

IN THE COURT OF APPEALS OF IOWA

No. 2-051 / 10-1765
Filed February 15, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY SHERRELL HINTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Michael J. Moon,
Judge.

A defendant contends that the district court erred in failing to order and
use a presentence investigation report prior to imposing his sentence.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney
General, Stephen Holmes, County Attorney, and Bryan J. Barker, Assistant
County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

VAITHESWARAN, P.J.

Anthony Hinton asks us to decide “whether the district court erred in failing to order and use a presentence investigation report in rendering the sentence.”

I. Background Facts and Proceedings

Hinton pleaded guilty to third-degree burglary and the district court sentenced him to a prison term not exceeding five years. The court suspended the prison term and placed Hinton on probation for a period not exceeding three years. Hinton’s probation was subsequently revoked, and Hinton was placed in prison.

Hinton filed an application for postconviction relief, alleging in part that the third-degree burglary charge lacked a factual basis. The district court agreed and “set aside and held for naught” Hinton’s resulting sentence. Thereafter, the State agreed to amend the charge from third-degree burglary to second-degree theft, and Hinton agreed to plead guilty to the amended charge.

The district court accepted the guilty plea. The court noted that there was a presentence investigation report on file and obtained Hinton’s approval to proceed immediately with sentencing. The court approved the joint sentencing recommendation of the State and defense and sentenced Hinton to a prison term not exceeding five years with credit for time already served on the third-degree burglary conviction.

II. Presentence Investigation Report

Iowa Code section 901.2 (2005) states in pertinent part:

The court shall order a presentence investigation when the offense is any felony punishable under section 902.9, subsection 1, or a class “B”, class “C”, or class “D” felony. A presentence

investigation for any felony punishable under section 902.9, subsection 1, or a class “B”, class “C”, or class “D” felony shall not be waived.

The Iowa Supreme Court has interpreted this provision to mean that a court cannot waive the preparation of the report but can waive its use. *State v. Thompson*, 494 N.W.2d 239, 241(Iowa 1992).

Hinton contends the fact that a PSI report was prepared at the time of his original plea to third-degree burglary did not obviate the need to prepare a new report at the time of his plea to second-degree theft. The State initially responds that “the district court did not need to order an additional PSI because one was already in existence,” but later asserts the case “should be remanded to the district court for entry of an order directing that a PSI be prepared.” We assume the State is making these arguments in the alternative.

We conclude a new PSI report did not need to be prepared. While Hinton points out that Iowa Code section 901.2 requires the preparation of a PSI report “[u]pon a plea of guilty, a verdict of guilty, or a special verdict upon which a judgment of conviction of a public offense may be rendered,” Hinton’s two pleas in this matter arose from the same conduct. When the district court found no factual basis for third-degree burglary, the State simply amended the trial information to charge Hinton with another Class D felony, second-degree theft. Under these circumstances, we are not convinced a new PSI report needed to be prepared. This brings us to the second question, whether Hinton waived his right to use of a PSI report. At the plea/sentencing hearing, the issue arose as follows:

THE COURT: There is a PSI that has been filed in the underlying criminal case and since that PSI was prepared you haven't been able to do much more than to get by in Fort Dodge, Oakdale first, and then Fort Dodge. It's my understanding that you want to proceed now to sentencing; is that correct?

MR. HINTON: Yes, sir.

THE COURT: Well, I have to discuss a couple other things with you. First of all, you have the right by statute to fifteen days between now and the time of sentencing. Do you want to give those fifteen days up?

MR. HINTON: Yes, Sir.

....

THE COURT: You want to go to sentencing right now? Any objection to that by the State?

[THE PROSECUTOR]: None, Your Honor.

....

[DEFENSE COUNSEL]: None, Your Honor.

Hinton argues that this colloquy does not reflect an informed decision to waive the use of a PSI report. The State responds that Hinton waived his right to use of the report because he "was willing . . . to be sentenced immediately" and "understood that under the terms of the plea, . . . he would be given credit for the time previously served and hoped that with the credit he 'may be released' by the Department of Corrections."

We need not reach the issue of whether Hinton waived his right to use of the PSI report, because the cited portion of the colloquy reflects that the district court had the PSI report available and made reference to it. As the report was in fact "used," there was no necessity to have Hinton waive its use.

III. Disposition

We affirm Hinton's sentence for second-degree theft.

AFFIRMED.