

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20050167-CA
v.)	
)	F I L E D
Michael David Wilbert,)	(November 24, 2006)
)	
Defendant and Appellant.)	2006 UT App 470

Second District, Farmington Department, 041701706
The Honorable Thomas L. Kay

Attorneys: Scott L. Wiggins, Salt Lake City, for Appellant
Mark L. Shurtleff and Marian Decker, Salt Lake City,
for Appellee

Before Judges Billings, Davis, and Thorne.

THORNE, Judge:

Michael David Wilbert appeals his conviction for possession of methamphetamine, a third degree felony, in violation of Utah Code section 58-37-8. See Utah Code Ann. § 58-37-8 (Supp. 2006).

Wilbert first claims that the trial court failed to correct contested information in his presentence investigation report (PSI report) before imposing his sentence. "Whether the trial court properly complied with a legal duty [to resolve on the record the accuracy of contested information in a PSI report] is a question of law that [an appellate court] reviews for correctness." State v. Veteto, 2000 UT 62, ¶13, 6 P.3d 1133.

Under Utah law, Wilbert had the burden of raising the alleged inaccuracies in the PSI report at the time of sentencing. See Utah Code Ann. § 77-18-1(6)(a) (Supp. 2006) ("Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the sentencing judge" (emphasis added)). "If a party fails to challenge the accuracy of the presentence investigation report at the time

of sentencing, that matter shall be considered to be waived." Id. § 77-18-1(6)(b).

Here, Wilbert did not point out any discrepancies in his PSI report before his sentence was imposed by the trial court. Before sentencing, the trial court specifically asked Wilbert whether he wanted to modify anything in his PSI report, to which Wilbert's counsel replied in the negative. When the trial court inquired about an arrest warrant for issuing a bad check that was identified in the PSI report, Wilbert offered an explanation but did not challenge the existence of the warrant. Thus, to the extent that the PSI report contains inaccuracies, Wilbert did not raise them in front of the trial court judge and the matter is "considered to be waived." Id.

Wilbert further contends that his counsel's failure to adequately raise challenges to the PSI report constitutes ineffective assistance of counsel. To prevail on this claim, Wilbert "must meet the heavy burden of showing that (1) trial counsel rendered deficient performance which fell below an objective standard of reasonable professional judgment, and (2) counsel's deficient performance prejudiced him." State v. Chacon, 962 P.2d 48, 50 (Utah 1998). "[W]e need not decide whether counsel's performance was deficient if we first conclude that the trial outcome was not prejudicially affected by the claimed error." State v. Butterfield, 784 P.2d 153, 157 (Utah 1989).

Wilbert contends that counsel should have challenged the PSI report's failure to reflect his plea agreement with the State whereby the State would not oppose a future motion to reduce the degree of Wilbert's offense if Wilbert successfully completed probation. See Utah Code Ann. § 76-3-402 (Supp. 2006). Wilbert provides no authority to suggest that such an agreement must be included in a PSI report, and, in any event, the trial court was aware of the agreement as it was included in Wilbert's written plea agreement. Wilbert further alleges that counsel's failure to address inaccuracies regarding the bad check arrest warrant constituted ineffective assistance, but again fails to challenge the warrant's actual existence or otherwise identify any factual inaccuracy in the PSI report that counsel could have raised.

In addition, Wilbert has shown no reason to believe that either of counsel's alleged failures altered the outcome of the sentencing hearing. The trial court was already aware of the contents of Wilbert's plea agreement, and Wilbert has failed to identify any factual inaccuracy in the PSI report regarding the bad check arrest warrant that counsel could have brought to the court's attention. Accordingly, Wilbert has not demonstrated

prejudice, and counsel's assistance cannot be deemed ineffective.
See Butterfield, 784 P.2d at 157.

Affirmed.

William A. Thorne Jr., Judge

WE CONCUR:

Judith M. Billings, Judge

James Z. Davis, Judge