

Presentence Reports

Contents

A presentence report must contain:

By statute: (1) an evaluation of and prognosis for the person's adjustment in the community based on factual information contained in the report; (2) if requested by a victim, any written impact statement submitted by the victim in accordance with the Crime Victim's Rights Act; (3) a specific written recommendation for disposition; (4) a statement prepared by the prosecuting attorney as to whether consecutive sentencing is required or permitted by law; (5) for each conviction for which a consecutive sentence is required or authorized and for the conviction having the highest guidelines crime class, the computation of and recommended minimum sentencing guidelines range and a specific statement as to the applicability of intermediate sanctions; and (6) available diagnostic opinion(s) unless exempted because it might seriously disrupt a program of rehabilitation. M.C.L. 771.14.

By court rule: (1) a description of the defendant's prior criminal convictions and juvenile adjudications; (2) a complete description of the offense and the circumstances surrounding it; (3) a brief description of the defendant's vocational background and work history, including military record and present employment status; (4) a brief social history of the defendant including marital and financial status, length of residence in the community, and educational background; (5) the defendant's medical and substance abuse history and if indicated, a current psychological or psychiatric report; (6) information concerning the financial, social, psychological or physical harm suffered by any victim of the offense including restitution needs; (7) if provided and requested by the victim, a written victim's impact statement as provided by law; (8) any statement the defendant wishes to make; (9) a statement prepared by the prosecutor on the applicability of any consecutive sentencing provisions; (10) an evaluation of and prognosis for the defendant's adjustment in the community based on factual information in the report; (11) a specific recommendation for disposition; and (12) any other information that may aid the court in sentencing. Mich. Ct. R. 6.425(A).

By MDOC Policy Directive: (1) an objective description of the offense including the name and age of the victim(s); (2) the offender's description of the current offense

and the circumstances surrounding it, as well as any other statement the offender wishes to make; (3) a description of the offender's adult and juvenile criminal history, including for convictions involving criminal sexual conduct with a victim under 18, the victim's name, age at the time of offense, relationship to the defendant, and circumstances leading to the offense; (4) a written victim impact statement or summary of an oral victim impact statement; (5) the financial, social, psychological or physical harm suffered by any victim of the offense if not included in the victim impact statement; (6) a description and status of all criminal charges pending against the offender at the time of the presentence investigation; (7) the offender's education background, employment qualifications, background, and status, military record, and social history including family relationships, marital status, financial status, interests, activities, and residence history; (8) medical and substance abuse history, including a psychiatric or psychological report when available and appropriate or when requested by the sentencing court; (9) information on any gang activity; (10) if sentencing for illegal delivery, possession, or use of alcohol or a controlled substance, a statement that the offender is a licensed or registered health care professional if applicable; (11) a statement by the prosecutor on the applicability of any consecutive sentencing provision; (12) any other information requested by the court subject to supervisory approval; (13) a proposed plan which shall include: an evaluation of the offender in terms of strengths, weaknesses, abilities, established behavior patterns, and readiness for change; screening for Office of Community Corrections programs, Special Alternative Incarceration (SAI) program and HYTA if the defendant is being considered for assignment; and a recommended disposition consistent with the MDOC Pre-Sentence Investigation Recommendation Guidelines including the amount of restitution to be paid. Michigan Department of Corrections Policy Directive 06.01.140 (effective 06-01-08).

The better practice may be to limit the contents of presentence reports to convictions, other charges pending against the defendant or dismissed as the result of a plea bargain, and juvenile dispositions. However, the report may also include other arrests or statements that the defendant has admitted, or was engaged in, other crimes, since a sentencing judge is capable of disregarding such matters if they are disputed or conducting a hearing to determine their accuracy. *People v. Books*, 95 Mich. App. 500 (1980); *People v. Beal*, 104 Mich. App. 159 (1981).

While criminal conduct not reduced to a conviction may be included in a presentence report, the sentencing judge has a due process duty to ascertain, when the objection is raised, that the defendant is not prejudiced by false information in the report. *People v. McIntosh*, 62 Mich. App. 422 (1975), *modified on other grds* 400 Mich. 1 (1977), *overruled on other grds* *People v. Weeder*, 469 Mich. 493 (2004); *People v. Fernando Perez*, 94 Mich. App. 759 (1980); *People v. Julian Perez*, 103 Mich. App. 636 (1981).

A sentencing judge may consider alleged criminal conduct of which defendant has been acquitted, as long as defendant has an opportunity to challenge the accuracy of the allegations and the judge finds their accuracy supported by a preponderance of the evidence. *People v. Ewing*, 435 Mich. 443 (1990).

The results of a polygraph examination cannot be included in the presentence report or otherwise considered by the sentencing judge unless the defendant consents. *People v. Allen*, 49 Mich. App. 148 (1973).

Reliance on psychiatric and psychological information contained in the presentence report does not violate the statutory physician-patient or psychologist-patient privilege, where the information at issue was not confidential, and where the defense focused on defendant's psychological history as a mitigating factor. *People v. Daniels*, 149 Mich. App. 602 (1986).

Letters from the parents and relatives of the 11-year-old vehicular manslaughter victim, all expressing the perception that society needed to be protected from defendant and suggesting a stiff prison sentence, were properly included in the presentence report. *People v. Kisielewicz*, 156 Mich. App. 724 (1986).

Where the defendant provided a written statement regarding the offense to the presentence investigator which was not attached to the presentence report, the defendant is entitled to a remand for the purpose of ensuring that the defendant's written statement is attached to his presentence report; Mich. Ct. R. 6.425(A) provides that the presentence report must include any statement the defendant wishes to make. *People v. Spice*, unpublished opinion of 05-05-00 (Court of Appeals #212716, MLW #38806).

Defendant must be sentenced on the basis of accurate information. *Townsend v. Burke*, 334 U.S. 736 (1948); *People v. Malkowski*, 385 Mich. 244 (1971).

The subsequent reversal of one of the four prior felonies listed in defendant's presentence report rendered the report inaccurate. Combined with the lack of articulated reasons on the record for the original sentence, this made it impossible to determine whether the sentence would have been different but for the conviction which was later reversed, and the trial court correctly resentenced defendant on this basis. *People v. Grier*, 152 Mich. App. 129 (1986).

Where it appeared that defendant had been represented by counsel on only one of his prior misdemeanors, the sentencing court erred by using the uncounseled offenses to enhance defendant's sentence. Defendant was entitled to resentencing with a corrected presentence report which omits the counselless convictions. *People v. Miller*, 179 Mich. App. 466 (1989).

The trial court properly refused to strike from defendant's presentence report information about three incidents which occurred while defendant was a juvenile, which did not result in conviction or juvenile adjudication. Absent any claim that the information was inaccurate, the trial court appropriately considered the information as a part of defendant's social history. *People v. Cross*, 186 Mich. App. 216 (1990).

An offender's expunged juvenile record may properly be included in a presentence report and considered in sentencing the offender as an adult. *People v. Smith*, 437 Mich. 293 (1991).

US v. Tucker, 404 U.S. 443 (1972), which precludes consideration of counselless convictions at sentencing, applies to juvenile adjudications. *People v. Carpentier*, 446 Mich. 19 (1994), *Accord*, *People v. Ristich*, 169 Mich. App. 754 (1988).

A 30-year-old conviction is not rendered untrustworthy or irrelevant merely by its age, and may properly be included in the presentence report and considered by the sentencing judge absent any claim of inaccuracy or constitutional defect. *People v. Line*, 145 Mich. App. 567 (1985).

The trial court's consideration of several uncounseled misdemeanors as "contacts with the system" and its failure to delete the convictions from the presentence report entitled defendant to resentencing before a different judge. *People v. Martinez*, 193 Mich. App. 377 (1992).

Correction

MCR 6.425(E)(2) provides:

If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determined that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge **or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to:**

- (a) correct or delete the challenged information in the report, whichever is appropriate, and
- (b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

The trial court did not abuse its discretion in rejecting the defendant's challenge to the victim impact statement in the presentence report that claimed the victim suffered an injury to his arm while attempting to apprehend the defendant, where the trial judge concluded the statement was the victim's subjective recollection of what happened. Moreover, the presentence report properly included the agent's subjective opinion that the defendant was "casing" houses on the night of the instant offense (as conclusions drawn from the facts may not be challenged). Finally, the defendant did not present an "effective challenge" to information contained in the report where the defendant merely claimed that the police officer failed to identify himself at the time of the offense, but did not support this challenge. *People v. Lucey*, 287 Mich. App. 267 (2010).

When a defendant challenges the accuracy or relevancy of information in the presentence report, the trial court must respond. The trial court did not abuse its discretion in retaining a statement in the report that the defendant was "uncooperative and refused to answer questions" where this was the opinion of the presentence investigator. *People v. Waclawski*, 286 Mich. App. 634 (2009).

Where the defendant requested a number of corrections to the presentence report and the court indicated that several of the changes would be made but were not, on remand the circuit court shall assure that a corrected copy of the report is prepared and transmitted to the MDOC pursuant to Mich. Ct. R. 6.425. *People v. Webber*, 483 Mich. 915 (2009).

Where the defendant objected to certain letters attached to the presentence report and the trial court stated that the information was not considered in passing sentence, the defendant is entitled to a remand to have those letters deleted from the presentence report, consistent with Mich. Ct. R. 6.425(D)(3). *People v. Grove*, 455 Mich. 439 (1997).

If the trial court on remand determines that the presentence report contains information that is inaccurate, including information regarding the defendant's prior criminal history, the report is to be corrected and this corrected report is to be forwarded to the Department of Corrections. *People v. Walton*, 461 Mich. 907 (1999).

The defendant is entitled to a remand for the circuit court to correct and edit the presentence report to delete contested facts that were not relied on in sentencing. *People v. Carino*, 456 Mich. 865 (1997).

Where the trial court specifically stated that the defendant's juvenile involvement had no bearing on the sentence, the court erred in failing to strike references to juvenile proceedings from the presentence report. On remand the defendant is entitled to a corrected report from which those references were to be struck, with the

corrected report transmitted to the Department of Corrections. *People v. Martinez (After Remand)*, 210 Mich. App. 199 (1995), *overruled on other grounds* recognized by *People v. Edgett*, 220 Mich. App. 686 (1996).

Where the trial court agreed to strike a reference to the defendant's acquittal of an assault and battery charge from the presentence report but neglected to do so, defendant is entitled to a remand for correction of the presentence report. *People v. Paquette*, 214 Mich. App. 336 (1995).

Defendant is entitled to have certain challenged information stricken from the presentence report where the sentencing court stated it would disregard the information challenged as inaccurate. *People v. Britt*, 202 Mich. App. 714 (1993).

Defendant is entitled to a corrected presentence report which omits counselless misdemeanor convictions. *People v. Miller*, 179 Mich. App. 466 (1989). *Accord*, *People v. Martinez*, 193 Mich. App. 377 (1992).

Defendant was entitled to have contested information stricken from the presentence report, in order to prevent potentially false information from going to the Department of Corrections, where the sentencing court imposed sentence without taking it into consideration. *People v. Taylor*, 146 Mich. App. 203 (1985).

Where the trial court agreed at sentencing to strike disputed information from the presentence report, but merely drew a line through a portion of the report and did not strike the challenged information, the defendant is entitled to a remand to have the information struck from the report. *People v. Barnes aka Momaster*, unpublished opinion of 10-24-00 (Court of Appeals #220817, CDRC).

Duty to Update

A reasonably updated presentence report must be used in felony sentencing and resentencing. *People v. Triplett*, 407 Mich. 510 (1980). Public policy does not permit the waiver of a presentence report before imposition of an indeterminate sentence in a felony case. *People v. Brown*, 393 Mich. 174 (1974). *In re Del Rio*, 400 Mich. 665 (1977).

A presentence report prepared for a similar offense four months earlier cannot be used at sentencing for the instant offense under M.C.L. 771.14. *People v. Anderson*, 107 Mich. App. 62 (1981); *People v. McKeever*, 123 Mich. App. 533 (1983). *See also* *People v. Triplett*, above; Department of Corrections Rule 910.1, 1977 AACRS R 791.9910(1), *cited in* *People v. Books*, 95 Mich. App. 500 (1980).

The right to an updated presentence report may be waived by a defendant at a resentencing, except where the prior report is "manifestly" outdated. *People v. Hemphill*, 439 Mich. 576 (1992).

An updated presentence report is required for sentencing on a probation violation. *People v. Bruce*, 102 Mich. App. 573 (1980); *People v. Crook*, 123 Mich. App. 500 (1983); *People v. McEntyre*, 127 Mich. App. 731 (1983). But see *People v. Blount*, 130 Mich. App. 804 (1983) [where defendant was sentenced only to county jail for probation violation, updated presentence report was not required under GCR 1963, 785.6 {Mich. Ct. R. 1989, 6.445(G)}].

A one-page addition updating the original presentence report was sufficient for resentencing, particularly in light of defendant's failure to object at the resentencing. *People v. Brzezinski*, 196 Mich. App. 253 (1992).

However, where the trial court is merely carrying out an order to correct a "mechanical" defect in the original sentence, defendant is not entitled to an updated report. *People v. Foy*, 124 Mich. App. 107 (1983) [defendant's felony firearm sentence was improperly augmented from two years to five based on a pending count; Court of Appeals remanded for correction].

Excepted Material

The sentencing court may exempt parts of the presentence report from disclosure, but must inform defendant and defense counsel of the nondisclosure and state on the record its reasons for this action. Mich. Ct. R. 6.425(B).

Resentencing was required where the trial court exempted victim impact statements from disclosure to defendant before sentencing, in violation of Mich. Ct. R. 6.425(B), and M.C.L. 780.763-764. *People v. Mellado*, unpublished opinion of 03-12-92 (Court of Appeals #133711, CDRC).

Interview

The failure to warn the defendant that any statements made during a presentence interview may be used in determining sentence did not violate the defendant's Fifth Amendment privilege against self-incrimination. Because the preparation of the presentence report is not a critical stage of the criminal proceeding, neither notice to defense counsel of the time and place of the presentence interview nor advice to the defendant of the right to counsel at such interview was required. *People v. Daniels*, 149 Mich. App. 602 (1986).

Failure to interview the defendant when preparing the presentence report was not error where defendant was in federal custody and unavailable to the probation

officer, and there was no allegation that information in the report was inaccurate, false or misleading. *People v. Young*, 183 Mich. App. 146 (1990).

PRACTICE NOTE: Assistance of Counsel

■ *Regardless of whether or not Michigan recognizes that the 5th and/or 6th Amendments attach to a presentence interview, there is nothing that precludes defense counsel from attending such an interview with the defendant and advising the defendant in that process.*

Recommendation

NOTE: *The presentence investigator is required to make a sentence recommendation in accordance with the MDOC Operating Procedure providing for Pre-Sentence Investigation Recommendation Guidelines*

Where the presentence report recommended only "incarceration," but a "sentencing panel" of three probation officers subsequently reviewed the report and made a recommendation which was disclosed to the trial court but not to defendant or defense counsel, defendant was denied effective allocution, and resentencing was required. *People v. Mills (After Remand)*, 145 Mich. App. 126 (1985).

A recommendation of "incarceration," without more, is sufficiently specific under M.C.L. 771.14. *People v. Humble*, 146 Mich. App. 198 (1985); *People v. Sterling*, 154 Mich. App. 223 (1986); *People v. Hearn*, 159 Mich. App. 275 (1987). So is a recommendation of "a very lengthy prison term." *People v. Thornsberry*, 148 Mich. App. 92 (1985).

Where the report given to defendant and defense counsel before sentencing recommended a year in jail, but an amended version recommending seven years in prison was given only to the court, resentencing was required. *People v. Raymond*, 119 Mich. App. 413 (1982).

Right to Examine at Sentencing

Mich. Ct. R. 6.425(B) was amended, effective May 1, 2010 and again July 1, 2010, to require that the trial court provide a copy of the presentence report to the defendant's lawyer or the defendant if not represented by a lawyer, at least 2 business days before the day of sentencing. ADM File No. 2008-39.

Defense counsel has a right to see the presentence report before sentencing in order to make sure defendant's sentence is based on accurate information. *People v. McFarlin*, 389 Mich. 557 (1973).

Where a supplement to a presentence report was given to the court, but not to defendant or his counsel, before sentencing, the defendant's right to inspect the report was denied. *People v. Matzat*, 108 Mich. App. 327 (1981); *People v. Raymond*, 119 Mich. App. 413 (1982).

Right to Examine on Appeal

Appellate counsel is entitled to a copy of the defendant's presentence report under Mich. Ct. R. 6.425(C). *People v. McFarlin*, 389 Mich. 557 (1973).

Mich. Ct. R. 6.425 was amended effective January 1, 2011 to explicitly provide that the prosecution, defense lawyer, or the defendant if not represented by a lawyer, may retain a copy of the presentence report after sentencing.

Raising Challenges on Appeal

The trial court erred in refusing to evaluate the defendant's post-sentencing objection to the accuracy of information in the presentence report because a challenge to the presentence report may be brought at sentencing, in a proper motion for resentencing, or in a proper motion to remand. *People v. Lloyd*, 284 Mich. App. 703 (2009).

Use of COMPAS Risk Assessment Information at Sentencing

By Katherine Marcuz and Anne Yantus, State Appellate Defender Office

What is COMPAS?

- COMPAS stands for Correctional Offender Management Profiling for Alternative Sanctions and it was developed by Northpointe Institute for Public Management, Inc.
- It is a statistically based risk assessment tool using empirical research on factors predicting criminal recidivism, developed to assess many of the key risk and needs factors in adult correctional populations and to provide decision-support information regarding the placement of offenders in the community.
- Currently all Michigan prisoners are given the COMPAS assessment at RG&C and the results are used to develop a case plan and determine programming needs. Additionally, COMPAS scores are available to the Parole and Commutation Board at the time of parole consideration.
- Beginning June 1, 2014, the MDOC plans to include COMPAS risk and needs assessment in the presentence report.

How does it work?

- There are two¹ parts to the assessment:
 - The screener completes the “official records” section, which is comprised of the following three subcategories: current charge, criminal history, and non-compliance.
 - The offender then participates in an interview or questionnaire covering the following subcategories: stability of prior living situation, family make-up and family criminal history, criminal peers and gang involvement, substance abuse, amount of crime in prior neighborhood, educational history, work experience, financial situation, leisure time and feelings of boredom, social situation and relationship with friends and family, personality self-assessment, and beliefs relevant to criminality and the law.
- The data is entered into the COMPAS computerized database and analysis system and the offender’s raw score is transformed into a decile score (1-10) indicating its relationship to other offenders of a normative group
 - There is a separate database and analysis system for women offenders.
- COMPAS makes separate risk predictions for violence, recidivism, failure to appear, and “community failure.”

¹ In at least some versions of COMPAS there is a third section where the screener is asked to use his or her professional judgment and rate the offender’s potential for success in the community and make predictions regarding risk. See General COMPAS Questionnaire from Prison and Corrections Seminar (6/12/12).

Potential Use

- Broad discretion in type of punishment and amount of supervision
 - 62% of cases fall under intermediate guideline cells; 27% straddle cell, 11% prison.
- Focus supervision on the highest-risk offenders – intensive services over a long period of time
- Avoid over-supervising and over-treating low-risk offenders

Concerns

- NOT designed to determine the length of a sentence
 - Designed to inform probation, prison, re-entry, and parole work
 - *Malenchik v State*, 928 NE2d 564, 572-573, 575 (Ind., 2010) (expressly concluding that LSI-R risk instrument not designed to determine sentence length).
 - Risk divorced from culpability
- Constitutional Concerns
 - Reliability of COMPAS predictions and Due Process²
 - Difference between predicting average recidivism rate for offenders who share the same characteristics and predicting individual outcomes in particular cases
 - COMPAS AUC Rates of .64 to .80
 - Independent study shows that COMPAS may be least reliable for African-American Men
 - Accurate Information and Due Process³
 - Accuracy in administration of the test
 - Quality of information put into instrument
 - Inter-rater reliability
 - Training and quality assurance testing by MDOC?
 - Disclosure of COMPAS test results to Defense Counsel
 - Preparing clients for the COMPAS interview
 - Equal Protection and Due Process⁴
 - COMPAS measures group characteristics, not individual risk
 - Unconstitutional use of Gender
 - Unconstitutional use of Socio-Economic Factors

² “[D]ue process is satisfied so long as the information the sentencing judge considers has sufficient indicia of reliability.” *People v Eason*, 435 Mich 228, 234 (1990).

³ Due Process right to sentencing based on accurate information. *Townsend v Burke*, 334 US 736 (1948); *People v Miles*, 454 Mich 90, 100 (1997).

⁴ Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, Stanford Law Review (forthcoming May 2014).

- Court treats differential treatment of the indigent in the criminal justice system with hybrid intermediate/strict scrutiny
- Policy Concerns
 - No legislative authorization to change Michigan Sentencing Policy
 - Individualized sentencing
 - Youth and COMPAS
 - Youth treated as aggravating risk factor by instrument.