

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WALLACE GLASSBROOK,

Defendant-Appellant.

UNPUBLISHED

March 13, 2007

No. 265845

Eaton Circuit Court

LC No. 03-020369-FH

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Defendant was convicted of manufacturing methamphetamine, MCL 333.7401(2)(b)(i), and possession of methamphetamine manufacturing equipment within 500 feet of a residence, MCL 333.7401c(2)(d). He was sentenced to concurrent terms of six to twenty years' imprisonment on both convictions. We affirm.

Defendant was initially charged with five criminal counts: (1) manufacturing methamphetamine; (2) possession of methamphetamine manufacturing equipment within 500 feet of a residence; (3) possession of methamphetamine manufacturing equipment in the presence of a minor, MCL 333.7401c(2)(b); (4) possession of marijuana, MCL 333.7403(2)(d); and (5) possession of methamphetamine, MCL 333.7403(2)(b)(i). On March 10, 2004, defendant was convicted by jury of the possession of marijuana and possession of methamphetamine charges. However, the jury deadlocked on the remaining charges. Defendant was sentenced to 210 days' jail time with twenty-three days credit for time already served, and was given work release authorization. Defendant was also sentenced to thirty-six months' probation and was required to submit to random drug testing. The trial court subsequently granted defendant's motion to quash his bindover on the charge of possession of methamphetamine manufacturing equipment in the presence of a minor, and an order of nolle prosequi was later entered with regard to that charge. Following a second jury trial on the remaining charges, defendant was convicted of manufacturing methamphetamine and possession of methamphetamine manufacturing equipment within 500 feet of a residence. The court departed from the recommended guidelines range, which had been scored to result in a range of thirty to fifty months, imposing a minimum sentence of seventy-two months' imprisonment. The court found that defendant's conduct while on probation after the first trial justified the departure.

Defendant argues that the trial court exceeded its authority in making an upward

departure. Sentencing judges may base an upward departure on conduct underlying a probation violation when imposing sentence on the original offense after a probation revocation. *People v Hendrick*, 472 Mich 555, 564-565; 697 NW2d 511 (2005). In this case, the departure was not based on defendant's conduct while under a sentence of probation for the instant offenses. Rather, the court based the challenged departure on conduct while defendant was on probation pending retrial. However, we fail to see how this distinction undermines the legitimacy of considering defendant's probation violations when imposing sentence in the case at hand.

Accordingly, the question is whether defendant's conduct while on probation constituted a substantial and compelling justification for the particular upward departure imposed. The Michigan Supreme Court has interpreted the statutory requirement of substantial and compelling reasons for departure to mean that the factors relied on must be objective and verifiable, of considerable worth in determining the length of the sentence imposed, irresistibly attention grabbing, and must exist only in exceptional cases. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). However, the trial court's reasons for departure may not be based "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentencing range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

Defendant first asserts that the court erred in departing because in doing so it referred to a conversation it had with the operators of defendant's treatment program regarding defendant's performance in the program. In context, however, it is clear that the court cited the conversation not in support of the sentence departure, but as part of its response to defense counsel's attempts to minimize the nature of defendant's violation based on his drug addiction. The conduct underlying the probation violations themselves is objective and verifiable, was specifically discussed in the record, and was the basis of the conversation at issue. *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005).

Defendant also asserts that the trial court erred by departing because the reasons for the departure were already adequately considered in scoring the guidelines. However, defendant fails to clarify where the guidelines take into account his probation violations. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position Failure to brief a question on appeal is tantamount to abandoning it." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). In any event, we conclude that the guidelines did not take into account the conduct underlying defendant's probation violations.

The question whether defendant's conduct while on probation is "irresistibly" or "keenly" attention grabbing and "of considerable worth" in determining the sentence to be imposed is a close one. We conclude, however, the fact that defendant had missed six testing appointments in approximately ten months and had tested positive for marijuana use on one occasion does satisfy these criteria. These behaviors are distinct enough to actively and strongly draw our attention to them, particularly when considered in light of the trust put in defendant by the court when placing him on probation. *Schaafsma, supra* at 185-186. The repetitive and substantive nature of the conduct (i.e., numerous failures to satisfy drug screening requirements)

in the context of the offenses in issue also makes the behavior of “considerable worth” in determining the sentence to be imposed.

Finally, we take note of plaintiff’s argument that even if the trial court erred in departing from the guidelines, such an error is harmless because defendant should have been scored at least five points for prior record variable (PRV) 6, which would place him in the fifty-one to eighty-five months sentencing range. MCL 777.63. Thus, plaintiff argues, defendant’s minimum sentence of seventy-two months’ imprisonment falls within the correct range. Altering the scoring of PRV 6 does, in fact, alter the guidelines recommended range. If correctly scored, defendant’s sentence would fall within the correct range. While this circumstance would not ordinarily render the error harmless, in this case it is clear that the trial court would have imposed at least the same sentence if presented with this different sentencing range.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Stephen L. Borrello