

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 21, 2013

v

MICHAEL ALAN GRAY,
Defendant-Appellant.

No. 309859
Kent Circuit Court
LC No. 01-006554-FC

Before: FITZGERALD, P.J., and METER and M. J. KELLY, JJ.

PER CURIAM.

Defendant Michael Alan Gray appeals as of right from his plea-based conviction of second-degree murder, MCL 750.317. We remand for the limited purpose of modifying defendant's presentence investigation report (PSIR).

On September 10, 2001, defendant pleaded guilty to second-degree murder for his involvement in a crime that occurred in 1982. At sentencing on October 30, 2001, defendant asked the trial court for permission to enter a statement to be attached to the PSIR, and the trial court orally granted defendant's request. On July 18, 2002, defendant filed several motions before the trial court, including a motion to correct the PSIR. On October 23, 2002, defendant, represented by appellate counsel, moved for resentencing, again arguing, among other things, that the PSIR should be amended to include his statement. The prosecution did not challenge this request. On December 2, 2002, the trial court rejected defendant's other arguments, but entered an order stating "that the defendant may prepare a short rendition of his version of events, which shall be attached to the presentence report and forwarded to the Department of Corrections as part of the presentence report." No statement was ever attached.

On November 27, 2002, defendant, through counsel, had filed in this Court an application for leave to appeal, which did not raise the issue of the omitted PSIR statement. This Court denied defendant's appeal, as did the Michigan Supreme Court. *People v Gray*, unpublished order of the Court of Appeals, entered March 3, 2003 (Docket No. 245128); *People v Gray*, 469 Mich 879; 668 NW2d 149 (2003). Defendant next moved for relief from judgment. Among other things, defendant again argued that his statement should be added to the PSIR. On July 20, 2004, the trial court denied defendant's motion for relief in part and granted it in part. In the course of its ruling, the court expressly reaffirmed the December 2, 2002 order. Defendant again attempted to obtain appellate review with respect to various issues, but his attempts were rejected

by this Court, the Michigan Supreme Court, and the United States Supreme Court. *People v Gray*, unpublished order of the Court of Appeals, entered February 3, 2006 (Docket No. 264015); *People v Gray*, 476 Mich 864; 720 NW2d 297 (2006); *Gray v Michigan*, 549 US 1228; 127 S Ct 1300; 167 L Ed 2d 114 (2007).

On March 13, 2007, defendant petitioned for a writ of habeas corpus, which was dismissed by the United States District Court for the Western District of Michigan. *Gray v Harry*, unpublished report and recommendation of the United States Magistrate Judge for the United States District Court, Western District of Michigan, issued March 2, 2010 (Docket No. 1:07-CV-246); *Gray v Harry*, unpublished order approving report and recommendation of the United States District Court, Western District of Michigan, issued September 29, 2009 (Docket No. 1:07-cv-246); 2010 WL 3851975. Defendant appealed the district court's decision, and the Sixth Circuit Court of Appeals vacated the district court's order and remanded with instructions for it to issue a conditional writ of habeas corpus releasing defendant from state custody unless the state provided defendant the opportunity to pursue a direct appeal from his conviction. *Gray v Harry*, unpublished order of the United States Court of Appeals for the Sixth Circuit, issued December 27, 2011 (Docket No. 10-2423). This appeal as of right followed.

Defendant's sole request is for this Court to compel the trial court to compel the Department of Corrections to enforce the trial court's earlier order to supplement the PSIR with defendant's statement detailing his version of the offense.

MCL 771.14(6) provides that “[a]t the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report. . . .” On appeal, “[a] defendant may not raise an issue challenging the accuracy of the presentence report unless the issue was raised at or before sentencing.” *People v Bailey*, 218 Mich App 645, 647; 554 NW2d 391 (1996); see also MCR 6.429(C). Defendant properly raised the present issue, and his claim is not now moot, because “[t]he Department of Corrections relies on the information contained in the PSIR to make critical decisions regarding a defendant's status.” *People v Lloyd*, 284 Mich App 703, 705-06; 774 NW2d 347 (2009). MCR 6.425(A)(1)(h), in relevant part, provides that the PSIR “must be succinct and, depending on the circumstances, include . . . any statement the defendant wishes to make”

At sentencing, the trial court clearly granted defendant's timely request to add his version of events to the PSIR, and it later specifically ordered that defendant's statement be appended to the PSIR. In its memorandum in opposition to defendant's motion for resentencing, the prosecution did not challenge defendant's request to amend the PSIR to add a statement of his version of events and instead suggested that this omission “be corrected under MCR 2.612(A) as a clerical mistake.” The present appeal, which was essentially ordered by the Sixth Circuit, involves the simple attempt to enforce an order—an attempt with which the prosecution does not take issue. Therefore, regardless of any law-of-the-case argument that could, in light of the wording of the various appellate orders involved, potentially be made to deny defendant relief, we remand this case for the sole purpose of ensuring that defendant's written statement is added to his PSIR. See MCR 6.425(A)(1)(h), *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993) (discussing remands for the correction of PSIRs), and *People v Phillips*, 227 Mich App 28, 33-34; 575 NW2d 784 (1997) (discussing the flexibility of the law-of-the-case doctrine).

Remanded for the limited purpose of modifying defendant's PSIR. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Patrick M. Meter

/s/ Michael J. Kelly