

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLINTON JUNIOR MILLER,

Defendant-Appellant.

UNPUBLISHED

January 31, 1997

No. 190936

Saginaw Circuit Court

LC No. 92-006908-FC

Before: Griffin, P.J., and McDonald and C. W. Johnson*, JJ.

MEMORANDUM.

Defendant pleaded guilty to violating his probation by leaving a drug treatment program without authorization. Defendant's probation was revoked and he was sentenced to four to ten year's imprisonment. His underlying convictions were carrying a concealed weapon, MCL 750.227; MSA 28.424, and being an habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant appeals as of right. We affirm.

Defendant's sole argument on appeal is that his sentence for the probation violation is disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree. The sentencing guidelines are not applicable to either probation violations or habitual offender convictions. *People v Cervantes*, 448 Mich 620, 625-626; 532 NW2d 831 (1995); *People v Cotton*, 209 Mich App 82, 83-84; 530 NW2d 495 (1995); *People v Reynolds*, 195 Mich App 182, 184; 489 NW2d 128 (1992). Although the guidelines for the underlying offenses should generally be used as a "starting point" in determining the proportionality the sentence imposed for a probation violation, *Cotton, supra* at 84; *People v Smith*, 195 Mich App 147, 149-150; 489 NW2d 135 (1992), the sentencing guidelines need not be referenced where defendant is sentenced as an habitual offender. *People v Haacke*, 217 Mich App 434, 437; 553 NW2d 15 (1996).

Defendant has three felony convictions, several violent misdemeanor convictions, and his probation officer opined that defendant has a serious substance abuse problem. Despite this serious

* Circuit judge, sitting on the Court of Appeals by assignment.

prior record, the sentencing court tried sentencing defendant to only probation and 193 days in jail. However, defendant disobeyed the terms of his probation by testing positive for barbiturate use. Though the sentencing court gave defendant another opportunity at probation by ordering defendant to attend a long term substance abuse program, defendant once again violated probation by escaping from the treatment center and failing to contact the Michigan Department of Corrections Probation Department. Even after consideration of the inapplicable sentencing guidelines, we conclude under these circumstances that defendant's sentence is proportionate to the offense and the offender. *Milbourn, supra*.

Affirmed.

/s/ Richard Allen Griffin

/s/ Gary R. McDonald

/s/ Charles W. Johnson