

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RALPH EDMUND MAIN,

Defendant-Appellant.

UNPUBLISHED

June 13, 2006

No. 260414

Eaton Circuit Court

LC No. 02-020227-FH

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

This is the second time this case is before this Court. Defendant was convicted by jury of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age). Defendant was originally sentenced to concurrent terms of 120 to 270 months in prison. This Court affirmed defendant's conviction but remanded for resentencing. *People v Main*, unpublished opinion per curiam of the Court of Appeals, issued April 27, 2004 (Docket No. 246343). On remand defendant was resentenced to concurrent terms of 107 to 270 months in prison. Defendant appeals as of right from the new sentence. We affirm.

Defendant first argues that his sentence violates *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. In *People v Claypool*, 470 Mich 715; 684 NW2d 278 (2004), the Michigan Supreme Court opined that *Blakely* is inapplicable to guidelines scoring in connection with indeterminate sentencing in Michigan. *Id.* at 730-731 n 14 (Taylor, J., joined by Markman, J.), 741 (Cavanagh, J.), 744 (Weaver, J.). We are bound by *Claypool*, *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), and defendant is therefore not entitled to resentencing.

Defendant next argues that he is entitled to have police reports regarding a prior indecent exposure conviction and a prior CSC II conviction removed from his presentence investigation report (PSIR) because they are irrelevant and potentially inaccurate. However, defendant failed to preserve this issue for appellate review by objection during the resentencing hearing. We have held that the plain language of MCL 771.14(5) and MCR 6.425(D)(2)(b) require a defendant to challenge the accuracy of any information contained in the PSIR at the time of sentencing. *People v Sharp*, 192 Mich App 501, 504; 481 NW2d 773 (1992). Accordingly, although

defendant raised this issue in a motion for remand to this Court, defendant's failure to challenge the accuracy of the information contained in the PSIR at the time of sentencing precludes appellate review of this issue. *Id.*¹

Defendant also argues that defense counsel's failure to object to the information contained in the police reports constituted ineffective assistance of counsel. We disagree. Defendant's ineffective assistance of counsel claim is limited to the existing record because he failed to move for new trial or an evidentiary hearing. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

The determination as to whether counsel was ineffective is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, defendant must show that his attorney's performance fell below an objective standard of reasonableness under the circumstances and according to professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, the defendant must show that this performance so prejudiced him that he was deprived of a fair trial. *Strickland, supra* at 687-688; *Pickens, supra* at 309. To establish prejudice, a defendant must show a reasonable probability that the outcome would have been different but for counsel's errors. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Here, defendant has failed to establish that counsel's performance was objectively unreasonable. As noted above, defendant cites no information contained in the police reports that is inaccurate. In addition, the information was relevant to the sentencing court. Further, defendant has failed to establish that the alleged error was outcome determinative.

Finally, defendant argues that he is entitled to resentencing because the sentencing court relied on a misdemeanor conviction obtained without the benefit of counsel when it scored prior record variable (PRV) 5. We disagree.

Defendant was assessed 10 points under PRV 5, and had a total PRV score of 70, placing defendant in PRV level E. MCL 777.64. PRV 5 requires the court to assess 10 points if the offender has three or four prior misdemeanor convictions. 777.55(1)(c). However, a sentencing court may not consider a defendant's prior misdemeanor convictions obtained without the benefit of counsel or without a valid waiver of the right to counsel. *People v Hannan*, 200 Mich App 123, 128; 504 NW2d 189 (1993). Here, defendant's PSIR indicates that he was convicted of three prior misdemeanors including two 1984 convictions for larceny and a 1988 conviction for indecent exposure. The report also indicates that defendant was represented by counsel for only one of these convictions.

¹ In any event, defendant has failed to identify what information in the police reports is inaccurate, and where defendant is charged with criminal sexual conduct, additional information related to past instances of sexually deviant conduct is relevant to the sentencing court. MCR 6.425(A).

However, if PRV 5 were scored at two points instead of 10 (based on one prior misdemeanor conviction), the resulting total PRV score of 62 would still place defendant in the same sentencing grid. MCL 777.55e; MCL 777.64. Thus, even if the score were adjusted the minimum sentence range would remain 43 to 107 months' imprisonment, and defendant's minimum sentence of 107 months fell within that range. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Moreover, there is no evidence that the court otherwise considered these misdemeanor convictions when imposing a sentence at the high end of the guidelines range.

Affirmed.

/s/ Michael R. Smolenski

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray