

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN CORNELL COLE,

Defendant-Appellant.

UNPUBLISHED

January 8, 2008

No. 274701

Jackson Circuit Court

LC No. 05-000973-FH

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from the trial court's revocation of probation imposed after his conviction of larceny from a motor vehicle, MCL 750.356a(1), and the imposition of a sentence of two to five years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to larceny from a motor vehicle in exchange for dismissal of charges of possession of burglar's tools, MCL 750.116, and possession of less than 25 grams of a controlled substance, MCL 333.7403(2)(a)(v). The sentencing guidelines recommended a minimum term range of zero to six months. The trial court sentenced defendant to serve a term of five years' probation, with the first 180 days in jail. The first 15 days of the jail term were to be served immediately, with the remainder to be suspended. Among the terms of defendant's probation were that he not consume alcohol or use controlled substances, and that he observe a curfew from 11:00 p.m. to 6:00 a.m.

On three occasions within the next year, defendant pleaded guilty to violating his probation. On the third occasion, he admitted to consuming alcohol and violating his curfew by being outside his residence. At the sentencing hearing for the third violation, the trial court noted that the guidelines recommended a minimum term range of zero to six months, but decided to exceed the guidelines for the stated reasons that the guidelines did not adequately account for the fact that defendant had violated his probation three times in one year, had been convicted of two new offenses during that time, i.e., being a minor in possession of alcohol, and had failed to

appear for substance abuse evaluation and counseling. The trial court terminated defendant's probation, and sentenced him to two to five years in prison, with credit for 204 days.¹

A probationer is entitled to written notice of charges that constitute a claim that he has violated probation. MCR 6.445(B)(1); MCL 771.4. The trial court may consider only evidence relating to those charges when determining whether a defendant has violated probation, and when making the discretionary decision whether to revoke probation. *People v Pillar*, 233 Mich App 267, 270; 590 NW2d 622 (1998).

Defendant argues that the trial court abused its discretion by revoking his probation and sentencing him to prison based on conduct that was not charged in the petition alleging probation violation. We disagree.

The transcript of the hearing at which defendant pleaded guilty to violating his probation for the third time reveals that the trial court's finding that defendant violated probation was based only on evidence that defendant consumed alcohol and was outside his residence during curfew hours. The trial court properly considered only evidence related to the charges when determining that defendant violated his probation. *Pillar, supra*.

The trial court in revoking defendant's probation mentioned the fact that defendant failed to appear for a substance abuse assessment, but emphasized the fact that defendant had been convicted of violating his probation three times in the last year. A fair reading of the transcript of the sentencing hearing makes clear that the trial court gave this fact the most weight when deciding to terminate defendant's probation. MCL 771.4 provides that a trial court may revoke a defendant's probation for a violation of a term of probation, "or for any other type of antisocial conduct or action on the probationer's part for which the court determines that revocation is proper in the public interest." The trial court acted within its statutory authority when terminating defendant's probation, and did not abuse its discretion when doing so. *Id.*

The sentencing guidelines for the underlying offense recommended a minimum sentence range of zero to six months. If the upper limit of the recommended guidelines range is 18 months or less, the trial court "shall" impose an intermediate sanction unless the trial court states on the record that a substantial and compelling reason exists to commit the defendant to prison. MCL 769.34(4)(a). An intermediate sanction may include a jail term that does not exceed the upper limit of the guidelines range or 12 months, whichever is less. *Id.* An intermediate sanction does not include a prison term. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002). Consequently, the trial court was required to justify the imposition of a prison sentence with a substantial and compelling reason to depart from the guidelines. *Id.* at 636; MCL 769.34(3).

¹ The trial court noted on the sentencing information report departure evaluation form that it intended that the sentence stand if any reason given for exceeding the guidelines was found to be valid.

To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. The reason for the departure must be articulated by the trial court on the record. MCL 769.34(3). A substantial and compelling reason articulated by a trial court to merit a departure from the sentencing guidelines must justify the particular departure at issue. If the stated reasons are partially invalid and the appellate court cannot ascertain whether the trial court would have departed to the same extent regardless of the invalid factors, remand for resentencing or rearticulation is necessary. *People v Babcock*, 469 Mich 247, 255-261; 666 NW2d 231 (2003).

In determining whether a sufficient basis exists to depart from the sentencing guidelines, the trial court must ascertain whether the departure would result in a sentence more proportionate to the seriousness of the offense and the defendant's criminal history than would adherence to the guidelines range. In addition, in departing from the guidelines, the trial court must determine whether the particular departure is proportionate to the circumstances of the offense and the offender. *Id.* at 262-264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

We review the determination of the existence of a factor for departing from the guidelines for clear error, the determination that a factor is objective and verifiable de novo, and the determination that objective and verifiable factors merited departure from the guidelines range for an abuse of discretion. *Babcock, supra* at 264-265. A trial court may depart from the guidelines for nondiscriminatory reasons based on an offense or offender characteristic that was already considered in calculating the guidelines if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 265-269. In determining whether substantial and compelling reasons existed to merit departure from the sentencing guidelines, an appellate court must give appropriate deference to the trial court's sentencing determination. *Id.* at 269-270.

Defendant argues that the trial court abused its discretion by exceeding the guidelines, and that the minimum term of two years is disproportionate. We disagree.

A violation of probation can constitute a substantial and compelling reason to depart from the sentencing guidelines. *People v Hendrick*, 472 Mich 555, 557; 697 NW2d 511 (2005). Defendant violated his probation three times in one year, and continued to do so even after the trial court ordered him to serve portions of the previously suspended sentence as punishment for doing so. The sentencing guidelines add points if a defendant awaiting sentence is on probation, see MCL 777.56, but do not allow for the addition of extra points if the defendant has violated probation on multiple occasions. Defendant's repeated violations of probation were objective and verifiable, and irresistibly attracted the attention of the trial court. Furthermore, the trial court was entitled to consider the fact that the guidelines did not account for defendant's repeated violations when determining whether a departure was appropriate. MCL 769.34(3)(b). The trial court's decision to exceed the guidelines in light of the facts that defendant violated his probation three times in one year, that defendant continued to violate his probation even after being required to serve jail time, and that the sentencing guidelines did not account for the repeated violations, did not constitute an abuse of discretion. The trial court's imposition of a minimum

two-year prison term, while harsh, was not outside the range of principled outcomes under the circumstances. *Babcock, supra* at 269. Defendant is not entitled to resentencing.

We affirm.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski