STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD O. BOWEN,

Defendant-Appellant.

UNPUBLISHED
April 10, 1998

No. 200493
Genesee Circuit Court
LC No. 91-044666-FC

Before: Hoekstra, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from a twenty-two to thirty-five year sentence imposed for assault with intent to commit murder, MCL 750.83; MSA 28.276, following an adjudication that he violated the terms of his probation. We affirm.

Defendant was charged with assault with intent to commit murder and armed robbery. Pursuant to a plea agreement, he pleaded nolo contendere to the assault charge in exchange for dismissal of the armed robbery charge and a sentence agreement of five years' probation with the first year in jail. Defendant was later charged with violating the terms of his probation. Following a hearing, the trial court found that defendant violated his probation by failing to report, failing to pay restitution, using illegal drugs, and committing a new crime. Defendant was thereafter sentenced to twenty-two to thirty-five years in prison.

Defendant's primary claim on appeal is that his due process rights were violated by the manner in which the violation of probation charges were instituted and heard. He first contends that the two probation violation warrants were not executed with due diligence. See *People v Henry*, 66 Mich App 394, 397; 239 NW2d 384 (1976). To ascertain whether the authorities exercised due diligence, it is appropriate to consider the length of the delay, the reason for the delay, and the prejudice to the defendant. *People v Ortman*, 209 Mich App 251, 255; 530 NW2d 161 (1995). We find that the delay between the alleged violations and the issuance of the warrants, which was one month or less, was not unreasonable. We further find that the approximate eight-month delay between the issuance of the warrants and the date of the probation violation hearing did not result from a lack of due diligence, given

that the delay was caused by defendant's disappearance for three months and the necessity of criminal proceedings in another county. Moreover, defendant has not shown that he was prejudiced by any delay. Cf. *People v Miller*, 77 Mich App 381, 384-385; 258 NW2d 235 (1977).

Defendant next contends that the failure of his probation officer to appear personally and assert facts based on personal knowledge regarding his failure to report constituted a denial of due process. *People v Taylor*, 104 Mich App 514, 517; 305 NW2d 251 (1981). This contention is without merit. A review of the record shows that the officer to whom defendant was required to report did in fact testify at the hearing. The officer testified that she directed defendant to report daily and that, while he did so for approximately a month thereafter, he subsequently failed to report for two consecutive days, at which time a bench warrant was sought.

Defendant next asserts that he was not given sufficient notice of the allegations against him. The record indicates that defendant was arraigned on the failure to report warrant five days before the hearing. Although he was not arraigned on the other warrant until the day before the probation violation hearing, he was advised of the contents of the other warrant at the earlier arraignment. Also, the basis of the charged violations were factually very simple, thus requiring little time to determine the existence of any viable defense. *People v Hanson*, 178 Mich App 507, 510-511; 444 NW2d 175 (1989). Ultimately, defendant did not testify at the probation violation hearing or otherwise demonstrate that he had a valid defense to the charges of which he was found guilty. Therefore, he has not shown that he was prejudiced by any alleged lack of sufficient notice.

Finally, defendant challenges the sufficiency of the evidence regarding his use of marijuana. Defendant's probation officer testified that a urine screen tested positive for marijuana and, when she reported this fact to defendant, he admitted to having smoked a "blunt." This evidence was sufficient to enable the court to find by a preponderance of the evidence that defendant used illegal drugs. Next, defendant has not cited any authority in support of his contention that failure to admit the toxicology report precluded a finding of guilt. Therefore, this issue is not preserved. *People v LaPorte*, 103 Mich App 444, 452; 303 NW2d 222 (1981). Finally, defendant's claim that failure to preserve the urine specimen deprived him of potentially exculpatory evidence is speculative at best and does not require reversal. *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Sawyer*, 215 Mich App 183, 192; 545 NW2d 6 (1996).

Defendant's second and third issues on appeal concern his sentence. He first asserts that the sentence was disproportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Although the guidelines do not apply to a probation violation sentencing, *People v Williams*, 223 Mich App 409, 411; 566 NW2d 649 (1997), defendant's minimum sentence is within the guidelines as scored for the underlying offense, thus supporting the conclusion that the sentence is proportionate. Defendant has not presented any unusual circumstances to overcome a presumption of proportionality. See *People v Lyons (After Remand)*, 222 Mich App 319, 324; 564 NW2d 114 (1997). We conclude that the sentence does not violate the principle of proportionality. *Milbourn*, *supra*.

Defendant also contends that his sentence was the result of prejudice or vindictiveness on the part of the sentencing judge. When a defendant is resentenced by the same judge and the second

sentence is longer than the first, there is a presumption of vindictiveness which may be overcome if the judge enunciates reasons for the longer sentence at resentencing. *Lyons, supra*, p 323. This case, however, was not before the trial court for resentencing, but for sentencing after a violation of probation. Moreover, because the first sentence was imposed pursuant to a sentence agreement, rather than an independent determination by the trial court, it cannot be validly compared to the second sentence. Having reviewed the trial court's comments at sentencing, we find that no improper factors were considered. The court's comments were directed principally to defendant's lack of remorse, which is a proper consideration in passing sentence. *People v Drayton*, 168 Mich App 174, 178-179; 423 NW2d 606 (1988).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Hilda R. Gage