

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 23, 2018

v

DANNY RAY PENNEBAKER,
Defendant-Appellant.

No. 335371
Jackson Circuit Court
LC No. 13-004717-FC

Before: MURPHY, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of two counts of assault with intent to rob while armed, MCL 750.89, and two counts of felonious assault, MCL 750.82. Defendant was originally sentenced to prison terms of 171 to 300 months on both counts of assault with intent to rob while armed, and 96 to 180 months on both counts of felonious assault. Following remand from this Court, *People v Pennebaker*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2015 (Docket No. 322117), the trial court resentenced defendant as a fourth habitual offender, MCL 769.12, to prison terms of 11 to 20 years on both counts of assault with intent to rob while armed, and 6 to 15 years on both counts of felonious assault. Defendant appeals by right, and we affirm.

In the original appeal, the Court affirmed the convictions but remanded for resentencing pursuant to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), after determining the trial court scored offense variable 3 (physical injury) based on judicial fact-finding, noting also that neither offense for which defendant was convicted contained an element of physical injury. *Pennebaker*, unpub op at 3.

Defendant argues that the court erred by considering erroneous information in the PSIR during resentencing. Specifically, he maintains the court improperly considered defendant's alleged failure to seek enrollment in substance abuse programs for which he was not yet eligible due to his imprisonment. Defendant argues that "he should not be punished for failing to enroll or sign up for substance abuse classes inside the Michigan Department of Corrections." Because defendant failed to preserve this argument, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In fashioning a sentence, the trial “court may consider all record evidence, including the contents of a PSIR” *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). “A judge is entitled to rely on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information.” *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). Sentences based on inaccurate information are invalid. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

The challenged passage in the PSIR is the following:

Based on the defendant’s lack of initiative in seeking substance abuse help, it is unclear as to whether or not this defendant is truly ready to give in to sobriety. The defendant must embrace a sober lifestyle and let go of the old “people, places and things” that would often serve as a roadblock to sobriety.

The passage does question defendant’s commitment to sobriety based on a “lack of initiative in seeking substance abuse help,” but it does not in any way indicate it is focused on what he has done while incarcerated. And given that this specific portion of the passage is also found in the original PSIR, it is reasonable to presume that the updated PSIR is again referencing steps not taken prior to his incarceration. There is nothing to indicate that defendant was then unable to seek substance abuse assistance.

Further, the record supports the observations. The updated PSIR states that defendant admitted he had not before attempted to seek sobriety assistance, but that he believed he would benefit from such. He also “acknowledge[d] his drug and alcohol addiction have led to most of his legal problems.” This is evidenced by his documented criminal history. After his discharge from prison in March 2009, he was periodically in and out of jail for various theft, controlled substance, and domestic violence offenses from 2009 through early 2012. Defendant was arrested again in April 2013 in Jackson County and convicted in November 2013 for illegal use of a narcotic (cocaine). In all, the updated PSIR lists four drug or alcohol related convictions, two while defendant was under the age of 18 (both probation violations), and two while an adult.¹ Further, another listed conviction indicates that he failed five drug tests after he was paroled in February 2005. Defendant also admitted to being under the influence of methamphetamine and heroin during the commission of the underlying crimes.

Additionally, where a trial court does not rely upon the disputed PSIR information in fashioning a sentence, its decision to leave the content unchanged does not necessarily amount to error. *People v Uphaus (On Remand)*, 278 Mich App 174, 182; 748 NW2d 899 (2008). There is also no indication the trial court considered the disputed passage in re-evaluating defendant’s sentence.²

¹ Moreover, his criminal record spans convictions in Michigan, Ohio, and Tennessee.

² At resentencing, the trial court explained the bases of its decision as follows:

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Jane M. Beckering

In passing sentence on you I'm individualizing your sentence. I'm taking into account a number of factors: I'm considering punishment, rehabilitation prospects, deterrence, protection of society. You've been in for a little while, for the most part only getting one [sic] well, two misconducts, but one billion dollars is sort of humorous, at least in my mind.