

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD WAYNE BUCKLEY, II,

Defendant-Appellant.

UNPUBLISHED

April 16, 1996

No. 186138

LC Nos. 94-N-55-FH

94-N-59-FH

Before: Young, P.J., and Holbrook, Jr., and J. Richard Ernst,* JJ.

PER CURIAM.

In No. 94-N-55-FH, defendant pleaded guilty of delivery of marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), and, in No. 94-N-59-FH, he pleaded guilty of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The court originally sentenced defendant to serve concurrent prison terms of one to four years and five to twenty years, respectively, then amended the judgments of sentence sua sponte to impose consecutive sentences. Defendant appealed as of right and this Court remanded for resentencing because defendant had been denied his right of allocution. On remand, the trial court resentenced defendant to the same prison terms. He again appeals as of right and we remand.

On appeal, defendant asserts that the trial court erred in failing to order preparation of an updated presentence investigation report (PSIR) for review before defendant's resentencing. We agree.

A defendant may not waive a presentence report, *People v Brown*, 393 Mich 174; 224 NW2d 38 (1974), and a "reasonably updated" presentence report must be utilized in the resentencing of felonies, *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980). In *People v Hemphill*, 439 Mich 576; 487 NW2d 152 (1992), our Supreme Court held that, unless the prior report is manifestly outdated, a defendant at resentencing may waive preparation of an updated report. *Id.* at

* Circuit judge, sitting on the Court of Appeals by assignment.

582. As with the waiver of constitutional protections, the waiver of a reasonably updated PSIR at resentencing must be intelligent, understanding, and voluntary. *Id.* at 582, quoting *People v Brown, supra* at 186 (T.M. Kavanagh, J, dissenting).

Here, resentencing occurred approximately one year after defendant was originally sentenced. Before resentencing, the trial court did not order the probation department to prepare an updated PSIR, and at the hearing defendant did not waive its preparation. In arguing for a lighter sentence, defense counsel raised certain changes in circumstance that had occurred since the original sentencing, including the possibility of defendant returning to work for his former employer, the successful completion of certain educational courses while in prison, and, on the negative side, his receipt of “a couple of tickets” in prison. In addressing defense counsel’s challenge to the scoring of certain offense and prior record variables, the court explained: “I don’t have the advantage of the [original] presentence report in front of me, although it had been reviewed some time ago. I don’t recall its contents.” On these facts, where the trial court failed in its duty either to order preparation of an updated report or to obtain an express waiver from the defendant of its preparation, we are compelled to remand this matter again to the trial court, which shall direct the probation department to prepare an updated PSIR before resentencing occurs. See MCR 6.425.

Remanded. We do not retain jurisdiction.

/s/ Robert A. Young

/s/ Donald E. Holbrook, Jr.

/s/ J. Richard Ernst