

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK R. MARCIN ,

Defendant-Appellant.

UNPUBLISHED

April 30, 1996

No. 185911

LC No. 93-011161-FH

Before: MacKenzie, P.J., and Saad and C. F. Youngblood,* JJ.

PER CURIAM.

Defendant pleaded guilty to first-degree retail fraud, MCL 750.356c(2); MSA 28.588(2), and to habitual fourth felony offense, MCL 769.12; MSA 28.1084. He was initially sentenced to serve one year in the county jail, serving thirty days immediately and the remainder at the court's discretion. Following defendant's repeated probation violations, the court eventually sentenced him to serve two and a half to fifteen years in prison. Defendant now appeals of right, arguing that the sentence ultimately imposed is disproportionate to the specific underlying offense (theft of a pickle and a package of popcorn). We affirm.

FACTS

Upon defendant's plea of guilty to the charged offense, he was initially sentenced on May 18, 1993, to serve thirty days in jail, with the remaining eleven months to be served at the court's discretion. Defendant was also required to perform two hundred hours of community service. On June 16, 1993, defendant was sentenced to twenty-four months of probation, which included numerous conditions, including: not using controlled substances, successful completion of substance abuse counseling, and reporting any change of address immediately to his probation officer.

* Circuit judge, sitting on the Court of Appeals by assignment.

On November 17, 1993, defendant was sentenced to serve an additional sixty days of his discretionary time in jail, because: (1) he had failed to report to his probation officer on September 1, 1993, October 6, 1993, and November 3, 1993, (2) he had tested positive for controlled substances on October 25, 1993, and (3) he had failed to appear for community service. Defendant was ordered to report to jail on December 1, 1993.

On January 19, 1994, defendant reported to his probation officer, stating that he was released from jail on January 16, 1994. He was told to find work and start reporting on a regular basis. Defendant failed to report on February 16, 1994, and a March 2, 1994, report from the substance abuse counselor indicated that defendant had not attended since November, 1993.

On May 20, 1994, defendant was sentenced to serve an additional ninety days of his discretionary time in jail, because he had failed to report to his probation officer on April 6, 1994, April 20, 1994, May 4, 1994, and May 18, 1994, and because he failed to inform his probation officer that he had changed his address since March 16, 1994. Also on May 29, 1994, defendant's probation order was amended to require him to maintain full-time employment.

Following defendant's release from jail on August 12, 1994, he was required to report weekly to his probation officer. Shortly thereafter, defendant stated that he was working at Fruit Packers, earning \$4.75 per hour. He failed to report to his probation officer on October 11, 1994, and when he next reported, he stated that he had quit the packing job because of back problems. On October 15, 1994, defendant failed to report, but on November 15, 1994, he stated that he was scheduled to have a physical and urine test for a job at Straits Steel and Wire.

On January 19, 1995, defendant reported, stating that he had starting working at Straits on January 3, 1995. On January 17, 1995, defendant was discharged from his substance abuse counseling for noncompliance. Defendant tested positive for controlled substances on February 15, 1995 and February 21, 1995. He failed to report on March 7, 1995, March 14, 1995, and March 21, 1995. On March 16, 1995, the lower court ordered that defendant serve an additional thirty days of his discretionary time in jail, and on March 23, 1995, a bench warrant was issued.

Following defendant's arrest on April 3, 1995, a probation violation hearing was held on April 19, 1995. Defendant pleaded guilty to six counts of the probation violations petition, and pleaded no contest to the remaining count. On May 16, 1995, defendant (who was then thirty-eight years old) was sentenced to two and a half to fifteen years in prison.

ANALYSIS

Defendant asserts on appeal that the two and a half to fifteen year minimum sentence for this particular crime violates the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 680 (1990). As threshold matter, retail fraud is not a guidelines offense. However, even if it were a guidelines offense, the guidelines would not apply per se in this matter, because the guidelines do not apply to habitual offenders or to defendants convicted of probation violation. *People v Gatewood*,

___ Mich ___ (Docket No. 104913, issued 3/19/96); *People v Britt*, 202 Mich App 714, 717; 509 NW2d 914 (1993).

As stated above, defendant has five previous felony convictions, and four previous misdemeanor convictions. Rather than take advantage of his lenient sentence of probation for this retail fraud conviction, defendant chose to repeatedly violate his probation by failing to report, failing to perform community service, continuing to take controlled substances, failing to attend or complete substance abuse counselling, and failing to maintain employment, over a period of two years. The trial court tried confining defendant to short jail terms, with no success. Accordingly, after reviewing the record, we are convinced that defendant's sentence was proportionate to the circumstances surrounding the offense and the offender. *People v Reynolds*, 195 Mich App 182, 184-185; 489 NW2d 128 (1992). The point here is clear: the sentence imposed was not for stealing a pickle, but rather for repeated probation violations and other conduct which evidenced defendant's refusal to comply with court-ordered remedial activity.

We affirm.

/s/ Barbara B. MacKenzie
/s/ Henry William Saad
/s/ Carole F. Youngblood