

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL WAYNE BOLTHOUSE,

Defendant-Appellant.

UNPUBLISHED

July 22, 1997

No. 188205

Barry Circuit Court

LC No. 94-000109-FH

Before: McDonald, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

Following a probation violation hearing, defendant was convicted of violating the terms of his probation, and his probation was revoked. At the time of the probation violations, defendant was serving the probationary portion of a sentence of one year of incarceration in jail and sixty months' probation resulting from a conviction of second-degree criminal sexual conduct (CSC II), MCL 750.520(c)(1)(b); MSA 28.788(3)(1)(b). Following defendant's revocation of probation, he was sentenced to ten to fifteen years' imprisonment for the CSC II conviction, with 371 days credit for time served. Defendant appeals as of right. We affirm in part, vacate in part, and remand.

Defendant first argues that the sentencing court erred in finding that defendant had violated the conditions of his probation in that the evidence offered by the prosecution supported only technical probation violations that did not justify probation revocation. In a probation revocation proceeding, the prosecution has the burden of proving a violation by the lesser standard of preponderance of the evidence, rather than the stricter standard of beyond a reasonable doubt. MCR 6.445(E)(1). Moreover, probation revocation consists of the following procedure: (1) a factual determination that a defendant has violated the terms of his probation, and (2) a discretionary determination whether the violation warrants revocation. *People v Laurent*, 171 Mich App 503, 505; 431 NW2d 202 (1988).

Under the first prong of the *Laurent* procedure, we determine whether "a rational trier of fact would conclude that the preponderance of the evidence indicated that defendant violated his probation." *People v Reynolds*, 195 Mich App 182, 184; 489 NW2d 128 (1992). Although defendant contends

that the prosecution presented insufficient evidence to support the sentencing court's determination that defendant violated conditions of his probation by assaulting a complainant and making a telephone threat regarding that complainant,¹ our review of the record reveals that the court's findings in regard to these allegations turned exclusively on its determination of the credibility of the witnesses to which this Court gives special deference. *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496 (1991). Moreover, defendant concedes that he technically violated at least two conditions of his probation. Defendant's admission to technically violating the terms of his probation and the complainant's testimony regarding the assault and threats were sufficient to cause a rational trier of fact to conclude by a preponderance of the evidence that defendant violated the conditions of his probation. *Reynolds, supra*.

The sentencing court, having properly found that defendant had violated the terms of his probation, was charged with the responsibility of deciding whether the violations warranted the revocation of defendant's probation. *Laurent, supra* at 505. Our review of the record reveals that the sentencing court did not abuse its discretion in revoking defendant's probation based upon its findings regarding defendant's probation violations. *Id.*; see, also, *People v Ritter*, 186 Mich App 701, 706; 464 NW2d 919 (1991).

Defendant next argues that the sentencing information report, upon which the sentencing court based its ultimate sentence of defendant, contained an inaccurate guidelines score, thereby resulting in an increased guidelines sentencing range. The sentencing guidelines, however, do not apply to defendants convicted of probation violations. *Reynolds, supra*. Moreover, because the guidelines do not have the force of law and defendant has failed to assert that the factual predicate underlying the scoring of OV 12 is wholly unsupported or materially false, defendant has failed to state a cognizable claim on appeal. *People v Mitchell*, 454 Mich 145, 175-177; 560 NW2d 600 (1997). To the extent that defendant claims that the trial court's interpretation of OV 12's instructions was improper, our Supreme Court has recently concluded that "[t]here is no juridical basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables." *Id.* at 176-177.

Defendant finally argues that, given the lack of severity of defendant's probation violations coupled with the original sentencing court's apparent belief that the facts and circumstances surrounding defendant's underlying conviction did not merit a harsh sentence, the subsequent sentencing court abused its discretion in imposing a disproportionate sentence of ten to fifteen years' imprisonment. We agree.

A sentence constitutes an abuse of discretion if it violates the principle of proportionality, which requires that sentences imposed be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). In this case, the trial court's remarks reveal that it believed that defendant had not yet committed a serious offense. The court chose to sentence defendant to ten to fifteen years in prison because the court wanted to ensure that defendant would not commit a serious offense in the future. While the need to protect society is a valid consideration in imposing sentence, *People v Snow*, 386 Mich 586, 592; 194

NW2d 314 (1972), defendant's sentence must be proportionate, *Milbourn, supra*; *People v Smith*, 195 Mich App 147, 149; 489 NW2d 135 (1992). Here, the original sentencing court and the prosecutor apparently believed that the circumstances surrounding the underlying offense of CSC II did not justify a harsh sentence. The original sentencing court departed downward from the sentencing guidelines and sentenced defendant to one year in jail and sixty months' probation. Furthermore, defendant's probation violations were not especially serious or extreme. In light of the circumstances surrounding defendant's underlying conviction and probation violations, as well as the court's own acknowledgment that defendant had yet to commit a serious offense, we conclude that defendant's minimum sentence of ten years is disproportionate to the seriousness of this offender and offense. *Milbourn, supra*.

We affirm the court's decision revoking defendant's probation, vacate defendant's sentence, and remand for resentencing. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Richard Allen Griffin
/s/ Richard A. Bandstra

¹ Defendant also contends that because he made the statements regarding the complainant to his mother over the telephone while, unknown to him, the complainant listened on another line, the statements cannot be construed as threats. However, the language of the probation condition relevant to this count imposes no requirement that defendant have knowledge that the threats that he utters will reach the target of the threatening remarks.