant was ordered to complete an SAI program as a condition of his probation. *Id.* at 2, 8.

In the instant case, the trial court did not award defendant credit for time served in the SAI boot camp program. However, the lower court record contains no indication that defendant was required to participate in the SAI boot camp program as a condition of his probation in this case. Instead, defendant was required to participate in the SAI boot camp program for a separate and unrelated conviction in LC No. 96-3708.

In *People v Ovalle*, 222 Mich App 463, 468; 564 NW2d 147 (1997), this Court held that the defendant in that case was properly denied sentence credit where the defendant's prior incarceration was not the result of a denial of bond or the inability to furnish bond, but rather, the prior incarceration related to a separate prior conviction. The *Ovalle* Court stated that MCL 769.11b "neither requires nor permits sentence credit" in cases where a defendant is incarcerated "as a result of charges arising out of an unrelated offense or circumstance" and then seeks credit in another case for the unrelated period of confinement." *Id.*, quoting *People v Prieskorn*, 424 Mich 327, 340; 381 NW2d 646 (1985). Accordingly, although defendant and the prosecution properly indicate that a defendant is generally entitled to receive credit for time served in the SAI boot camp program, defendant was not entitled to credit for time served in this case because the sentence related to a separate, unrelated conviction.

Next, we address defendant's contention that he should receive credit for time spent at the William Dickerson Facility. In *People v Wagner*, 193 Mich App 679, 682; 485 NW2d 133 (1992), this Court stated,

While it is true that double jeopardy principles require an award of credit for time spent in jail as a condition of probation when the defendant is later sentenced to prison upon revocation of probation, . . . the Double Jeopardy Clauses do not mandate awards of sentence credit for all probationary confinements. Sentence credit under the Double Jeopardy Clauses is required only for confinements amounting to time spent "in jail" as that term is commonly used and understood (citation omitted).

In this case, Judge John Patrick O'Brien entered an amended order of probation on July 11, 1996, which provided that defendant would continue on lifetime probation, but defendant was to serve twelve months of the probationary period at the William Dickerson Facility. Defendant was ordered to participate in the Target Cities S.A. Program while at the William Dickerson Facility.

We hold that defendant has demonstrated a plain error affecting his substantial rights and has avoided forfeiture of this issue. Defendant is entitled to credit for the time he spent at the William Dickerson Facility as part of his probation. *Wagner, supra* at 682. However, based on

the lower court record, we are unable to determine the appropriate credit defendant should receive. Therefore, we remand this case for a proper determination of the credit to which defendant is entitled.

Finally, defendant argues that he is entitled to correction of his presentence investigation report. We agree. Issues regarding the accuracy of a presentence investigation report are constitutional in nature. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990). This Court reviews questions of law de novo. *Connor, supra* at 423.

“It is well settled that the use of inaccurate information at sentencing may violate [a] defendant’s constitutional right to due process.” *Hoyt, supra* at 533. “When a sentencing court states that it will disregard information in a presentence report challenged as inaccurate, the defendant is entitled to have the information stricken from the report.” *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993); see also MCL 771.14(6); MCR 6.425.

Defendant argues, and the prosecution agrees, that defendant is entitled to have certain information stricken from the presentence investigation report. Specifically, defendant argues that the cover page of the presentence investigation report should reflect two prior felonies rather than three prior felonies in the “prior convictions” section. Defendant raised this objection at sentencing and the trial court agreed that the third felony should be stricken from the report.

If the trial court finds challenged information contained within the presentence investigation report to be inaccurate or irrelevant, the trial court must strike that information before sending the presentence investigation report to the Department of Corrections. *Hoyt, supra* at 535. Defendant seems to argue that the Department of Corrections does not have an accurate presentence investigation report, which may have an effect on defendant as it relates to the denial of certain programs, to the increase of security classifications, and to any delay in defendant’s probation or parole. While the presentence investigation report provided to this Court contains the corrections defendant now requests, we are unable to verify whether such information was stricken from the presentence investigation report *before* it was sent to the Department of Corrections. Therefore, we remand this case to the trial court for the ministerial task of correcting defendant’s presentence investigation report as agreed on the record at defendant’s sentencing, and order the trial court to forward a corrected copy of the presentence investigation report to the Department of Corrections.

We remand for recalculation of the amount of sentence credit for which defendant is entitled for time served at the William Dickerson Facility and for correction of the presentence investigation report, and affirm in all other respects. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Donald S. Owens