

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY GENE HOPPER,

Defendant-Appellant.

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UNPUBLISHED

June 24, 1997

No. 179783

Barry Circuit Court

LC No. 92-90 FH

Before: Gage, P.J., and Reilly and Hoekstra, JJ.

MEMORANDUM.

This case encompasses appeals of right from two separate but sequential probation violation adjudications and sentences, the first continuing defendant's 5 year probationary term but adding a 9 month jail sentence and further conditions of probation, the second producing a sentence of 6 2/3 to 10 years imprisonment on the underlying charge of breaking and entering a place of business with intent to commit larceny. We affirm.

Defendant contends that condition 28 was void for vagueness and overbroad in violation of his First Amendment rights. The First Amendment, however, provides no protection for threats of violence, *RAV v St Paul*, 505 US 377, 388; 112 S Ct 2538; 120 L Ed 2d 305 (1992). A condition of probation may be too vague to disclose every instance to which it might be applied, yet still properly operate to prohibit specific conduct with which the defendant is actually charged if that conduct is clearly and fairly within the terms of the order of probation. *People v Bruce*, 102 Mich App 573; 302 NW2d 238 (1980). Here, defendant choked his girlfriend and threatened her with violence. This conduct is clearly within the terms of condition number 28.

As to condition 18, the trial judge recognized that this was uncharged conduct, and simply mentioned this activity, admitted by defendant in his own testimony, as a prelude to sentencing, where such conduct could be properly considered as the trial court ruminated over the proper disposition of defendant. *People v Graber*, 128 Mich App 185, 193-194; 339 NW2d 866 (1983).

As to proportionality, the sentence guidelines do not apply to probation violation proceedings. *People v Reeves*, 143 Mich App 105; 371 NW2d 488 (1985). Any use of the guidelines to evaluate a

probation violation sentence would be improper. See *People v Edgett*, 220 Mich App 686; \_\_\_ NW2d \_\_\_ (1996). Accordingly, a probation violation sentence is properly reviewed only for abuse of the trial court's sentencing discretion. *People v Houston*, 448 Mich 312; 532 NW2d 508 (1995); *People v Gatewood (On Remand)*, 216 Mich App 559; 550 NW2d 265 (1996). Defendant was initially placed on probation despite having already benefited from a plea bargain by virtue of which a fourth offender charge was dismissed. Defendant's criminal record of assaultive offenses, unrepentant attitude and lack of rehabilitative potential satisfies us that no abuse of the trial court's sentencing discretion has occurred.

Finally, defendant's claim of ineffective assistance of counsel is unsupported by independent record evidence to establish the alleged perjury. Accordingly, defendant has failed to establish the prejudice prerequisite to appellate relief on a claim of ineffective assistance of counsel. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Affirmed.

/s/ Hilda R. Gage  
/s/ Maureen Pulte Reilly  
/s/ Joel P. Hoekstra