

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON FRANK-JAMES BAUER,

Defendant-Appellant.

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UNPUBLISHED

December 23, 2014

No. 317965

Wayne Circuit Court

LC No. 11-008258-FC

Before: O'CONNELL, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree criminal sexual conduct (“CSC II”), MCL 750.520c(1)(b)(i) (victim was at least 13 but less than 16 years of age and same household). He was sentenced to 57 months to 15 years’ imprisonment for his CSC II conviction. The prosecution appealed, and this Court vacated the sentence and remanded for resentencing because “the trial court did not consider evidence . . . relative to the proper scoring of OV 3 and OV 11” due to its belief “that it was specifically precluded from scoring OV 3 or 11 based on the verdict of the jury.” *People v Bauer*, unpublished opinion per curiam of the Court of Appeals, issued April 16, 2013 (Docket No. 309185), pp 1, 9. On remand, defendant was resentenced to 8 to 15 years’ imprisonment. Defendant now appeals as of right the new sentence imposed for his CSC II conviction. For the reasons set forth in this opinion, we affirm.

Prior to defendant’s resentencing, his counsel interrupted the trial court and the following exchange took place:

*[DEFENSE COUNSEL]:* May I interrupt?

Before we get into it too much, I just want to put on the record that we are here today for resentencing. Normally[, in] my experience[,] there has to be an updated Presentence Report, where . . . the good, the bad and the ugly would be presented to the Court, updated information.

We don’t have that today just because it didn’t happen. I have explained that to Mr. Bauer. In my view[,] as a defendant he’s entitled to an updated Presentence Report, but like any other right, it can be waived.

So I have explained to him that he can waive his right and do so in open court. The only concern he had as it related to the Presentence Report is that

he be given proper credit for the time he's already served both in the Wayne County Jail and in the prison.

*THE COURT:* As a matter of law he has that.

[*DEFENSE COUNSEL*]: So with that I would just simply ask him if I could.

Mr. Bauer, knowing that you have a right in my view to an updated Presentence Report, but knowing too that you'll be given full credit for every day you served in jail and in prison on this case, you choose to waive your right to have an updated Presentence Report?

*DEFENDANT BAUER:* I do.

[*DEFENSE COUNSEL*]: And you're doing that freely and voluntarily?

*DEFENDANT BAUER:* Yes.

[*DEFENSE COUNSEL*]: Nobody promised you anything other than the fact that you are going to get all the credit due you for the time you have served?

*DEFENDANT BAUER:* Yes.

[*DEFENSE COUNSEL*]: Okay.

*THE COURT:* All right. Thank you.

With that understanding, Mr. Clark.

[*PROSECUTOR*]: Thank you, your Honor.

On appeal, defendant argues that he is entitled to resentencing because the trial court used a manifestly outdated presentence investigation report ("PSIR") when imposing his sentence. We disagree for two reasons. First, defendant knowingly and voluntarily waived his right to appellate review of this issue. *People v Carines*, 460 Mich 750, 762 n7; 597 NW2d 130 (1999). Second, though defendant waived his right to appellate review of this issue, such review is not precluded if defendant's PSIR is found to be manifestly outdated. *People v Hemphill*, 439 Mich 576, 579-581; 487 NW2d 152 (1992). Our finding that defendant's 17 month old PSIR was not manifestly outdated precludes any relief for defendant on appeal.

Whether a defendant is entitled to resentencing because the trial court did not use an updated PSIR is a question of law, which this Court reviews de novo. See *People v Conner*, 209 Mich App 419, 423; 531 NW2d 734 (1995) ("We review questions of law de novo.") However, when an issue is not preserved on appeal, the defendant "must show a plain error that affected substantial rights." *People v Carines*, 460 Mich at 774. As discussed in this opinion, defendant waived this issue by expressly permitting the trial court to resentence him without an updated

PSIR. Further, at the very least, this issue is not preserved on appeal because defendant failed to object to the trial court's use of an outdated PSIR at resentencing or otherwise raise this issue at the lower court level, and "[f]or an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court," *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007).

Pursuant to MCL 771.14(1), a judge is required to use a PSIR at sentencing. *People v Hemphill*, 439 Mich at 579. The report must be complete, accurate, reliable, and "reasonably updated," *People v Triplett*, 407 Mich 510, 514; 287 NW2d 165 (1980), and it must include the information listed in MCL 771.14(2) and MCR 6.425(A). The following reports have been held to be not reasonably updated: a PSIR that was several years old; a PSIR that was prepared in connection with an unrelated offense several months earlier; and a PSIR that was several months old in conjunction with "significant allegations that defendant's circumstances had changed in the interim." *Hemphill*, 439 Mich at 580-581. A supplemental PSIR, as opposed to an entirely new PSIR, is sufficient to establish a reasonably updated report. *Id.* at 581; *People v Martinez*, 210 Mich App 199, 202; 532 NW2d 863 (1995), overruled on other grounds by *People v Edgett*, 220 Mich App 686, 691-696 (1996). The Michigan Supreme Court has held that public policy prevents a defendant from waiving the use of a PSIR at sentencing. *Hemphill*, 439 Mich at 579-581. However, "a defendant at *resentencing* may waive preparation of an *updated* [PSIR]" "[u]nless the prior report is manifestly outdated." *Id.* at 582 (emphasis added).

It is clear from defendant's statements at the resentencing hearing that he waived his right to an updated PSIR, assuming that such a waiver was permitted. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Carines*, 460 Mich at 762 n 7, quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (internal quotation marks omitted). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996) (internal quotation marks omitted).

However, as mentioned above, a defendant is only permitted to waive an updated PSIR if the "previously prepared report is accurate" and not "manifestly stale," because basing a defendant's sentence on manifestly outdated information "would . . . jeopardize the public interest." *Hemphill*, 439 Mich at 582. Contrary to defendant's arguments, this Court finds that the defendant's PSIR was not manifestly outdated. Defendant's PSIR was prepared 17 months, not several years prior to his resentencing hearing, and it was prepared in connection with the same conviction. Also, given that defendant only claims that the PSIR did not include his rehabilitative progress while he was incarcerated, it appears that defendant concedes that the vast majority of the PSIR was up-to-date at the time of resentencing, as almost all of the report pertained to aspects of his background that would presumably remain unchanged during incarceration. To the extent the report did not contain up-to-date information concerning defendant's progress while incarcerated, the record clearly reveals that defendant and his counsel were able to orally update the trial court relative to all matters they deemed pertinent regarding defendant's progress while incarcerated. Thus, viewing the entirety of the factors relative to this particular case, we cannot conclude that defendant's PSIR was manifestly outdated.

Even if we were to find that defendant did not affirmatively waive his right to an updated PSIR, defendant is still not entitled to relief as he has failed to demonstrate how the trial court's failure to obtain an updated PSIR was plain error that affected his substantial rights. *Carines*, 460 Mich at 774. Defendant has not presented this Court with any evidence that would demonstrate any prejudice inflicted on him by waiving an updated PSIR. Hence, defendant has failed to establish any claim of error that could have affected the outcome of the lower court proceedings. *Id.* at 763.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Stephen L. Borrello  
/s/ Elizabeth L. Gleicher