

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD EDWARD WRIGHT,

Defendant-Appellant.

UNPUBLISHED

September 19, 2006

No. 260813

Calhoun Circuit Court

LC No. 1988-001685-FH

Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of sentence entered after a probation violation. He was sentenced to 60 to 240 months' imprisonment on his underlying plea-based conviction of conspiring, combining, confederating and agreeing to manufacture or deliver less than 50 grams of a mixture containing cocaine, MCL 733.7401(2)(a)(iv). We affirm.

After failing to appear for sentencing following his 1989 nolo contendere plea, defendant was arrested on a bench warrant in 2004 and sentenced to four years' probation. One condition of his probation was that he submit to drug testing at the discretion of his probation officer. Another condition of his probation was that he make monthly payments of \$23 to cover costs and a fine imposed by the sentencing court. The trial court revoked defendant's probation after finding that he failed to take a required drug test and failed to make the required monthly payments.

Defendant first argues that the trial court violated his right of equal protection when it required that he make monthly restitution payments as a condition of his probation and then revoked his probation when he failed to make these payments. Because defendant failed to raise this issue before the trial court, it is not preserved for our review. *People v Conner*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Therefore, we review the trial court's decision to revoke defendant's probation for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Contrary to defendant's assertion, the trial court did not impose restitution on defendant as a condition of his probation. Rather, as a condition of his probation, the trial court required defendant to pay \$1,000 in costs and a \$100 fine in monthly installments of \$23. The trial court revoked defendant's probation, in part, because he failed to make these monthly payments. We find that these actions by the trial court did not violate defendant's equal protection rights.

A trial court has the right to impose costs and fines on a defendant as a condition of his probation. MCL 771.3(2)(b), (c). Furthermore, as a general matter, a trial court may revoke probation if a defendant violates a term of his probation order. MCL 771.4. But MCL 771.3(8) limits the circumstances under which a trial court may revoke a probation order on the basis of a defendant's failure to pay costs required by the order. Under MCL 771.3(8), a trial court may impose "costs as a condition of probation, subject to a requirement that a probationer will not be punished for failing to pay costs which the probationer cannot afford." *People v Flaherty*, 165 Mich App 113, 124; 418 NW2d 695 (1987). See also *People v Music*, 428 Mich 356, 361-362; 408 NW2d 795 (1987). And this Court has recognized that "revocation of probation for failure to pay a fine or costs by one who is unable to pay constitutes a denial of equal protection as guaranteed by the Fourteenth Amendment." *People v Wright (On Remand)*, 99 Mich App 801, 816; 298 NW2d 857 (1980). See also *People v Collins*, 239 Mich App 125, 135-136; 607 NW2d 760 (1999). Thus, in determining whether to revoke probation, the court shall consider the probationer's employment status, earning ability, and financial resources, the willfulness of the probationer's failure to pay, and any other special circumstances that may have a bearing on the probationer's ability. MCL 771.3(8).

The trial court did not violate defendant's equal protection rights when it revoked defendant's probation after he failed to make monthly payments to cover costs. The record supports the trial court's finding that defendant had the ability to make the payments but did not make a good faith effort to do so. Defendant admitted at the probation revocation hearing that he could have made the monthly payments. He claimed, however, that he failed to make the payments because he was not aware of this requirement. The trial court found that defendant was not credible in this regard. Defendant signed the order of probation, acknowledging that he read the order, including the provision that, as a condition of his probation, he make monthly payments of \$23 to cover costs and a fine. Furthermore, defendant's probation officer testified that he told defendant that he must make the \$23 monthly payments as a condition of his probation. "Questions regarding the credibility of witnesses are to be resolved by the trier of fact" *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998). The trial court believed the probation officer's testimony that he informed defendant of the payment requirement. Accordingly, the trial court did not plainly err when it found that defendant knew of the monthly payment requirement, had the means to make the payments and, in choosing not to make the payments, violated a condition of his probation. Consequently, revocation of defendant's probation for failure to make these monthly payments was appropriate.

Although MCL 771.3(8) applies specifically to circumstances in which the trial court may revoke a defendant's probation for failing to pay costs as opposed to a fine, we nevertheless conclude that the trial court did not violate defendant's equal protection rights when it revoked his probation for failing to make the required monthly payments, which included a portion of the \$100 fine imposed by the trial court. Revocation of probation for failure to pay a fine only constitutes a violation of a probationer's equal protection rights if that probationer is unable to pay the fine. *Wright, supra* at 816. As previously discussed, defendant admitted at the probation revocation hearing that he was financially able to make the required payments to cover the fine.

Defendant also claims that the trial court erroneously revoked his probation without first "conduct[ing] a hearing to determine whether Defendant had the ability to pay and whether the violation was a willful default or simply a misunderstanding the terms and conditions of

probation.” However, he fails to explain why the probation revocation hearing, wherein evidence on these issues was presented, was insufficient to determine whether defendant violated his probation. Moreover, defendant has not described the hearing that should have taken place, and has not cited any authority in support of his argument. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Accordingly, defendant has abandoned this issue, and we will not consider it further. *Id.*

Next, defendant argues that the trial court erroneously imposed a sentence on defendant that was disproportionate to the circumstances surrounding the offense and the offender. Specifically, defendant asserts that, because his minimum recommended sentence under the legislative sentencing guidelines would have fallen in the range of 7 to 23 months, the 5 to 20 year sentence imposed by the trial court is “clearly disproportionate” to his offense. But the legislative sentencing guidelines do not apply in this matter because the legislative sentencing guidelines only apply to felonies committed on or after January 1, 1999. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Instead, “[t]he sentencing guidelines promulgated by Administrative Order No. 1988-4, [430 Mich ci (1988),] as governed by the appellate case law concerning those guidelines, remain in effect for applicable offenses committed before January 1, 1999.” These sentencing guidelines do not apply to probation revocation cases. *People v Hendrick*, 472 Mich 555, 560 n 5; 697 NW2d 511 (2005); *People v Cotton*, 209 Mich App 82, 84; 530 NW2d 495 (1995).

Instead, a sentence imposed after a revocation of probation is appropriate if it is proportionate to the seriousness of the crime and to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Moreover, after a sentencing court revokes a probation order, it may sentence the offender in the same manner and to the same penalty as it might have done if the probation order had never been made. MCL 771.4; *People v Sandlin*, 179 Mich App 540, 543; 446 NW2d 301 (1989). The trial court is also “at liberty to consider defendant’s action and the seriousness and severity of the facts and circumstances surrounding the probation violation in arriving at the proper sentence to be given.” *People v Williams*, 223 Mich App 409, 411; 566 NW2d 649 (1997), citing *People v Peters*, 191 Mich App 159, 167; 477 NW2d 479 (1991).

The trial court considered the entirety of defendant’s criminal history when fashioning his sentence. In particular, the trial court noted that defendant pleaded nolo contendere to conspiring to deliver a controlled substance, and that this is “not an offense to be taken lightly.” In addition, the trial court explained that defendant avoided his sentence for this offense “for a long time through [his] own choice and by absconding, leaving the state and so on.” Furthermore, the trial court recognized that defendant had a “fairly substantial felony record” at the time of his 1989 plea of nolo contendere, including convictions for unarmed robbery, larceny, hindering and opposing the police, possession of controlled substances, and escape from prison. The trial court also recognized that, after his 1989 nolo contendere plea, defendant “stay[ed] out of trouble” and “[had] a fairly decent life and so on as far as the legal system is concerned” It also commented on several letters it had received attesting to defendant’s good character. However, the trial court noted that, during defendant’s original sentencing hearing, the court took into account his good behavior over the previous 15 years and sentenced him to probation. At that

time, the court warned defendant that he would go to prison if he violated the terms of his probation. Taking these factors into consideration, the trial court concluded, “I think you’ve been given every consideration and every possible chance to avoid the inevitable which I think is that you just should serve the sentence that you originally got or were supposed to get.”

We conclude that the trial court properly used its discretion to determine that the 5 to 20 year sentence recommended in the 1989 sentencing information report was proportionate to the severity of defendant’s offense, and the circumstances. The trial court did not impose a disproportionate sentence.

Defendant also cites *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), in support of the argument that the trial court could not engage in judicial factfinding when determining defendant’s minimum sentence. But in *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006), our Supreme Court definitively held that the ruling in *Blakely* does not apply to Michigan’s indeterminate sentencing scheme. “As 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.

Defendant received the statutorily authorized maximum sentence of 240 months’ imprisonment for a violation of MCL 333.7401(2)(a)(iv). Accordingly, any factfinding performed by the trial court in the course of determining defendant’s minimum sentence did not violate defendant’s Sixth Amendment rights. Similarly, because *Blakely* does not apply to Michigan’s indeterminate sentencing scheme, defendant’s argument that *Blakely* should apply retroactively is irrelevant.¹

Defendant additionally claims a violation of his “ex post facto” rights. His argument regarding this issue is incomprehensible. He fails to explain how the trial court violated his ex post facto rights when it sentenced him pursuant to the judicial sentencing guidelines. Defendant has also failed to indicate any particular action by the trial court that was objectionable or otherwise entitles him to relief. Thus, he abandoned this issue on appeal. *Kelly, supra* at 640-641. Furthermore, we note that defendant failed to raise this issue in his statement of the questions presented, as required by MCR 7.212(C)(5). For this reason, this Court need not consider defendant’s argument further. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

Finally, defendant asserts that there is a question of fact regarding whether the statute of limitations for the underlying offense had expired and that this factual dispute prohibited the trial court from imposing a sentence. Because defendant failed to include this argument in his statement of questions presented, this Court need not consider it. *Miller, supra* at 172. Regardless, defendant’s argument fails on the merits. The purpose of a statute of limitations is to limit the time in which prosecution of a criminal charge may be commenced:

¹ In *Drohan, supra*, our Supreme Court reaffirmed its statement in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), that *Blakely* does not apply to Michigan’s indeterminate sentencing scheme.

The purpose of a criminal statute of limitations is clearly related to determining the factual guilt of a defendant. In fact, it is the same purpose behind the right to a speedy trial. “Statutes of limitation ‘are intended to foreclose the potential for inaccuracy and unfairness that stale evidence and dull memories may occasion in an unduly delayed trial.’” Accordingly, we conclude that an unconditional plea of guilty or nolo contendere waives the statute of limitations defense because . . . the purpose of the statute relates to determining a defendant’s factual guilt. [*People v Allen*, 192 Mich App 592, 602; 481 NW2d 800 (1992) (citations omitted).]

Defendant pleaded nolo contendere to the underlying offense. His factual guilt is not an issue. Therefore, a statute of limitations defense is inapplicable.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O’Connell