

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY GRANVILLE SMITH,

Defendant-Appellant.

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UNPUBLISHED

September 19, 1997

No. 197578

Ingham Circuit Court

LC No. 94-067207 FH

Before: Markey, P.J., and Neff and Smolenski, JJ.

MEMORANDUM.

In a bench trial, defendant was convicted of first degree retail fraud, MCL 750.356c; MSA 28.588(3), and then adjudicated a third habitual offender, MCL 769.11; MSA 28.1083. He received a probationary sentence, the first year of which was to be spent in the county jail. However, with defendant's consent, the incarcerative term of his probation was amended to substitute participation in the New Paths Drug Rehabilitation Program. Defendant did not successfully complete the program, however, and as this was a condition of his probation, he was charged as a probation violator. Defendant admitted to the violation, and he then received an enhanced sentence based on the underlying offense of two and one-half to four years' imprisonment, with 125 days' credit. He now appeals of right. We affirm.

Defendant first contends that he is entitled to more than 125 days' credit. Defendant is not entitled to credit for time spent in the New Paths Program, which was rehabilitative, not punitive. *People v Whiteside*, 437 Mich 188, 202; 468 NW2d 504 (1991). *Whiteside* is indistinguishable, particularly because it involved the very same drug rehabilitation program.

By defendant's calculation, aside from the New Paths Program issues, he had 23 days' credit as of the original sentencing date, 58 days in jail before being released to the New Paths Program, and 64 days of incarceration after being arrested on the probation violation charges until sentencing. However, the record is unclear as to whether defendant was incarcerated the entire time between arrest and sentencing on the probation violation charges. The presentence report indicates that during that time frame, defendant provided a urine sample for drug testing to his probation agent in Genesee

County, although he would have been incarcerated in the Ingham County jail. Defendant never objected at sentencing to the credit awarded and filed no motion in the trial court seeking correction of the credit. This record is inadequate for this Court to award appellate relief on this issue, *Lemanski v Ford Motor Co*, 82 Mich App 244, 252; 266 NW2d 775 (1978), although this decision is without prejudice to defendant's opportunity to seek any additional credit to which he is entitled by applying to the trial court in the first instance.

Defendant contends that he improperly received a dual, concurrent sentence for both retail fraud and retail fraud enhanced as a third offender. The judgment of sentence, however, reflects only a single sentence of 30 to 48 months on Count II of the information, which is the third offender enhancement portion. This claim of error is therefore without factual predicate in the record.

Finally, defendant contends that the presentence report should be corrected by a remand to the trial court. With respect to the number of program violations in the New Paths environment, the updated presentence report with attachment correctly reflects that only four of those program violations were sustained after investigation and hearing. Reading the presentence report as a whole, therefore, there is no inaccuracy in this respect. Similarly, an assertion that defendant's Genesee County probation agent suspected defendant of still being involved with drugs was stricken from the report by the sentencing judge, whose initials and date are written on the face of the report. This adequately indicates to the Department of Corrections that this information was of insufficient accuracy to be considered at sentencing, and no authority has been cited to indicate that a new presentence report, in which such information is illegible, must be prepared. The correction made by the trial judge is adequate to the task.

Affirmed.

/s/ Jane E. Markey

/s/ Janet T. Neff

/s/ Michael R. Smolenski