

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
	)	
Plaintiff and Appellee,	)	Case No. 20050146-CA
	)	
v.	)	F I L E D
	)	(August 31, 2006)
	)	
Michael S. Toles,	)	2006 UT App 359
	)	
Defendant and Appellant,	)	

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Second District, Farmington Department, 041700540  
The Honorable Rodney S. Page

Attorneys: Scott L. Wiggins, Salt Lake City, for Appellant  
Mark L. Shurtleff and Jeffrey S. Gray, Salt Lake  
City, for Appellee

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Before Judges Bench, Billings, and Thorne.

PER CURIAM:

Michael S. Toles appeals from his sentence on a conviction of assault by a prisoner. We affirm the sentence but remand for specific findings to be made on the record.

Toles asserts that the trial court erred when it failed to make findings on the record regarding his objections to his presentence report. Pursuant to Utah Code section 77-18-1(6), the trial court was required to resolve any disputes about the presentence report on the record. See Utah Code Ann. § 77-18-1(6)(a) (Supp. 2006). If the parties cannot resolve discrepancies prior to the sentencing hearing, "the court shall make a determination of relevance and accuracy on the record." Id. Section 77-18-1(6) "requires the sentencing judge to consider the party's objections to the report, make findings on the record as to whether the information objected to is accurate, and determine on the record whether that information is relevant to the issue of sentencing." State v. Jaeger, 1999 UT 1, ¶45, 973 P.2d 404. A trial court's failure to resolve presentence report discrepancies on the record is a failure to comply with a court's

legal duty under the statute. See State v. Veteto, 2000 UT 62, ¶15, 6 P.3d 1133.

Here, the trial court failed to resolve Toles's objections to his presentence report on the record. The State concedes that the trial court erred in this manner. Because Toles does not contend that this error affected his sentence, however, the error does not require reversal. See Jaeger, 1999 UT 1 at ¶46. Rather, the proper remedy is remand to the trial court for the purpose of entering findings as required under section 77-18-1(6), specifically resolving Toles's objections on the record.

Toles also asserts that he received ineffective assistance of counsel because trial counsel did not object to the trial court's failure to resolve his objections. However, Toles has shown no prejudice from this alleged error. See State v. Dunn, 850 P.2d 1201, 1225 (Utah 1993) (noting to establish ineffective assistance of counsel, defendant must show prejudice). Toles asserts only that, absent the error, intermediate sanctions would have been "more arguable." Toles has not demonstrated that there was a reasonable likelihood of a different outcome. See id. On the contrary, the trial court focused on Toles's failure to appear at a previously scheduled sentencing hearing and his prior parole violations in concluding that Toles was a poor risk for supervision. From all that appears in the record, the alleged inaccuracies had no effect on the court's determination that prison was the appropriate sentence.

In sum, Toles has not established ineffective assistance of counsel. However, the trial court erred in failing to make specific findings on the record resolving Toles's objections to the presentence report. Therefore, this case is remanded to the trial court for the entry of findings as required under section 77-18-1(6). Toles's sentence is otherwise affirmed.<sup>1</sup>

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Russell W. Bench,  
Presiding Judge

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<sup>1</sup> The State notes that the presentence report is a private document and was improperly attached as an addendum to Toles's brief. It is hereby ordered that addendum B is stricken.

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Judith M. Billings, Judge

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William A. Thorne Jr., Judge