

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 16, 2014

v

JACKIE LEE TRAMMELL,
Defendant-Appellant.

No. 316665
Saginaw Circuit Court
LC No. 10-033872-FH

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted¹ the trial court's order revoking his probation and sentencing him to serve 21 months to 6 years in prison for his conviction by guilty plea of failure to pay child support, MCL 750.165. We affirm in all respects but remand for correction of a clerical error in the judgment of sentence.

I. BACKGROUND FACTS

In May 2010, defendant pleaded guilty as a habitual offender, second offense, to failure to pay child support. In accordance with the plea agreement, the trial court sentenced defendant to serve 18 months' probation ending on December 17, 2011. On December 2, 2011, the trial court amended the original probation order by extending the term of probation for six months until June 17, 2012. On June 6, 2012, the prosecution complained that defendant had violated his probation by failing to pay the required costs, assessments, and child-support obligations.

At the probation violation hearing, defendant explained that he paid the costs and assessments totaling \$128, but ongoing medical difficulties prevented him from obtaining employment to satisfy his child-support obligations. According to defendant, his only child-support payment during the term of probation was a single payment of \$78 on May 26, 2012. The prosecution ultimately agreed to dismiss the allegations against defendant regarding failure to pay costs and assessments, but it maintained that defendant violated probation by failing to

¹ *People v Trammell*, unpublished order of the Court of Appeals, entered October 24, 2013 (Docket No. 316665).

satisfy his child-support obligations. The trial court found by a preponderance of the evidence that defendant had violated his probation by failing to pay child support. On June 28, 2012, the trial court revoked defendant's probation and sentenced him to serve 21 months to 6 years in prison, which was consistent with the original sentencing guidelines range of 2 to 21 months.

Defendant moved for reconsideration of his sentence, arguing that impossibility is a defense to failure to pay child support, so the trial court should consider whether he was medically disabled during probation and thus unable to maintain employment to pay child support. At the motion hearing, the trial court accepted into evidence documents indicating that defendant was in a Minnesota jail between August 27 and September 29, 2010, and was categorized as "[t]otally disabled" between November 11, 2010, and March 10, 2011. The trial court denied the motion for reconsideration.

II. IMPOSSIBILITY DEFENSE

Defendant argues that the trial court erred in denying his impossibility defense set forth in his motion for reconsideration. Because defendant did not argue the defense of impossibility until his motion for reconsideration, this issue is unpreserved. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *People v Walters*, 266 Mich App 341, 350; 700 NW2d 424 (2005). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Guajardo*, 300 Mich App 26, 34; 832 NW2d 409 (2013) (citation and quotation marks omitted).

The common-law defense of impossibility is an affirmative defense to felony nonsupport. *People v Likine*, 492 Mich 367, 420; 823 NW2d 50 (2012). In *Likine*, our Supreme Court explained that "[f]or the payment of child support to be truly impossible, a defendant must explore and eliminate all the reasonably possible, lawful avenues of obtaining the revenue required to comply with the support order." *Id.* at 402.

Assuming the applicability of *Likine* to defendant's case, we hold that the trial court did not plainly err in rejecting defendant's impossibility defense. The documents presented by defendant and considered by the trial court showed that he was categorized as "[t]otally disabled" for about four months and in jail for about one month. In addition, a document referenced at an earlier probation violation hearing indicated that defendant was categorized as "disabled" for about 20 days in June 2012. These documents only indicated that defendant may have been unable to work for a total of six months during his 24-month probation. And, defendant did not show bona fide efforts to seek employment during the remaining 18 months of his probation, which is a minimal expectation for an impossibility defense. See *Likine*, 492 Mich at 401-402. Without a showing that he diligently sought employment in an attempt to satisfy his child-support obligations, defendant did not even establish inability to pay, much less a true impossibility defense. See *id.* at 403-404. The trial court did not commit any error, much less plain error, in refusing to accept defendant's impossibility defense.

Defendant also argues that, even if the trial court did not err in ruling that he failed to show impossibility, he was nevertheless entitled to be resentenced. Specifically, defendant argues that because the trial court sentenced him in June 2012 without knowing the full extent of his disability, he was sentenced on the basis of inaccurate information. “A defendant is entitled to be sentenced . . . on the basis of accurate information.” *People v McGraw*, 484 Mich 120, 131; 771 NW2d 655 (2009). However, harmless error can be found where the alleged inaccurate information did not affect the trial court’s sentence. *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000), lv den in part and remanded in part on other grounds 465 Mich 884 (2001).

In imposing defendant’s sentence, the trial court specifically emphasized defendant’s ongoing unwillingness to seek employment. The presentence investigation report (PSIR) indicated that defendant was unemployed and had no plans to seek employment, and defense counsel stated on the record that he had no objections to the PSIR. Moreover, a statement from defendant’s probation officer in Minnesota also indicated that defendant had no plans to seek employment. Thus, it is apparent from the record that the trial court did not impose its sentence because defendant failed to maintain continuous employment during his 24-month probation. Rather, the trial court imposed its sentence because defendant persistently refused to seek gainful employment to attempt to pay child support. And the trial court showed no indication at the March 2013 hearing that it questioned the propriety of its sentence in hindsight after considering defendant’s new evidence. For these reasons, any lack of information at the June 2012 sentencing was harmless. See *McAllister*, 241 Mich App at 473-474.

III. DISPROPORTIONATE SENTENCE

Defendant argues that the sentence imposed following his probation revocation was disproportionate and unconstitutional cruel and unusual punishment. We review this unpreserved issue for plain error affecting substantial rights. See *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003).

“The legislative sentencing guidelines apply to sentences imposed after probation revocation.” *People v Hendrick*, 472 Mich 555, 565; 697 NW2d 511 (2005). “A sentence that falls within the appropriate sentencing guidelines range is presumptively proportionate.” *People v Armisted*, 295 Mich App 32, 51; 811 NW2d 47 (2011). And when a sentence is proportionate, it does not violate the federal and state constitutional prohibitions against cruel and unusual punishment. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008); US Const, Am VIII; Const 1963, art 1, § 16. “In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate.” *People v Bowling*, 299 Mich App 552, 558; 830 NW2d 800 (2013) (citation and quotation marks omitted).

It is not disputed that the minimum sentence of 21 months in prison was within the sentencing guidelines, so the sentence was presumptively proportionate. *Armisted*, 295 Mich App at 51. Defendant has not identified any unusual circumstances to rebut the presumption that his sentence was proportionate. The record shows that during his 24-month probation, defendant spent about one month in a Minnesota jail, was categorized as “[t]otally disabled” for a period of about four months, and was categorized as “disabled” for a period of about one month. During

the remaining 18 months when defendant was apparently able to work, he only submitted a single payment of \$78 toward his outstanding child-support obligation. In other words, defendant disregarded his opportunity during probation to comply with the law and avoid incarceration. See *Hendrick*, 472 Mich at 562-563 (conduct during probation may be considered in imposing a sentence after probation revocation). On the existing record, defendant was precisely the type of offender targeted by MCL 750.165. Further, defendant has failed to establish that his minimum sentence of 21 months in prison is unusual in comparison to the sentences imposed by other states for similar crimes. See *Bowling*, 299 Mich App at 559. Defendant has not shown that his sentence was either disproportionate or unconstitutional cruel and unusual punishment.

IV. TERMS OF PROBATION

Defendant argues that the trial court erred in revoking his probation for failure to pay child support because the condition of probation obligating him to do so was no longer in effect after December 17, 2011. This unpreserved issue is reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

A probation order must “be definite and certain in its provisions. It must be sufficiently clear to enable the probationer to know what he is required to do in order to comply with it.” *People v Sutton*, 322 Mich 104, 109; 33 NW2d 681 (1948). A defendant’s probation cannot be revoked for violating an alleged condition of probation not found either in statute or the probation order itself. *Id.* at 110.

Under MCL 771.2(2), the trial court has the authority to amend the defendant’s original order of probation. *People v Glass*, 288 Mich App 399, 403; 794 NW2d 49 (2010). The amendment may include an extension in the length of probation, so long as the statutory maximum term of probation is not exceeded. See *People v Marks*, 340 Mich 495, 501; 65 NW2d 698 (1954). The statutory maximum term of probation is five years for a felony conviction. MCL 771.2(1).

In this case, the amending order “[e]xtend[ed] probation for six (6) months to allow the defendant time to pay State Costs and Crime Victims Fee (new expiration date 06/17/2012).” The reference to “State Costs and Crime Victims Fee” was merely a reason for the extension. There was no language in the amending order to suggest that all remaining conditions in the original probation order, but for the conditions referencing state costs and fees, would no longer be in effect. To the contrary, the amending order provided that “[a]ll other conditions not inconsistent with this order shall remain in effect.” Thus, the amending order did not remove the condition in the original probation order requiring defendant to make child-support payments as established by the Friend of the Court, as this condition was not “inconsistent” with the amending order. Accordingly, because the conditions of probation were definite and certain, the

trial court did not err in revoking defendant's probation for violation of one of those conditions. See *Sutton*, 332 Mich at 109-110.²

V. INEFFECTIVE ASSISTANCE

Defendant's final argument is that trial counsel was ineffective in several respects. Because defendant did not move for a new trial or a *Ginther*³ hearing, this issue is unpreserved. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). "Unpreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the record." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). Whether a defendant received ineffective assistance of counsel presents a question of constitutional law reviewed de novo. *Id.*

Under the federal and state constitutions, a criminal defendant has the right to the effective assistance of counsel. *People v Carbin*, 463 Mich 590, 599 n 7; 623 NW2d 884 (2001), citing US Const, Am VI and Const 1963, art 1, § 20.

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. [*People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002) (citations omitted).]

Defendant's final argument is that trial counsel was ineffective for failure to raise the argument set forth in Section IV above, failure to seek a paternity test that could absolve him of any child-support obligation, and refusal to introduce the four separate documents in the possession of his sister during the hearing. Each of these three arguments will be addressed in turn.

Trial counsel was not ineffective for failure to raise the argument set forth in Section IV. For the reasons explained above, defendant's argument regarding the terms of probation was without merit. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.").

² In any event, a statutory condition of probation is that the probationer cannot violate the criminal law of the state. See MCL 771.3(1)(a). Under MCL 750.165(1), a person must pay court-ordered child support. Thus, even if the amending order revoked the condition in the original probation order referencing child-support payments, defendant still violated a statutory condition of probation. See *People v Pippin*, 316 Mich 191, 196; 25 NW2d 164 (1946) (a defendant is presumed to know the conditions of probation that are mandated by statute).

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Trial counsel was not ineffective for failure to seek a paternity test. Defendant's challenge on appeal to his paternity is an impermissible collateral attack on the child-support order, not a direct challenge to the adjudication of guilt. See *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995). Moreover, defendant stated on the record during his June 2010 sentencing that he was aware of the proper procedure that should be followed if he desired to challenge paternity. Defendant has not presented any record evidence to suggest that trial counsel unreasonably disregarded or impeded his efforts to challenge paternity. Without any record support, defendant's claim of ineffective assistance fails. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Further, defendant has not shown that his June 2010 guilty plea was entered in violation of his right to effective assistance of counsel. "To establish ineffective assistance of counsel in the context of a guilty plea, courts must determine whether the defendant tendered a plea voluntarily and understandingly." *People v Corteway*, 212 Mich App 442, 445; 538 NW2d 60 (1995). A guilty plea may be involuntarily or unknowingly tendered if trial counsel fails to explain the charges or the consequences of the plea. *Id.* Here, defendant has not indicated how his guilty plea was involuntarily or unknowingly tendered. To the contrary, defendant stated on the record that his guilty plea was tendered voluntarily and understandingly with the advice of counsel.⁴

VI. CONCLUSION

We affirm defendant's conviction by guilty plea, probation revocation, and sentence. However, we note that the judgment of sentence reflects defendant's status as a habitual offender, third offense, MCL 769.11. The respective transcripts of the May 2010 plea hearing and the June 2010 sentencing unambiguously show that defendant agreed to plead guilty as a habitual offender, second offense, MCL 769.10. We therefore remand this case for the ministerial task of correcting the judgment of sentence to reflect defendant's status as a habitual offender, second offense.

Affirmed, but remanded for the ministerial task of correcting the judgment of sentence. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello

⁴Regarding his argument concerning documents held by his sister, the trial court stated in the March 2013 hearing that it had received and considered all of the documents in the possession of defendant's sister. Indeed, the four documents that defendant asserts were withheld from the trial court are in fact included in the trial record.