

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE WALKER,

Defendant-Appellant.

UNPUBLISHED

March 4, 1997

No. 182722

Ingham County

LC No. 94-067900

Before: Michael Kelly, P.J. and Saad and H.A. Beach,* JJ.

PER CURIAM.

Defendant appeals from his jury conviction of delivery of under fifty grams of a mixture containing the controlled substance cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15.(7401) (2)(a)(iv). The Court sentenced defendant to two to twenty years in prison. We affirm defendant's conviction and sentence, but remand for a supplemental presentence investigation report.

Defendant first claims that the trial court erred when it permitted the prosecutor to elicit alleged hearsay testimony from various police officers contrary to MRE 801. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). However, "a statement offered to show the effect of the statement on the hearer is not hearsay and may be properly admitted." *People v Flaherty*, 165 Mich App 113, 122; 418 NW2d 695 (1987).

Defendant challenges the admissibility of four statements. Two of the statements refer to comments that officers overheard while an undercover officer was wired. (Defendant erroneously asserts that the other two challenged conversations involved statements that were heard over the undercover officer's wire. In fact, this testimony was by the undercover officer himself, who was relating a conversation he had with another officer over the police radio and a conversation he had with the person who led him to the illegal transaction.) Based on our review of the record, we conclude that these references were only used to show their effect on the officers and were not used as proof of the

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

matters asserted. The prosecution carefully elicited only testimony that showed how the officers reacted at certain times or how much time had elapsed between the officers' actions.

Next, defendant claims that his attorney was ineffective in light of his failure to object to the above contested evidence, his failure to clarify and correct mistakes in defendant's presentence investigation report (PSIR), and his failure to advise the court of any useful or favorable information regarding defendant. To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation was so prejudicial that the defendant was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). As noted earlier, the officers' statements were admissible to show their effect on the listener. We note that defendant's counsel did object to the first of these statements but then properly concluded that they were admissible. Furthermore, counsel did point out errors in defendant's PSIR regarding defendant's credit for time served and did make a positive statement on behalf of defendant. Defendant's PSIR was also erroneous in that it inaccurately reported that defendant had four, as opposed to three, prior felony convictions. However, defendant was only scored for three prior convictions under the offense variable section of the PSIR and the trial court indicated at sentencing that it was aware that defendant had only been convicted of three felony convictions. Although counsel did not bring this error to the court's attention, he did not need to because the court had indicated that it was aware of the error. Thus, defendant is not entitled to relief on grounds that his counsel was ineffective.

Next, defendant argues that he is entitled to a corrected PSIR that reflects the trial judge's recognition of the inaccuracy in the report, namely that defendant was not convicted of possession of cocaine and that defendant was appearing before the trial court on his fourth felony conviction when in actuality he was appearing on only his third felony offense. If a sentencing court states that it will disregard information in a PSIR challenged as inaccurate, the defendant is entitled to have the information stricken from the report. MCL 771.14(5); MSA 28.1144(5). It is important that a PSIR be accurate because it follows the defendant to the Department of Corrections and serves as the basis for decisions about parole and how the defendant will be classified in the system. See *People v Taylor*, 146 Mich App 203, 205-206; 380 NW2d 47 (1985). However, there is no requirement that a completely new report be prepared; a supplemental report is sufficient. *People v Martinez*, 210 Mich App 199, 202; 532 NW2d 863 (1995). Here, there is no indication that a supplemental report was ever prepared. Therefore, we remand so that a supplemental report can be prepared.

Finally, defendant asserts that his sentence is too severe and that if the trial court had considered that he was on probation at the time of sentencing, it would have awarded a more lenient sentence. A sentence should have an appropriate relationship to the circumstances of the offense and the offender. See *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Moreover, a sentence within the sentencing guidelines range is presumed proportionate. *Id.* A defendant's criminal history is a permissible consideration for the sentence imposed. See *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). In imposing sentence, the trial court properly noted defendant's prior convictions and his drug history. Moreover, defendant's minimum sentence of two years is presumed proportionate

because it was the suggested minimum under the Michigan Sentencing Guidelines sentence. Moreover, MCL 768.7a(2); MSA 28.1030(1)(2): provides:

If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

This statute suggests that a defendant's parole status should have no bearing on his sentence. We hold that defendant has not overcome the presumption of proportionality.

Conviction and sentence affirmed; remanded for preparation of supplemental PSIR.

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Harry A. Beach