STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WESLEY THOMAS, Jr.,

Defendant-Appellant.

UNPUBLISHED
February 7, 1997

No. 188797

Detroit Recorder's Court
LC No. 91-002291-01

Before: Gribbs, P.J., and Holbrook, Jr., and J.L. Martlew,* JJ.

PER CURIAM.

In 1991, defendant pleaded guilty of assault with intent to commit first-degree criminal sexual conduct, MCL 750.520g(1); MSA 28.788(7)(1), and was sentenced to serve five years probation with the first year to be monitored on an electronic tether. A warrant was issued in June 1992 charging defendant with violating the curfew provisions of his probation. In 1995, defendant pleaded guilty of probation violation, and the trial court revoked defendant's probation and sentenced him to serve five to ten years in prison. He appeals as of right, challenging the proportionality of his sentence under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We affirm.

A sentence imposed for probation violation must comply with the principle of proportionality announced in *Milbourn, supra*. *People v Leske*, 187 Mich App 153, 158; 466 NW2d 361 (1991). Although the sentencing guidelines do not apply to probation violations, they should be used as a starting point in determining whether such a sentence was disproportionately harsh in light of the offender and the circumstances of the underlying offense as well as the nature and severity of the probation violation. *People v Britt*, 202 Mich App 714; 509 NW2d 914 (1993); *People v Smith*, 195 Mich App 147, 149; 489 NW2d 135 (1992). The reasons for the sentence imposed should be articulated on the record. *Id.*

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

The presentence report prepared in advance of defendant's sentencing on his probation violation indicated that defendant was twenty-six years of age and a single father of two children.

He had dropped out of high school in the eleventh grade and his employment history was "sparse." At the time of the offense, however, defendant was employed at a local market. Defendant had no history of alcohol or drug abuse and his only prior criminal offense as either a juvenile or adult was a disorderly conduct conviction in Arizona in 1989. The circumstances of the underlying offense involved defendant's companion forcing the female complainant into a car being driven by defendant. The complainant was taken to an unknown location and forced to perform sexual acts on both defendant and his codefendant. She was then driven to another location where she was beaten when she refused to perform sexual acts on two other unnamed males. Defendant's description of the offense to the presentence investigator was a blatant attempt to downplay the serious nature of the offense: "What started as two buddies having a night on the town, turned into an unexpected evening of mayhem." Incomprehensibly, the presentence investigator concluded that defendant was "not perceived as a threat to the community at this time" and recommended that defendant's probation be continued under the original terms and conditions.

At the sentencing hearing, the court questioned defendant regarding the circumstances of his probation violation and then stated:

> I gave you a break when I sentenced you for assault with intent to commit criminal sexual conduct in the first degree and I gave you probation. Shame on me.
>
> It's the sentence of this Court you be committed to the State Prison of Southern Michigan, Department of Corrections for a period of not less than five years, nor more than ten years. Give him credit for 24 days. That's it.
>
> You got a double break with that plea and then the probation from me back then. That's it.

Indeed, defendant had originally been charged with first-degree CSC and possession of a firearm during the commission of a felony, but he was allowed to plead guilty to the lesser assault offense and the felony-firearm charge was dismissed. Given that a conviction of first-degree CSC would have yielded a recommended minimum sentence of five to ten years, and a conviction of felony-firearm would have yielded a consecutive mandatory two-year prison term, defendant clearly enjoyed a "double break," first by being offered the opportunity to enter a plea to the lesser assault offense—for which the guidelines recommended a minimum sentence of zero to twenty-four months—and, second, by being sentenced to probation. Under the circumstances, a sentence of probation in the first instance appears to this Court to have been quite a favorable result for defendant. Defendant failed, however, to take advantage of these "breaks."[1] Accordingly, in light of the circumstances of this offender, the underlying offense, and the violation of probation, we are unable to conclude that the sentencing court abused its discretion in imposing a prison term of five to ten years.

Affirmed.

/s/ Roman S. Gribbs
/s/ Donald E. Holbrook, Jr.
/s/ Jeffrey L. Martlew

[1] Moreover, we note that, in explaining the nearly three-year delay between the issuance of the warrant charging him with probation violation and his arrest, defendant stated to the presentence investigator: "They never sent a letter or came to the house. I was foolish enough to think that I got lost in the shuffle, so I just did not report."