FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA 524

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed September 20, 1979
vs.	)	
ALLEN DEAN SMITH,	)	237
Defendant-Appellant.	)	63244 & 45

Appeal from Hamilton District Court - Russell J. Hill, Judge.

Defendant appeals from judgment and sentence imposed after pleas of guilty to the offenses of theft in the first degree and theft in the third degree. AFFIRMED.

Mark R. Danielson, Webster City, Iowa, for appellant.

Thomas J. Miller, Attorney General of Iowa; Lona Hansen, Assistant Attorney General; and Lonny T. Morrison, Hamilton County Attorney; for appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant appeals from judgment and sentence imposed after pleas of guilty to the offenses of theft in the first degree and theft in the third degree, violations of section 714.1(6), Supp. to the Code 1977. He contends the trial court abused its discretion in denying his motion to continue sentencing to allow him to examine the probation officer who prepared his presentence investigation report.

At the sentencing hearing on January 15, 1978, the presentence investigation report was made available to defendant and his attorney for the first time. After examining the report, defense counsel moved to continue sentencing to allow him to examine the probation officer concerning some "discrepancies" in the report and some "inferences" which were drawn that defendant did not think were justified. The trial court overruled the motion as being untimely.

Defendant contends the trial court erred in denying his motion for a continuance on the basis that it was not timely made. Upon our review of the record we conclude that this issue need not be decided. Defendant has failed to show how he was in any way prejudiced by the trial court's adverse ruling on his motion for a continuance.

After ruling on the motion, the trial court offered defendant the opportunity to take the stand to deny or explain, under oath, the material allegations in the report. Defendant, after conferring with his attorney during a short recess, declined to do so and sentencing proceeded without further objection from defendant. Later, in response to the trial court's inquiry regarding corrections in the presentence investigation report, defendant suggested only two corrections, neither of which were material to the articulated bases for the sentence imposed. When sentencing defendant to incarceration, the trial court enumerated, as bases for its decision, factors verifiable without using the statements of the probation officer contained in the presentence investigation report.

As a result of defendant's failure to challenge directly the accuracy of the material statements in the report, or to request that the trial court disregard anything contained therein, no ground for reversal exists. See State v. Delano, 161 N.W.2d 66, 69 (Iowa 1968).

AFFIRMED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C.J. (dissenting)

I dissent. The defendant desired to cross examine the probation officer who prepared the presentence report on certain facts in the report and on the recommendation that defendant be denied probation. The majority disposes of defendant's complaint on the factual matter but does not address the trial court's refusal to permit defendant's cross examination on the probation recommendation.

The granting of probation involves a subjective decision. Three factors enter the decision: society's safety interest; defendant's receptiveness to receive benefits of probation; and the correction department judgment as to its ability to respond to the defendant's needs and receptiveness. The trial court did attach great significance to the factors of society's safety and defendant's lack of motivation to complete probation. But, due process requirements and the need to give more than lip service support to the statutory requirement of a presentence report in felony cases mandate that the defendant be allowed to examine the presentence reporter on his recommendation that probation be denied.