

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY CORTEZ SPENCER, a/k/a BRANDON
SPENCER,

Defendant-Appellant.

UNPUBLISHED

March 27, 2007

No. 268388

Wayne Circuit Court

LC No. 03-001792-01

Before: Zahra, P.J. and Bandstra and Owens, JJ.

PER CURIAM.

Defendant pleaded guilty to violating his probation and was sentenced to 2 to 20 years' imprisonment on his plea-based conviction of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). He now appeals his sentence by delayed leave granted. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court erred by exceeding the sentencing guidelines range of 0 to 11 months "by more than 100%."

The sentencing guidelines apply to sentences imposed after a probation violation. *People v Hendrick*, 472 Mich 555, 557; 697 NW2d 511 (2005). But a court may consider acts that give rise to the violation and other "postprobation factors" to determine whether there are substantial and compelling reasons for a departure. *Id.*, at 557, 562-563.

Defendant argues that the trial court's comments referring to his failure to find employment violated MCL 769.34(3)(a), which prohibits a court from departing from the guidelines range because of an individual's "lack of employment." Although the trial court referred to defendant's lack of employment, it did so only in the context of explaining why it was unwilling to continue defendant's probation, not as a basis for departing from the guidelines. The court instead relied on defendant's violations of probation as the reason for departure. Thus, the court did not violate **Error! Not a valid link.**

The trial court's determination that defendant's repeated violations of probation constituted substantial and compelling reasons for departure was not an abuse of discretion. "[A]ny probation violation represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer."

People v Schaafsma, 267 Mich App 184-185, 186; 704 NW2d 115 (2005). Defendant's challenge to the extent of the departure, 13 months more than the high end of the guidelines range, is moot, because defendant has already served his minimum sentence. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Defendant also contends that he is entitled to be resentenced under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006), which was decided after defendant filed his brief, our Supreme Court held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme generally. The Court explained that "[a]s long as the defendant receives a sentence within [the] statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.*, at 164. But the Court expressly declined to decide the applicability of *Blakely* to the intermediate sanction sentencing scheme, MCL 769.34(4)(a), which is implicated in this case. *Id.*, at 143-144 n 1. However, defendant does not claim error on this basis. In any event, the trial court relied solely on defendant's violations of probation as the basis for its decision to impose an enhanced sentence beyond the guidelines range. Defendant's probation violations were established by defendant's guilty pleas, and *Blakely* expressly permits reliance on facts established by a defendant's admissions. See *Drohan, supra*, at 156. Thus, even if *Blakely* were applicable, defendant has not established a *Blakely* error.

We affirm.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens