

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 188684

Monroe Circuit Court

CHRISTOPHER LANE BATES,

LC No. 92-024741-FH

Defendant-Appellant.

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Before: Taylor, P.J., and Griffin and Saad, JJ.

TAYLOR, P.J. (dissenting).

I respectfully dissent. I would reverse and remand for a new decision on whether to revoke defendant's probation because the court inappropriately considered uncharged conduct in making its decision. As the case law cited by the majority states, in making such a determination a court may only consider the probation violation charge to which a defendant pleaded guilty.

Defendant pleaded guilty to breaking and entering an unoccupied dwelling in 1982 and was sentenced to five years' probation with the last year to be spent in jail on April 9, 1993. On January 12, 1995, defendant was charged with violating his probation by failing to report to his probation officer in September and October of 1994, contrary to the order of probation. On February 3, 1995, defendant pleaded guilty to violating his probation and the court accepted the guilty plea. The court set sentencing for August 18, 1995, i.e., just over six months later. The court then indicated that defendant's probation was going to be transferred to Wayne county (apparently by agreement of the parties) but specifically told defendant he had to keep reporting to his current probation officer until the transfer was accepted. The court also told defendant that all the other terms and conditions of probation continued. Sentencing occurred on August 25, 1995. The court indicated that defendant did not respond well to probation because there were new violations (defendant had been charged with committing new crimes in Wayne county). The court said it realized defendant had not been charged with violating his probation with reference to the new charges but nevertheless said that it could not close its eyes to the new charges and imposed a three to ten year prison sentence.

The majority acknowledges that the court did not expressly revoke defendant's probation when it accepted defendant's guilty plea to violating his probation but nevertheless concludes that probation was revoked and that defendant was placed on delayed sentencing status. I disagree. The majority's conclusion that the court silently revoked defendant's probation when it accepted defendant's plea is not supported by the record. When the court accepted defendant's guilty plea, it expressly stated that it was going to transfer defendant's probation to Wayne county. If probation had been revoked, there was no probation to transfer. The court also told defendant that all other terms and conditions of his probation continued. If defendant's probation had been revoked, this statement would not have been made nor would it have made sense. The majority's conclusion that defendant was placed on delayed sentencing when the court accepted defendant's plea also is not supported by the record. MCL 771.1(2); MSA 28.1131(2) authorizes a trial court to delay the sentencing of defendant's convicted of certain offenses for up to one year. The statute specifies, however, that "When the sentencing is delayed, the court shall make an order stating the reason for the delay, which shall be entered upon the records of the court." Neither the prosecutor nor the majority has cited, nor has my review of the lower court found, any order stating that a delayed sentencing was being ordered and stating the reasons for the delay. In the absence of such an order which is required by the delayed sentencing statute, one cannot conclude that the court placed defendant on delayed sentencing when it accepted defendant's guilty plea.

I agree with the majority's statement that a defendant cannot be on probation and delayed sentencing concurrently. MCR 6.445(G) provides that a court, if a probationer pleads guilty to violating his probation, may continue probation or revoke probation and impose a sentence of incarceration at sentencing. The record shows that the court postponed sentencing for six months so that it could decide whether to continue defendant's probation. If defendant had not been in any trouble during that time period, it is likely that the court would have continued defendant's probation as MCR 6.445(G) specifically allows. The court, however, admittedly considered information that defendant had been charged with some new crimes in Wayne county and found that a prison sentence was warranted. Because the court did not revoke defendant's probation when it accepted defendant's guilty plea, it necessarily did so at the sentencing hearing. However, as acknowledged by the majority, in deciding whether to revoke a probation, a court may not consider uncharged conduct. See Gillespie Mich Crim L & Proc §774.65<sup>1</sup> and cases cited therein.

I dissent because defendant is entitled to a new decision on whether to revoke his probation and resentencing.

/s/ Clifford W. Taylor

<sup>1</sup> Only evidence relating to the specific charge of probation violation may be considered at a probation revocation hearing and only that evidence may provide a basis for a decision to revoke probation. The injection of extra-notice matters impermissibly taints the proceedings and in such cases another hearing must be held. *Id.*