

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARRIE ANN HOFER,

Defendant-Appellant.

UNPUBLISHED

January 26, 2006

No. 256431

Isabella Circuit Court

LC No. 01-009794-FH

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Defendant Carrie Ann Hofer appeals by delayed leave granted from the trial court's order sentencing her to two to five years' imprisonment, with credit for 153 days served, based on her plea of guilty to violating probation. We affirm. We decide this appeal without oral argument.¹

I. Basic Facts And Procedural History

Hofer pleaded guilty to operating a motor vehicle under the influence of alcohol while another person who is less than 16 years of age is occupying the vehicle, second offense.² She violated probation by visiting an establishment that served liquor for consumption on the premises, possessing alcoholic beverages while testing for a blood alcohol content of .265 grams per 100 milliliters of blood, and failing to make certain required payments to the trial court. The recommended range for Hofer's minimum sentence under the guidelines was zero to nine months' incarceration;³ however, the trial court sentenced Hofer to two to five years in prison.

On appeal, Hofer challenges the upward departure from the sentencing guidelines and from her having been sentenced by Judge William Rush when Judge Paul H. Chamberlain had initially accepted her plea and imposed a term of probation.

¹ MCR 7.214(E).

² MCL 257.625(7)(a)(ii).

³ MCL 777.66.

II. Sentencing Judge

Generally, a defendant who pleads guilty to a crime should be sentenced by the judge who accepted the plea.⁴ Similarly, probation violations should be adjudicated by the original plea-taking judge.⁵

Judge Rush began his participation in this case by presiding over Hofer's preliminary examination. The case then went to Judge Chamberlain for trial. Hofer returned to Judge Chamberlain to plead guilty to a violation of her resulting term of probation. Judge Chamberlain offered to proceed to sentencing immediately, but defense counsel asked that sentencing await a new presentence investigation report and exploration of the possibilities of drug court. Judge Chamberlain replied, without explanation, that sentencing would then "have to be set in front of Judge Rush," reminded Hofer that she had a right to be sentenced by himself, and elicited from her and her attorney that they were "willing to waive that right and proceed to sentencing before Judge Rush." Hofer agreed to Judge Rush's replacement of Judge Chamberlain.

Judge Rush imposed a jail sentence. Hofer then returned to Judge Rush to plead guilty to violating probation again and received the sentence she now challenges.

Hofer states that this claim of error "was not passed upon by the trial court," but also asserts that defense counsel "unsuccessfully argued to Judge Rush[] for a continuance on probation to Judge Chamberlain," citing four pages of hearing transcript that in fact show no such request. Hofer speculates that Judge Rush did the sentencing simply because Judge Chamberlain was unavailable that day, but the record indicates that Judge Chamberlain had explained that future proceedings would take place before Judge Rush.

In any event, Hofer's expressed agreement to have Judge Rush take the case from Judge Chamberlain earlier in the proceedings, and her silence on such developments thereafter, constitute an affirmative waiver of appellate objections, leaving this issue extinguished.⁶ No appellate relief is warranted.

⁴ *People v Robinson*, 203 Mich App 196, 197; 511 NW2d 713 (1993).

⁵ See *People v McIntosh*, 124 Mich App 705, 708; 335 NW2d 129 (1983).

⁶ *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). See also *Robinson, supra* at 197-198 (reversal is not required where a defendant does not object when informed that a judge other than the one who accepted the plea would be imposing sentence); *McIntosh, supra* at 709 ("We will not permit [a] defendant to wait until after the judge has found a probation violation and then object because the matter had proceeded before the wrong judge.").

III. Sentencing

A. Standard Of Review

A sentencing court departing from the guidelines must state on the record its reasons for doing so and may deviate only for a “substantial and compelling reason”⁷ Deviations from sentencing recommendations follow from only objective and verifiable factors.⁸

On appeal, we review de novo the trial court’s determination that a particular factor is objective and verifiable.⁹ And we review for an abuse of discretion the trial court’s determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence.¹⁰

B. Upward Departure

In rejecting the guidelines’ recommendation of zero to nine months’ incarceration in favor of a prison sentence, the trial court explained as follows:

If you look at all of these things that have gone on, I’m not going to reiterate them all here, but as I take them, each one of them in my mind mitigates towards deviating from the . . . guidelines in . . . an upward fashion.

I am going to determine that there are significant and compelling reasons to deviate from the guidelines for each and every one of the reasons set forth in the case report.

We read this statement as adopting by reference that part of the presentence investigation report that specifically recommends an upward departure, as adjusted by the trial court:

It is . . . recommended that [Hofer] be committed to the Michigan Department of Corrections to serve a prison term.

* * *

It is further recommended that the Court deviate from the guidelines based on the following reasons; [Hofer] has continued to consume alcohol while on probation. As noted in the previous paragraphs [Hofer] has continually violated her probation. While on probation she has been charged and convicted of Contributing to the Delinquency of Minor, [Driving with a suspended license],

⁷ MCL 769.34(3).

⁸ *People v Babcock*, 469 Mich 247, 257-258, 272; 666 NW2d 231 (2003).

⁹ *Id.* at 264.

¹⁰ *Id.* at 264-265.

and Reckless driving, all of which are violations of her probation, thus [Hofer]'s continued involvement in the Criminal Justice System would indicate that she is not an appropriate candidate for community supervision.

The trial court's ultimate conclusion, that Hofer is not well suited to community supervision effectively reiterates the recommendation that she be sentenced to a term of imprisonment. This recommendation is supported with a recitation of facts, all of which are well documented, and none of which Hofer challenges on appeal. Instead, Hofer argues, without elaboration, that those reasons are not substantial and compelling.

Hofer argues that her underlying conviction was her first felony, that the offense did not involve violence, and that she is remorseful. She also argues that the imposed period of incarceration is not conducive to her goal of reform. However, these general policy arguments for mitigation do nothing to discredit the cited reasons for the departure. We conclude that Hofer's persistent failure to control her alcohol problem, manifested in a history of repeated probation violations, some of which involved placing others in danger, constitutes a substantial and compelling reason to exceed the guidelines.

We affirm.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette