STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM EDWARD HUTCHERSON,

Defendant-Appellant.

UNPUBLISHED
May 13, 1997

No. 189672
Kent Circuit Court
LC No. 94002379-FC

Before: Hoekstra, P.J., and Markey and J.C. Kingsley*, JJ.

PER CURIAM.

Defendant was sentenced to one year in prison and five years' probation after he pleaded guilty to assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1); MSA 28.788(7)(1).[1] The trial court subsequently revoked defendant's probation after it found that he violated four conditions of his probation. MCL 771.4; MSA 28.1134. The court then sentenced defendant on the underlying assault conviction to four to ten years in prison, with credit for one year already served. Defendant appeals as of right, and we affirm.

Defendant first argues that the prosecution failed to prove that defendant violated his probation by a preponderance of the evidence. We disagree. A probation revocation proceeding has two steps: first, a factual determination that the charged violations have occurred; and second, a discretionary determination that the proven charges warrant revoking probation. *People v Laurent*, 171 Mich App 503, 505; 431 NW2d 202, 203 (1988). We review the evidence in the light most favorable to the prosecution and determine whether it would enable a rational trier of fact to conclude that the essential elements of the charge were proven by a preponderance of the evidence. *People v Ison*, 132 Mich App 61, 66; 346 NW2d 894 (1984).

The four relevant conditions of defendant's probation required him to keep appointments with his probation officer, live in a pre-approved residence, abide by his 9:00 p.m. curfew, and abstain from using alcohol. At the probation revocation hearing, defendant testified that he missed two appointments

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

with his probation officer because of medical reasons, but the probation officer testified that he was not informed of defendant's excuse. Notably, although defendant testified that he called his probation officer to notify him of the medical emergency on one occasion (for which the probation officer could not remember receiving the call), there was no testimony that defendant tried to contact the probation officer regarding the second missed appointment. Second, defendant testified as to his motivation for moving to a different residence, but he presented no evidence why he failed to seek or obtain his probation officer's approval before moving or notify the probation officer of his new address. Third, defendant's landlord testified that despite persistently knocking on defendant's bedroom door at 10:30 p.m., the landlord was unable to locate defendant. In contrast, defendant testified that he did not hear his landlord knocking and did not answer the door because he was sleeping. Fourth, although defendant testified that the most alcohol he had had since being placed on probation was one allegedly non-alcoholic beer, both defendant's landlord and roommate testified that they observed defendant under the effects of alcohol.

The trial court assessed the credibility of the witnesses who appeared before it in keeping with its role as trier of fact. See *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). The trial court apparently determined that the prosecution's witnesses were more credible than defendant. Thus, viewing the evidence in the light most favorable to the prosecution, we hold that a rational trier of fact could conclude that the four charges against defendant were proven by a preponderance of the evidence. *Ison, supra*.

Defendant next argues that that the trial court abused its discretion in revoking his probation because this was his first probation violation and the charges against him were not as serious as they could have been. Probation is a matter of grace, not right, so it may be revoked. MCL 771.4; MSA 28.1134. After the court finds a probation violation, it has "wide discretion" to decide whether to continue probation, modify the conditions of probation, or revoke probation and impose a prison sentence. MCR 6.445(G); *People v Whiteside*, 437 Mich 188, 193; 468 NW2d 504 (1991). Here, the court decided that defendant's violation of four conditions of his probation revealed that defendant lacked self-discipline and was not a good candidate for probation. We do not find an abuse of discretion in the trial court's decision to revoke probation.

Finally, defendant argues that he should not have been sentenced to four to ten years' imprisonment. After revoking probation, a sentencing court may sentence the probationer in the same manner and to the same penalty with respect to as it might have done had it never entered the probation order. MCL 771.4; MSA 28.1134, *People v Sandlin*, 179 Mich App 540, 543; 446 NW2d 301 (1989). Notably, however, the sentencing guidelines do not apply to sentencing for probation violations. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v Edgett*, 220 Mich App 686, 690; ___ NW2d ___ (1996).

The underlying offense in this case, assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1); MSA 28.788(7)(1), is punishable by a maximum prison term of ten years, and a minimum guidelines range of twelve to forty-eight months' imprisonment was

recommended for the underlying conviction. Even though the guidelines are inapplicable here, defendant's sentence is presumptively valid because it fell within the guidelines for the underlying offense. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Spicer*, 216 Mich App 270, 276; 548 NW2d 245 (1996).

Moreover, defendant's sentence does not violate the principle of proportionality. First, the underlying offense and the reduced charge to which defendant pleaded are serious offenses. *Milbourn, supra*, also does not address the unique sentencing situation that arises when a defendant pleads guilty to a charge in exchange for dismissal of other or greater charges, as in the case at bar. *People v Brzezinski (After Remand),* 196 Mich App 253, 256; 492 NW2d 781 (1992). Additionally, the presentence report indicates that defendant also has four fairly recent misdemeanor convictions, including one for fourth-degree attempted criminal sexual conduct. Finally, when given a chance at probation rather than imprisonment, defendant violated his probation order in four instances within a short time after being placed on probation. Thus, defendant's sentence was not disproportionate and the court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Jane E. Markey
/s/ James C. Kingsley

Judge Hoekstra did not participate in the decision.

[1] Defendant was originally charged with first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). The presentence investigation report also states that defendant was charged as a second habitual offender based upon his December 1, 1993 conviction for attempted fourth-degree CSC.