

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 11, 2014

v

MARTELL DEVON JONES,

Defendant-Appellant.

No. 316701
Livingston Circuit Court
LC No. 11-019605-FH

Before: FITZGERALD, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

A jury convicted defendant of two counts of assaulting a prison employee, MCL 750.197c, and the trial court sentenced him as an habitual offender, second offense, MCL 769.10, to a prison term of 30 to 89 months. Defendant appealed, and the prosecutor cross-appealed. This Court affirmed the convictions as well as the trial court’s scoring of Offense Variable (OV) 3, but agreed with the prosecutor¹ that the trial court erred by scoring OV 7 at zero points instead of 10 points. Because the error resulted in an increase in the sentencing guidelines range, this Court remanded for resentencing. *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2012 (Docket No. 306379). Defendant now appeals as of right the 36 to 90 month sentence that was imposed on remand. We affirm.

At the resentencing hearing, the court reviewed the ruling from this Court,² and noted that an increase in the score for OV 7 from zero points to 10 points resulted in an increase in the minimum sentence range to 14 to 36 months. Defendant objected to the accuracy of the PSIR, in part because it identified him as “found to be in good mental health” and “there are no diagnoses of mental illness on record.” He asserted that the Department of Corrections (DOC) “knows that he’s mentally ill” and is now being treated. Further, defendant noted that the case report update to the PSIR recommended a sentence of 5 to 20 years, whereas the maximum should be 7½ years. The court recognized and corrected this error. The court sentenced defendant to a prison

¹ Defendant conceded that the trial court erred in scoring zero points for OV 7.

² The trial court noted that this Court found that the court had properly scored 10 points for OV 3.

term of 36 months to 7½ years with 602 days credit for time served between the original sentence and the resentencing.

Defendant first challenges the trial court's handling of OV 3 on remand. "Whether the trial court followed this Court's rulings on remand presents a question subject to de novo review. Similarly, this Court reviews de novo the determination whether the law-of-the-case doctrine applies and to what extent it applies." *Lenawee Co v Wagley*, 301 Mich App 134, 149; 836 NW2d 193 (2013) (citation and internal quotation marks omitted). The law of the case doctrine "provides that an appellate court's decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case." *People v Herrera*, 204 Mich App 333, 340; 514 NW2d 543 (1994). Generally, the doctrine will apply regardless of the correctness of the prior determination, however in a criminal case the trial court retains the power to grant a new trial if justice has not been done. *Id.*

Although defendant failed to object to the scoring of OV 3 at his original sentencing, this Court considered the issue on appeal. *Jones*, unpub at 5-6. This Court interpreted the language of the OV and applied it to the facts of this case, holding "the trial court did not plainly err in scoring ten points for OV 3." *Id.* at 6. Because this Court had already affirmed the trial court's decision to score 10 points for OV 3, the trial court properly declined to consider defendant's challenge to the scoring of OV 3 on remand.³ Similarly, this Court has already considered and rejected defendant's challenge to his sentence under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). *Jones*, unpub at 7. In any event, our Supreme Court has repeatedly held *Blakely* inapplicable to Michigan's indeterminate sentencing scheme. See, e.g., *People v Harper*, 479 Mich 599, 615; 739 NW2d 523 (2007). Additionally, the sentence here is within the guideline range, is thus presumptively proportionate, and therefore not cruel and unusual punishment. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

Defendant also argues that the sentencing court failed to consider mitigating factors, particularly his mental illness, when imposing sentence. However, the record clearly shows that the court did consider defendant's evidence and argument about his mental illness; the court simply rejected it.

Additionally, defendant argues that he was deprived of the effective assistance of counsel when the court denied counsel's motions. Defendant does not present any authority to advance this claim nor argue how denial of a motion by the court constitutes ineffective assistance of counsel. See *People v Waclawski*, 286 Mich App 634, 679; 780 NW2d 321 (2009).

Defendant also argues that the court failed to utilize an updated PSIR. He argues that the updated case report failed to comply with MCR 6.425 because it did not provide accurate information regarding his mental health. "The trial court's response to a claim of inaccuracies in the presentence investigation report is reviewed for an abuse of discretion. A court abuses its

³ Nonetheless, defendant's arguments are without merit. Additionally, defendant concedes that the sentencing guidelines range would remain the same if OV 3 was scored at zero points instead of 10 points.

discretion when it selects an outcome outside the range of reasonable and principled outcomes.” *Waclawski*, 286 Mich App at 689.

Although a sentencing court must respond to a challenge to the accuracy of a PSIR, it has wide latitude in how to respond. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). A court “may determine the accuracy of the information, accept the defendant’s version, or simply disregard the challenged information.” *Id.* at 648. If the court disregards the challenged information, “it must clearly indicate that it did not consider the alleged inaccuracy” for the purpose of sentencing. *Id.* at 649. Disregarded information should be stricken from the report, but “failure to strike disregarded information can be harmless error.” *Waclawski*, 286 Mich App at 690.

When the PSIR was initially created, the Department of Corrections apparently determined defendant was not mentally ill, but subsequently reversed that decision and placed him on medication, to which he responded. Defendant attempted to admit documents showing “even the Department of Corrections knows that he’s mentally ill” and that the DOC is “medicating him, [and] they have been medicating him.” The court indicated it had “listened to what you have to say, I’ve listened to what your lawyer had to say,” but looking at the guidelines established on remand from this Court, the sentence would “follow the order of the Court of Appeals in that regard.” The court then relied upon the guidelines in sentencing defendant.

The court clearly indicated it was not relying on defendant’s mental state because mental illness was not “used in the calculation of the sentences.” *Maclawski*, 286 Mich App at 691. Thus, “the trial court allowed defendant an opportunity to challenge the accuracy of the information in the PSIR, considered it, and then rejected it” as irrelevant to the issues on remand. *Id.* Further, defendant admits that the DOC is the source of the information and that they are already treating him for mental illness. Therefore, any inaccuracy regarding his mental health in the PSIR is harmless.

Additionally, defendant argues that he is entitled to resentencing because his sentence was based on a PSIR prepared by personnel within the DOC, whose employees defendant was convicted of assaulting. He argues that this alleged conflict of interest invalidates his sentence. However, the conflict of interest statute cited by defendant only relates to rendering “services for a private or public interest when that employment or service is incompatible or in conflict with the discharge” of official duties. MCL 15.342(6). Defendant does not cite to any authority stating that preparation of the PSIR is incompatible or in conflict with the discharge of the preparer’s duties where the victims are prison guards. A duty of impartiality is not violated, nor any conflict of interest proven, simply because two parties may be tangentially connected in the bureaucratic superstructure of the DOC. Further, there is no allegation that any member of the probation department, charged with preparing the PSIR, MCR 6.425(A)(1); MCL 771.14(1), knew or was biased in favor of any employee of the prison. There is no allegation that the groups operate under the same or related supervisors or that any other common control exists between the two groups. Where a “defendant has an opportunity to challenge the accuracy of the report and tell the court about any additional facts which might clarify or explain the information in the report, due process has been satisfied.” *People v Czerwinski*, 99 Mich App 304, 309; 298 NW2d 16 (1980).

Defendant also challenges the imposition of fines and costs. We review this unpreserved claim of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*Id.* at 763 (citations and internal quotation marks omitted).]

Defendant asserts that plain error occurred when the court imposed fees and costs without a separate hearing. He also contends that the sentencing judge did not mention the costs at the sentencing hearing and that the court cannot “add substantive conditions to a sentence after the sentencing hearing.” We disagree. The court advised defendant that the previous fee and cost order would remain in effect. The court stated, “By the way, the other costs that I previously ordered, state costs and crime victim fee, those are ordered as well. They’ve not been upset by the previous sentence that got appealed to the Court of Appeals so they remain . . . to be paid as part of this sentence.”⁴ The court also assessed fees associated with the resentencing. Defendant has not established any error.

Although defendant also makes reference to equal protection guarantees, he does not cite to authority for that position nor argue to what class of persons defendant belongs to which the law has been unequally applied. Further, defendant cites the Ninth Amendment to the United States Constitution, but again offers no authority or argument for its application.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause

⁴ In the previous appeal, this Court rejected defendant's argument that the trial court erred when it ordered him to pay attorney fees without considering his ability to pay based on *People v Jackson*, 483 Mich 271, 283; 769 NW2d 630 (2009). This Court also stated that, “Although defendant claims that *Jackson* was wrongly decided, we are required to follow the decisions of the Supreme Court. *People v Strickland*, 293 Mich App 393, 402; 810 NW2d 660 (2011).” *Jones*, unpub at 8.