

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES JAY FRANKINA,

Defendant-Appellant.

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UNPUBLISHED  
February 22, 2005

No. 251371  
Macomb Circuit Court  
LC No. 2000-000503-FH

Before: Fort Hood, P.J. and Griffin and Donofrio, JJ.

MEMORANDUM.

Defendant appeals as of right his 85 to 240 month sentence for first-degree criminal sexual conduct, MCL 750.520b, entered after remand from this Court. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal from his resentencing, defendant argues that in scoring the sentencing guidelines, the trial court improperly considered prior misdemeanor convictions obtained without the presence of counsel. Convictions obtained in violation of the right to counsel cannot be considered in determining punishment for another offense. *People v Love (After Remand)*, 214 Mich App 296, 299; 542 NW2d 374 (1995). A defendant who collaterally challenges a prior conviction bears the initial burden of establishing that the conviction was obtained without counsel or a proper waiver of counsel. *Id.* A defendant can satisfy this burden by either presenting prima facie proof such as a docket entry or transcript, or evidence that he requested such records from the sentencing court, and that request was ignored or denied. *Id.*, 299-300.

The presentence report only indicates that it was unknown whether an attorney was present for six of defendant's convictions. Defendant has not presented any information from the sentencing courts showing that counsel was not present and that defendant did not waive the right to counsel. In the alternative, there is no evidence that defendant requested records from the sentencing courts and that the request was not honored. Defendant did not carry his burden of proof, and he is not entitled to resentencing. *People v Carpentier*, 446 Mich 19, 31-32; 521 NW2d 195 (1994).

Defendant also argues that the trial court erred in failing to determine the validity of a conviction for a November 2, 1993 misdemeanor when he had been sentenced to one year imprisonment on May 10, 1993, and to eighteen months' imprisonment on July 29, 1993. However, defendant presented no evidence that he was actually incarcerated on the date of the

offense. Where defendant was scored for having five or six prior misdemeanor convictions, and the PSIR shows that he had seven convictions, the deletion of one conviction would not affect the guidelines score.

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Richard Allen Griffin  
/s/ Pat M. Donofrio