

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELLY LEE MURPHY,

Defendant-Appellant.

UNPUBLISHED

February 6, 2007

No. 266834

Berrien Circuit Court

LC No. 04-406941-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant was sentenced to two years' probation following his plea of guilty to a charge of resisting or obstructing a police officer, MCL 750.81d(1). He subsequently violated his order of probation, and was sentenced to 14 to 24 months in prison. Defendant appeals by delayed leave granted from his conviction of probation violation and resulting sentence. We affirm.

Defendant was charged with violating Conditions 14 and 25 of his probation order. Condition 14 precluded him from engaging in any assaultive, abusive, threatening, or intimidating behavior. Condition 25 required that he enroll in the Kalamazoo Probation Enhancement Program (KPEP), that he follow all its rules, and that he successfully complete the program. Within one month of being placed on probation, defendant was expelled from KPEP for making kissing noises toward a teacher in a GED program, trying to hug her, asking for her address and telephone number, and trying to give her his address and telephone number.

The prosecution has the burden of proving a charge of probation violation by a preponderance of the evidence. MCR 6.445(E)(1); *People v Pillar*, 233 Mich App 267, 270; 590 NW2d 622 (1998).

Defendant first argues that although his behavior toward the teacher was childish, inappropriate, and disruptive, it was not "assaultive, abusive, threatening or intimidating." Further, he asserts that basing a probation violation on dismissal from KPEP placed too much authority in KPEP personnel, and that the trial court had to determine whether the dismissal was based on sufficient and proper grounds. Defendant's citation of *Pillar, supra*, for this proposition is inapposite. In *Pillar*, the evidence showed that the defendant had been arrested

and charged with a crime, but there were no verified facts in the record indicating a violation of probation. *Pillar, supra* at 269-270.¹ In contrast, the prosecutor here established that defendant was expelled from KPEP. Failure to complete the program was a condition of probation. A violation of Condition 25 was established by sufficient evidence. *Reynolds, supra*.

Defendant next argues that the trial court did not have substantial and compelling reasons for departing from the sentencing guidelines. The minimum sentence of 14 months was within the guidelines range of zero to 17 months. However, since the upper limit of this range was less than 18 months, substantial and compelling reasons were required to sentence defendant to prison. MCL 769.31(b); MCL 769.34(4). A violation of probation can constitute a substantial and compelling reason for departure, *People v Hendrick*, 472 Mich 555, 557; 697 NW2d 511 (2005), as can a prior record that was given inadequate weight. MCL 769.34(3)(b). Under MCL 777.55(1)(a), defendant was scored 20 points for having seven or more prior misdemeanor convictions. Defendant had 33 prior misdemeanor convictions. The trial court did not abuse its discretion in concluding that defendant's prior record was given inadequate weight. This factor, plus the quick violation of probation, constituted substantial and compelling reasons for departure.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper

¹ As the *Pillar* Court noted, it is well settled that probation may not be revoked solely on the basis that the probationer was arrested. *Id.*