

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN GOLDEN,

Defendant-Appellant.

UNPUBLISHED

November 16, 2006

No. 260020

Wayne Circuit Court

LC No. 03-010863

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the trial court order revoking his probation and sentencing him to six to ten years' imprisonment on his plea-based conviction of breaking and entering with the intent to commit larceny, MCL 750.110. We affirm.

Defendant pleaded guilty to breaking and entering a building under construction with the intent to commit larceny, and was sentenced to six months' probation with the first 100 days to be served in the county jail. On April 27, 2004, the trial court issued a bench warrant, asserting that defendant had violated his probation (1) by failing to maintain verifiable employment, and (2) because he had been videotaped by a television news crew illegally purchasing scrap metal.

At defendant's probation violation hearing, evidence was presented that Detroit police officer Chris Gibson had contact with defendant and defendant's father on at least five occasions regarding their operation of a scrap yard on residential property without a license. Gibson's most recent contact with defendant occurred approximately one month before the hearing and two days before Gibson saw the television news report featuring defendant. Gibson had received complaints that defendant was still operating a scrap yard at his residence, which defendant denied. Gibson observed shopping carts full of metal being unloaded onto the sidewalk before being loaded onto defendant's white truck, which Gibson had previously impounded because of similar conduct.

A local business owner, John Sarcone, testified that he followed a man with a shopping cart to defendant's residence on one occasion, and that he observed persons delivering scrap metal items to defendant's residence. Sarcone contacted the television news crew, and assisted in the production of the television news report detailing defendant's activity. A videotape of the report was played at the hearing.

Defendant first argues that the trial court improperly exceeded the sentencing guidelines without articulating substantial and compelling reasons, and that his sentence is disproportionately severe, constituting cruel and unusual punishment. In reviewing a departure from the sentencing guidelines range, we review the existence of a particular factor supporting a departure for clear error, the determination whether the factor is objective and verifiable de novo, and whether a reason is substantial and compelling for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). Further, we review the extent of a departure for an abuse of discretion. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

Sentences imposed after probation revocation must comply with the legislative sentencing guidelines. *People v Hendrick*, 472 Mich 555, 560, 563; 697 NW2d 511 (2005). A trial court may only depart from the guidelines if it has substantial and compelling reasons to do so, and states those reasons on the record. *Abramski*, *supra* at 74. A substantial and compelling reason must be objective and verifiable, must “‘keenly’” or “‘irresistibly’” grab the court’s attention, and must be recognized as being “‘of considerable worth’ in deciding the length of a sentence” *Babcock*, *supra* at 257, quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). The “objective and verifiable” requirement “mean[s] that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *Abramski*, *supra* at 74. A departure may not be based on characteristics already taken into account in determining the appropriate guidelines range, unless the court determines from facts in the record that the particular characteristic at issue has been given inadequate or disproportionate consideration. *Id.*

Defendant’s sentencing guidelines range was zero to 17 months, which placed defendant in an intermediate sanction cell. MCL 769.34(4)(a) provides in part:

If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in [MCL 777.1 *et seq.*] is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections.

The trial court sentenced defendant to six to ten years’ imprisonment, stating that the sentencing guidelines did not adequately take into account defendant’s “pattern of criminal activity which is very marked and very clear and very consistent[.]” The trial court remarked that at the time defendant committed the conduct charged in the amended probation violation petition, he was on probation for breaking and entering a structure that was under construction and stealing building materials. The trial court further noted that defendant was released from parole just months before he committed the breaking and entering in this case, and that defendant’s previous prison sentence had stemmed from similar criminal conduct committed in Macomb County. The trial court determined that defendant’s criminal history, along with the facts and circumstances supporting defendant’s probation revocation, evidenced a clear pattern that was not adequately taken into consideration by the sentencing guidelines.

The trial court further stated:

What it amounts to in effect is that Mr. Golden has been for a number of years involved in a very direct and significant way in the plundering and desecration of this city.

The problems that this city faces, the city of Detroit now have [sic] many causes, but certainly one of the causes is the plundering and pillaging of the real estate and the property in this city. So that when buildings become for short periods of time [sic], they are stripped of their plumbing and their electrical materials, and their bricks and their mortar and their windows. By vandals who sell their materials to the Sean Golden¹ of this world. Mr. Golden was a [facilitator] in that plundering and pillaging of the property in this city.

And that's very clear from the evidence that I heard in the probation violation hearing and it's very clear from Mr. Golden's criminal history. That he is very instrumental in [facilitating] and aiding and abetting that kind of activity and in fact on some occasions has actually been directly involved in it himself. That has catastrophic consequences on the viability of this city and it has consequences for hundreds of thousands if not millions of people.

It makes it very difficult for abandoned property to be rehabilitated, and put back into productive use in this city. Because by the time redevelopers get a hold of it the property has been completely plundered and pillaged and desecrated. It makes it very difficult for honest business men to do business in this city. Whether they own truck repair shops, or lawful scrap yards, or whatever their businesses are. Their ability to do business successfully and peacefully in this city [is] hampered or [a]ffected to [a] very large measure by people like Mr. Golden.

And that all has some very, very dire consequences on this community as a whole. Those are factors that are not adequately taken into account by the sentencing guidelines. . . .

And I think to describe Mr. Golden as simply a property crime violator, is to trivialize the consequences and the impact of his crimes. In Mr. Golden's case at least, his criminal history has as much dire consequences on this community as carjackers have, or armed robbers have. In his own way he has played a very serious and significant role in destroying the ambiance of this city. And what is even more disturbing to me is that whatever remedial intermediate sanctions are meted out to Mr. Golden over, and over, and over again. They have no impact on him; they have no deterrent effect on him.

He has served jail time before, he's been on probation numerous times, and he's even been to prison on one occasion. And very shortly after he got [out]

¹ The television news report had referred to defendant by the alias "Sean Golden."

of prison, he reoffended in exactly the same way that he's offended in the past. So all of those reasons, all of those factors are substantial and compelling reasons to depart from the sentencing guidelines in this case, which at least in this case are woefully inadequate to address the seriousness of crime or crimes for which Mr. Golden stands before us today.

Defendant argues that the sentencing guidelines adequately addressed his prior convictions, and thus that the trial court erred by departing on this basis. Considering defendant's criminal history, the circumstances giving rise to the revocation of defendant's probation, and defendant's failure to rectify his behavior despite previous probation terms and imprisonment, we conclude that the trial court's determination that the sentencing guidelines did not adequately account for defendant's criminal history was not clearly erroneous. This factor is objective and verifiable, and the trial court did not abuse its discretion in determining that it constituted a substantial and compelling reason to depart from the sentencing guidelines range. Moreover, circumstances giving rise to a probation revocation properly may be considered in determining whether substantial and compelling reasons exist to support a sentencing departure. *Hendrick, supra* at 562-563.

Defendant also argues that the trial court erred by attributing to him the destruction wrought on the city of Detroit. We agree that it would have been error for the trial court to depart from the guidelines based on the purported effect of defendant's conduct on the city. This factor was not objective and verifiable, and thus could not constitute a substantial and compelling reason for the departure. *Babcock, supra* at 257.

However, the court stated that it did not depart from the sentencing guidelines based on the effect of defendant's actions on the city. The trial court explained:

And, you know, my remarks about Mr. Golden and the consequences of Mr. Golden's actions on the city or people who commit crimes like that was not meant to blame Mr. Golden for all of the city's problems, but only meant to put the offenses that Mr. Golden apparently has an inability to stop committing into some context. They're not trivial offenses especially when they're committed repeatedly and regularly and on a fairly broad scale as they are by Mr. Golden

* * *

And that leads to the next point, that being the sanction that I imposed, this was an extraordinary departure I'll admit, six to ten years on theft crime carrying guidelines arguably of zero to 17, but I indicated in my departure report and apparently on the record why I did that.

And I think it's very important to note that Mr. Golden had just – had been sentenced to a prison term for virtually the same crime in Macomb County I think in '97. He served a prison term, then was on parole for a period of time, got off parole just months before he committed this new offense that was before me and his presentence investigation report indicated th[at] his adjustment to parole was poor, but he did manage to successfully complete parole but with, I guess,

apparently with a lot of reservations on the part of the Michigan Department of Corrections.

And then just very shortly . . . after he got off parole he committed the offense that was before me. After having served a prison sentence for the same thing, we've got this guy coming here before us committing the same crime He got a very lenient sentence under the circumstances, 100 days in the Wayne County Jail, six months probation. . . . And then within weeks of his getting out of jail he starts committing these crimes again, committing the same kinds of offenses again after having already served a prison term. He served a jail term on my watch.

I don't know what else we can do with somebody . . . like Mr. Golden but to give him a six to ten year sentence. It's almost like there is nothing short of that that sends a message to him or offers an opportunity for him to rehabilitate himself or gets him off the streets long enough for his victims to recover.

So I stand by the sentence despite the fact that it was an extraordinary departure. I indicated that and as the People indicated also that I think the fact that he violated his probation alone is a substantial and compelling reason to depart. The fact that his prior record variables were inadequately accounted for in the sentencing guidelines is another reason. And the six to ten year sentence under the circumstances is appropriate under the circumstances.

The trial court therefore denied departing from the guidelines based on the public and societal consequences of defendant's conduct. More importantly, the court's reasoning shows that the court would have imposed the same sentence even in the absence of this improper factor. If a trial court articulates multiple reasons supporting a departure, and this Court determines that some of the reasons are substantial and compelling and some are not, this Court must determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons alone. *Babcock, supra* at 260. The trial court's statements clearly show that the court would have imposed the same sentence absent its consideration of the purported effect of defendant's conduct on the city. As noted above, this sentence was based on proper substantial and compelling reasons. Thus, resentencing is not required.

Defendant further argues that his sentence is disproportionate and constitutes cruel and unusual punishment. We disagree. "[I]n departing from the guidelines range, the trial court must consider whether its sentence is proportionate to the seriousness of the defendant's conduct and his criminal history because, if it is not, the trial court's departure is necessarily not justified by a substantial and compelling reason." *Id.* at 264. We conclude that defendant's sentence is proportionate to the seriousness of his conduct and his criminal history for the reasons identified and aptly stated by the trial court. Further, because defendant's sentence is proportionate, it does not constitute cruel and unusual punishment. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004), *aff'd* 475 Mich 140 (2006).

Defendant next contends that he is entitled to a new probation violation hearing because the trial court allowed the prosecutor to amend the probation violation petition without providing prior written notice. We disagree. Because defendant did not object to the amendment of the

petition on this basis in the trial court, this issue is not preserved for appellate review. *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005). As such, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Reversal is warranted only if the error resulted in conviction of an actually innocent defendant, or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

MCL 771.4 provides in part that a "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." "The purpose of the notice requirement is to provide a defendant a reasonable opportunity to dispute, with evidence, the claimed violation." *People v Hunter*, 106 Mich App 821, 825; 308 NW2d 694 (1981). This Court has previously recognized, however, that the failure to provide a defendant with adequate written notice of an alleged probation violation does not require reversal if the defendant received actual notice of the charged violation by other means. *Id.* at 827.

Here, defendant received actual notice of the charge added by the amendment. The original petition alleged that (1) a television news station had videotaped defendant illegally purchasing scrap metal, and (2) defendant had failed to maintain verifiable employment. At defendant's probation violation hearing, the trial court permitted the prosecutor to amend the petition to include a charge of operating a scrap yard without a license. The trial court granted the prosecutor's oral motion and adjourned the hearing for nine days to allow defendant time to prepare to defend against the additional allegation. Thus, defendant received actual notice of the additional charge.

Moreover, defendant has not demonstrated how the trial court's ruling prejudiced him. The court specifically stated that, if necessary, defendant would be permitted to recall any witnesses who had already testified. Ultimately, however, defendant did not call any further witnesses. Accordingly, defendant has failed to show any prejudice resulting from the lack of written notice, and has not established plain error affecting his substantial rights.

Defendant next argues that the evidence was insufficient to support counts II and III² of the amended probation violation petition, and that the trial court improperly considered evidence of charges not contained in the petition. We review de novo claims challenging the sufficiency of the evidence. *People v Girard*, 269 Mich App 15, 21; 709 NW2d 229 (2005). "[E]vidence is sufficient to sustain a conviction of probation violation if, viewed in the light most favorable to the prosecution, it would enable a rational trier of fact to conclude that the essential elements of the charge were proven by a preponderance of the evidence." *People v Ison*, 132 Mich App 61, 66; 346 NW2d 894 (1984). Further, whether the trial court improperly considered evidence not contained in the probation violation petition is a question of law. We review questions of law de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

² Although defendant refers to "Counts I and III" in his statement of questions presented in his brief on appeal, his substantive argument relates to counts II and III.

Defendant argues that the prosecutor failed to present sufficient evidence supporting count II of the amended probation violation petition—alleging failure to maintain verifiable employment—because no evidence was presented regarding defendant’s failure to obtain employment. Contrary to defendant’s contention, his probation officer testified that defendant never provided verification of employment and indicated that he was unemployed. Thus, the record does not support defendant’s argument.

Defendant also argues that the prosecutor failed to present sufficient evidence supporting count III of the amended petition—alleging operation of a scrap metal business without a license—because no evidence was presented that defendant did not possess such a license. Again, the record does not support this contention. Officer Gibson testified that he previously warned defendant against operating a scrap yard without a license and that defendant did not possess a license to operate his business. Therefore, we cannot conclude that the prosecutor presented insufficient evidence on this matter.

Defendant further argues that the trial court improperly considered evidence of charges not contained in the petition. But the charges to which defendant refers are unclear. It appears that defendant is arguing that the trial court improperly assumed that he violated the law by receiving or concealing stolen property and by operating a scrap yard without a license. Conduct not charged in a probation violation petition may not be considered in determining whether a defendant violated probation. *People v Laurent*, 171 Mich App 503, 505; 431 NW2d 202 (1988). However, contrary to defendant’s argument, the amended petition alleged that defendant operated a scrap metal business without a license. Therefore, the trial court properly considered evidence regarding this charge.

Moreover, in determining that defendant violated his probation, the trial court stated that the circumstances indicated that defendant was receiving or concealing stolen property. Although the petition did not allege receiving or concealing stolen property, the evidence presented was not directed toward this offense. Rather, the evidence, including the television news report, showed that defendant engaged in the trafficking of scrap metal, which supported counts I and III of the amended petition. Because such conduct was charged against defendant, the trial court did not err in considering this evidence. *Id.* Moreover, the trial court did not determine that defendant had received or concealed stolen property, but rather that he had violated probation for the reasons alleged in the amended petition. The trial court did not rely on an uncharged offense to revoke defendant’s probation.

Finally, defendant argues that the trial court deprived him of a fair and impartial hearing by invading the province of the prosecutor and by overzealously pursuing his probation revocation. We disagree. Because defendant did not raise this argument below, he failed to preserve it for appellate review. *Bauder, supra* at 177. Therefore, our review is limited to plain error affecting defendant’s substantial rights. *Carines, supra* at 763.

“Probation violation hearings are summary and informal and are not subject to the rules of evidence or of pleading applicable in a criminal trial.” *People v Pillar*, 233 Mich App 267, 269; 590 NW2d 622 (1998). MCL 771.4 provides in pertinent part:

The method of hearing and presentation of charges are within the court's discretion The court may investigate and enter a disposition of the probationer as the court determines best serves the public interest.

In *People v Rial*, 399 Mich 431, 435; 249 NW2d 114 (1976), our Supreme Court rejected the notion that a probation violation hearing is equivalent to a trial. The *Rial* Court recognized that “[p]robation revocation is not a stage of a criminal prosecution,” and that in such proceedings, courts “deal not with the procedural rights of an accused in a criminal prosecution, but with the more limited due process rights of one who is a probationer because he has been convicted of a crime.” *Id.*

Defendant contends that the trial court allowed evidence of incidents that occurred years before the allegations at issue in this case, and allowed evidence of the wrongdoing of his father. As previously stated, the rules of evidence do not apply to probation revocation hearings. MCL 771.4; *Pillar, supra* at 269. Moreover, the trial court stated that although it allowed testimony regarding previous incidents involving defendant, it would not take into account prior alleged acts of dishonesty in rendering its decision. The court stated that it admitted the evidence “under advisement or conditionally, depending on how the rest of the evidence comes in,” and further stated that it would not consider such evidence if it determined that the evidence was irrelevant. A review of the trial court’s findings indicates that the court did not rely on evidence of acts that occurred years earlier in rendering its decision. In addition, although the trial court allowed minimal evidence regarding the actions of defendant’s father, the trial court did not consider this evidence in rendering its decision. The trial court properly exercised its discretion with respect to the probation revocation proceeding and the admission of evidence. Defendant has shown no plain error.

Defendant also contends that he was denied a fair and impartial hearing because the trial court questioned certain witnesses. Under MCL 771.4, the conduct of the hearing and presentation of charges were within the trial court’s discretion. Although defendant contends that the trial court’s comments and questions transcended the limits of judicial impartiality, he cites no specific comments or questions as improper. A review of the record reveals that the trial court’s questioning and remarks were not improper or partial. In fact, the trial court’s questioning of Sarcone revealed that although Sarcone suspected that items stolen from his business had eventually ended up on defendant’s truck, Sarcone did not actually see the items from his business on defendant’s property. The trial court was merely exercising its discretion in posing questions to certain witnesses. Defendant has not established plain error in this regard.

Defendant further contends that the trial court overzealously pursued his probation revocation by sua sponte determining that the evidence showed that he operated a scrap yard without a license and suggesting that the prosecutor orally move to amend the petition to add such a charge. This suggestion occurred at the end of the first day of the hearing. Both the trial court and the prosecutor acknowledged that until the evidence was presented at the hearing, they were unaware of the specific details of defendant’s activity. Although the trial court’s sua sponte suggestion may have arguably transcended the limits of judicial impartiality, defendant has failed to show prejudice. The trial court adjourned the proceedings to allow defendant an opportunity to prepare to contest the additional charge, and in the end, no additional testimony was presented. Moreover, the trial court ultimately determined that defendant had violated his probation without regard to the new, additional charge. In other words, defendant’s probation would have been

revoked even in the absence of the added charge. Defendant has failed to establish the existence of prejudicial plain error.

Finally, defendant contends that the trial court acted with partiality or bias in attributing to him “the City of Detroit’s ills.” As we previously determined, based on the trial court’s articulated reasoning, the court would have imposed the same sentence even in the absence of its belief that defendant’s conduct negatively affected the city of Detroit. Consequently, defendant has failed to satisfy the plain error standard with respect to this issue.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Kathleen Jansen