

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS MICHAEL SCHROEDER,

Defendant-Appellant.

UNPUBLISHED

October 16, 2007

No. 271480

St. Clair Circuit Court

LC No. 04-002963-FH

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Defendant pleaded guilty to communicating with another to commit a crime using computers or the Internet, MCL 750.145d(2)(d), and possession of child sexually abusive material, MCL 750.145c(4). He was originally sentenced to five years' probation, subject to several conditions, including that he undergo a forensic evaluation. Following a discussion with the probation officer that defendant had been terminated from his employment, the trial court ordered defendant to submit to a forensic evaluation. Following completion of that report, the prosecutor moved to revoke defendant's probation based on allegations that defendant's employment had been terminated, which constituted a violation of his probation, and that the results of the forensic evaluation demonstrated that revocation was justified for the "public good" as permitted by MCL 771.4. The trial court revoked defendant's probation after determining by a preponderance of the evidence that the public good required revocation. Defendant was sentenced to concurrent prison terms of 19 to 120 months for the unlawful use of a computer conviction and 17 to 48 months for the child sexually abusive material conviction. He now appeals by delayed leave granted, seeking reinstatement of his probationary sentence. For the reasons set forth in this opinion, we affirm.

A trial court's decision to revoke probation is generally reviewed for an abuse of discretion. *People v Ritter*, 186 Mich App 701, 706; 464 NW2d 919 (1991). The abuse of discretion standard acknowledges that there will be circumstances in which there is more than one reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (1996). If a trial court selects a principled outcome, it has not abused its discretion. *Id.* A trial court's findings of fact are reviewed for clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). We review de novo a trial court's interpretation and application of a statute. *People v Stone*, 269 Mich App 240, 242; 712 NW2d 165 (2005).

Defendant argues that the trial court erroneously revoked his probation without finding a probation violation. Defendant's argument is flawed because a trial court may revoke probation pursuant to MCL 771.4 which states, in relevant part:

It is the intent of the legislature that the granting of probation is a matter of grace conferring no vested right to its continuance. *If during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation.* All probation orders are revocable in any manner the court that imposed probation considers applicable either for a violation or attempted violation of a probation condition or for any other type of antisocial conduct or action on the probationer's part for which the court determines that revocation is proper in the public interest. Hearings on the revocation shall be summary and informal and not subject to the rules of evidence or of pleadings applicable in criminal trials. In its probation order or by general rule, the court may provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition or conduct inconsistent with the public good. The method of hearing and presentation of charges are within the court's discretion, except that the probationer is entitled to a written copy of the charges constituting the claim that he or she violated probation and to a probation revocation hearing.... (Emphasis added).

An unambiguous statute must be enforced as written. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). MCL 771.4 provides that probation is "a matter of grace." See also *People v Harper*, 479 Mich 599; ___ NW2d ___ (Docket Nos. 130988, 131898, decided July 26, 2007), slip op at 28. The statute further provides that "[i]f during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or *that the public good requires revocation of probation*, the court may revoke probation." (Emphasis added.) Thus, the statute allows a court to revoke probation based on the "public good" without finding that a condition of probation was violated. See *Harper*, *supra*, slip op at 28. However, a trial court must still afford a probationer fair treatment, See *People v Marks*, 340 Mich 495, 500-501; 65 NW2d 698 (1954), by providing a probationer notice of the "public good" charge and a hearing on the charge before probation is revoked. *People v Elbert*, 21 Mich App 677, 683 n 9; 176 NW2d 467 (1970). In general, due process requires that notice be reasonably calculated to apprise the probationer of the charges. *Ritter*, *supra* at 709 n 3.

In this case, defendant was provided with notice informing him of the prosecutor's intent to seek revocation of defendant's probation based on the "public good." The prosecutor's motion also provided notice that this charge was based on the information from the forensic evaluation.

It was reasonable for the court to seek the assistance of a forensic examiner to evaluate defendant's status once the trial court learned that defendant had been suspended from his long-time employment because of his convictions, and had been informed by defendant's probation officer that a forensic evaluation would be helpful to determine if defendant posed a risk to the community. See generally *People v Peters*, 191 Mich App 159, 164-165; 477 NW2d 479 (1991) (in setting probationary conditions, a sentencing judge must be guided by factors lawfully and

legally related to a defendant's rehabilitation); MCL 771.3(3) ("court may impose other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper"). It is apparent that the trial court agreed with the prosecutor's argument that, premised on the forensic examiner's clinical impressions of defendant, a probationary sentence was inadequate to protect the public. The trial court relied on the forensic examiner's report and defendant's inability to understand the wrongfulness of his conduct to justify a prison sentence. Although the trial court could have addressed this concern by allowing defendant to engage in counseling while on probation, as proposed by defense counsel, it was also reasonable for the trial court to conclude that the public risk evidenced by defendant's lack of understanding warranted a more structured setting and, specifically, a period of incarceration. Because there is a reasonable and principled basis for the trial court's decision to revoke defendant's probation, we find no abuse of discretion.

We also disagree with defendant's argument that reversal is required because he did not have the opportunity to cross-examine the forensic examiner. Defendant stipulated to the admission of the forensic examiner's report and did not request an opportunity to cross-examine the examiner. Therefore, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Although a trial court's decision to revoke probation must be based on verified facts, probation revocation hearings are summary and informal and are not subject to the rules of evidence. *People v Pillar*, 233 Mich App 267, 269-270; 590 NW2d 622 (1998). The minimum procedural requirements afforded to the probationer include the right to produce witnesses and documentary evidence, and the right to cross-examine and confront adverse witnesses, unless there is good cause for not allowing the confrontation. *People v Smith*, 66 Mich App 639, 640; 239 NW2d 431 (1976). This standard looks to due process principles, not Sixth Amendment confrontation rights, to determine if hearsay evidence violates a probationer's rights. See *United States v Hall*, 419 F3d 980 (CA 9, 2005). Where hearsay is involved, the primary consideration is whether the information is reliable. See *Reyes v State*, 868 NE2d 438, 441 (Ind, 2007) (discussing different approaches taken by courts to evaluate hearsay evidence in probation revocation proceedings).

In this case, considering that defendant did not request the forensic examiner's production for cross-examination and admittedly waived any objection to the admission of the forensic examiner's report, along with defendant's failure to show that the report provided an unreliable basis for the trial court to make its decision, we conclude that defendant has not established a plain due process error affecting his substantial rights.

Finally, there is no merit to defendant's claim that the trial court lacked jurisdiction to resentence him after imposing the probationary sentence. A trial court who sentences a defendant to probation retains jurisdiction to revoke probation during the probationary term. MCL 771.4; *Ritter, supra* at 706. Indeed, "[t]he probation statutes confer upon the sentencing court a broad range of discretionary power in handling all aspects of the probationary process." *Id.* at 707-708; see also *Marks, supra* at 500-501 (probation order may be amended in form and substance). Defendant's reliance on *People v Barfield*, 411 Mich 700; 311 NW2d 724 (1981), is misplaced because the sentencing court in that case attempted to reinstate a probationary sentence after imposing a sentence of incarceration, so that it could be revoked and replaced with

a second sentence of incarceration. This case is also distinguishable from *In re Richards*, 150 Mich 421; 114 NW 348 (1907), which involved the imposition of two different prison sentences. Here, the trial court imposed a single probationary sentence and, pursuant to MCL 771.4, the court retained jurisdiction during the probationary period to revoke defendant's probation and to sentence defendant in the same manner as the court might have done if probation had never been ordered.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Jane M. Beckering