

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT MARTINI MILLER, also known as
ROBERT MARTINIA MILLER,

Defendant-Appellant.

UNPUBLISHED

August 20, 2002

No. 233635

Jackson Circuit Court

LC No. 00-000030-FH

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ from his sentence of twenty-three months to five years following a entry of an order revoking his probation. We affirm.

On March 8, 2000, defendant pleaded guilty to carrying a concealed weapon. The guilty plea was the result of an agreement under which the prosecutor dismissed the charges of felon in possession of a firearm, receiving and concealing a stolen firearm, and habitual offender second offense. Because this offense was committed after January 1, 1999, the statutory sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). The statutory sentencing guidelines range is five to twenty-three months. Defendant was initially sentenced to three years' probation, with the first ninety days to be served in jail.

¹ Defendant originally filed a timely claim of appeal from the order revoking his probation. In an order entered March 20, 2002, this Court held that the appeal would be treated as an application for leave to appeal in light of the holding of *People v Kaczmarek*, 464 Mich 478; 628 NW2d 484 (2001), in which the Supreme Court held that a ruling that probation has been violated is not a new conviction for purposes of appellate review, and a defendant's right to an appeal of the decision is based on the underlying conviction. Because defendant's underlying conviction for carrying a concealed weapon was based on a guilty plea, which is appealable only by leave granted pursuant to MCL 600.308(2)(d), this Court concluded that any appeal of the probation violation order must also be by leave.

On February 1, 2001, the court found defendant guilty of three probation violations and sentenced defendant to twenty three months to five years' imprisonment. Defendant now seeks appellate review of his sentence, which he claims is disproportionate. Appellate review is precluded by MCL 769.34(10) and MCL 744.1.

Under the statutory guidelines, a sentence within the guidelines recommended range is not subject to appellate review for proportionality. MCL 769.34(7) and (10); *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000). MCL 771.4 provides in part: "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." It would be inconsistent with the Legislature's intent, as expressed in MCL 769.34 and MCL 744.1, to allow expanded review of a sentence imposed within the guidelines after probation is revoked when the sentence would not have been subject to judicial review for proportionality if imposed at the time of the initial sentencing.

Defendant asserts, incorrectly, that *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1997), stands for the proposition that the sentencing guidelines do not apply to probation violations. However, *Edgett* merely stands for the proposition that the sentencing guidelines should not be calculated for probation violation offenses. The guidelines must still be calculated for the underlying offense, and the resultant recommended range is applicable to any sentence imposed following a probation violation because under MCL 744.1, the court must sentence the defendant "in the same manner and to the same penalty" as the court might have done if the defendant had not received probation.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski