

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER DEAN FREDERICK,

Defendant-Appellant.

UNPUBLISHED

September 29, 2000

No. 215972

Calhoun Circuit Court

LC No. 97-000189-FC

Before: Murphy, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's revocation of his probation pursuant to MCL 771.4; MSA 28.1134. We affirm.

Defendant pleaded no contest to criminal sexual conduct in the second degree, MCL 750.520c; MSA 28.788(3). Defendant was sentenced to twelve months in jail, twelve months on a tether, and five years' probation. The trial court, in accordance with MCL 771.4; MSA 28.1134, revoked defendant's probation after finding he failed to maintain employment and had violated his tether contract. Defendant was then sentenced to seven to fifteen years' imprisonment.

The first issue is whether the circuit court erred when it concluded defendant had violated his probation.

The revocation of probation consists of two separate determinations: (1) a factual determination that the probationer is in fact guilty of violating probation, and (2) a discretionary determination whether the violation warrants revocation. *People v Pillar*, 233 Mich App 267, 269; 590 NW2d 622 (1998). This Court will review a circuit court's factual findings under the clearly erroneous standard. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). However, the circuit court's decision to revoke probation is reviewed for an abuse of discretion. *People v Laurent*, 171 Mich App 503, 505; 431 NW2d 202 (1988). This Court will not find an abuse of discretion simply because it would have reached a contrary result where the probation violation was clearly established. *People v Knox*, 115 Mich App 508, 515; 321 NW2d 713 (1982).

The state has the burden of proving a probation violation by a preponderance of the evidence. MCR 6.445(E)(1). In addition, MCL 771.4; MSA 28.1134 states:

It is the intent of the legislature that the granting of probation is a matter of grace conferring no vested right to its continuance. If during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation. All probation orders are revocable in any manner the court that imposed probation considers applicable either for a violation or attempted violation of a probation condition or for any other type of antisocial conduct or action on the probationer's part for which the court determines that revocation is proper in the public interest.

At the probation revocation hearing, defendant's probation agent testified defendant was restricted to going between home and work. Defendant was employed through a temporary agency at Permabilt. The basis for revoking defendant's probation involved two days, in particular. The first day, October 10, 1997, defendant was given permission by his probation agent to leave work early to attend a court hearing. However, defendant was instructed to report to his probation agent immediately afterwards. At the probation revocation hearing, the probation agent testified defendant did not report to her after the court hearing. Defendant's supervisor from Permabilt testified defendant did not punch out that day or notify him that he would be leaving. Defendant also admitted he did not return to work that day.

On the second day, October 13, 1997, defendant had a job interview scheduled. Defendant claimed the interview time was moved up after defendant was sent home from work. It is undisputed that defendant had permission to attend the interview. However, defendant's testimony that he was sent home from work that day was directly contradicted. Defendant's probation agent testified defendant's tether report indicated that he had left home early that morning. Defendant's probation agent also verified with defendant's supervisor, other Permabilt employees, and time card records that defendant never went to work. Thus, defendant was unaccounted for during the morning of October 13, 1997, for several hours.

Defendant also acknowledged he had given his notice to the temporary agency. Defendant claimed he did this because he was informed, after the interview, that he would begin working at Ekrich the following week. Again, the testimony of defendant was directly contradicted. After contacting defendant's interviewer, the probation agent was informed defendant was unqualified for the job and would not be hired to work at Ekrich.

We conclude the circuit court did not clearly err when it found defendant had failed to maintain employment and violated his tether contract. The evidence demonstrated defendant left work early to attend a court hearing scheduled for that morning. Defendant had permission to attend this court hearing. But, defendant did not return to work that day.

Defendant also contends the trial court abused its discretion when it revoked defendant's probation and sentenced defendant to seven to fifteen years' imprisonment. We review a sentencing decision for an abuse of discretion. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). "[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to 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).

MCR 6.445(G) provides for the sentencing of a probationer that has violated probation. It states:

If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report and having complied with the provisions set forth in MCR 6.435(B), (D)(2), and (D)(3).

MCL 771.4; MSA 28.1134 also provides:

If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made.

Further, the sentencing guidelines do not apply to probation violations. *People v Smith*, 195 Mich App 147, 149; 489 NW2d 135 (1992). "The trial court is at liberty to consider defendant's actions and the seriousness and severity of the facts and circumstances surrounding the probation violation in arriving at the proper sentence. The reasons for the sentence imposed should be articulated on the record." *Id.* at 150.

The circuit court did not abuse its discretion when it revoked defendant's probation. We also find defendant's seven to fifteen year prison sentence proportionate. Defendant was sentenced by the circuit court for the original offense, criminal sexual conduct in the second degree. The circumstances surrounding this offense were particularly violent. Defendant broke into the home of a Homer schoolteacher, raped the schoolteacher at knifepoint, and forced her to perform oral sex. Defendant then left through the back door of the house, taking the mattress pad and sheets with him.

Defendant initially received probation, despite four prior misdemeanor convictions and an extensive juvenile history. During his sentencing, defendant was cautioned that "any failure to comply would result in a formal violation hearing." Yet, defendant violated the terms of his probation only two months after he was placed on probation.

We find the circuit court acted appropriately when it revoked defendant's probation. We also find defendant's sentence proportionate, particularly where there is a total absence of

mitigating factors, an escalating criminal history, and a failure to abide by the terms of probation, despite clear warnings.

Affirmed.

/s/ William B. Murphy

/s/ Richard Allen Griffin

/s/ Kurtis T. Wilder