STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROBERT SINISHTAJ,

Defendant-Appellee.

UNPUBLISHED
October 26, 2004

No. 240705
Oakland Circuit Court
LC No. 99-168698-FH

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Defendant was placed on lifetime probation after pleading guilty to a charge of delivery or manufacture of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), an offense that occurred on September 11, 1999. On August 14, 2001, defendant pleaded guilty to a new charge of delivering less than fifty grams of a controlled substance. On January 10, 2002, defendant pleaded guilty of probation violation as a result of the August 14 plea[1] and was sentenced on January 24, 2002, to a prison term of four months to twenty years. The prosecutor appeals by leave granted, challenging the sentence imposed. We affirm.[2]

The prosecutor argues that when sentencing defendant for the probation violation the trial court was required by MCL 333.7401(2)(a)(iv) to impose a mandatory minimum sentence of one year. Issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mutual Automobile Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002).

At the time defendant committed the underlying drug offense, MCL 333.7401(2)(a)(iv) provided that a person found guilty of delivery or manufacture of less than fifty grams of cocaine

[1] Defendant also admitted that he violated his probation by turning in "a couple of dirty urine samples," failing to report to a class as required, and failing to obtain substance abuse treatment.

[2] Defendant's four-month sentence was consecutive to a one- to thirty-year sentence, and defendant was discharged from the jurisdiction of the Department of Corrections on September 2, 2004. This appeal is therefore moot because this Court cannot fashion a remedy. See *People v Green*, 260 Mich App 392, 414; 677 NW2d 363 (2004). However, because the issue raised is capable of repetition while evading appellate review, it is appropriate that it be addressed. *Franciosi v Parole Bd*, 461 Mich 347, 348; 604 NW2d 675 (2000).

"shall be imprisoned for not less than 1 year nor more than 20 years, and may be fined not more than $25,000, or placed on probation for life."[3] MCL 333.7401(4) authorized a departure from the mandatory one-year minimum sentence "if the court finds on the record that there are substantial and compelling reasons to do so." However, MCL 769.34(4)(b)[4] of the legislative sentencing guidelines provided strict guidance for the very crime defendant committed:

> If the offense is a violation of sections 7401(2)(a)(iv) or 7403(2)(a)(iv) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, and the upper limit of the recommended minimum sentence range is 18 months or less, the court shall impose a sentence of life probation absent a departure.

MCL 771.4 provides in pertinent 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.

Under MCL 771.4, a trial court can continue probation when sentencing a defendant for a probation violation. However, if the trial court revokes probation and resentences the defendant, the legislative sentencing guidelines control. *People v Hendrick*, 261 Mich App 673; 683 NW2d 218 (2004). Specifically, the *Hendrick* Court stated:

> As used in MCL 771.4, "may" indicates that the trial court has the discretion and authority to resentence the probationer after revoking his probation. Thus, the court may continue or extend probation, or the court may revoke probation and 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." MCL 771.4. Use of the permissive term "may" when describing the trial court's authority to resentence a probationer after revoking his probation does not excuse the trial court from complying with the Legislature's mandate in MCL 769.34(2) that the court must impose a sentence within the guidelines when the crime was committed on or after January 1, 1999. MCL 771.4 provides the trial court with the discretion to either continue probation or revoke probation and resentence the probationer. If the court elects to revoke probation and resentence the probationer, MCL 771.4 expressly requires the court to impose a sentence that was available at the time of the initial sentencing. If the underlying crime was an enumerated felony that was committed on or after January 1, 1999, the sentence that was available at the time of the initial sentencing was one that was governed by the legislative guidelines. [*Hendrick, supra* at 680-681.]

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[3] MCL 333.7401(2)(a)(iv) was amended by 2002 PA 665 to delete the mandatory one-year minimum sentence for delivery of less than fifty grams of cocaine. The statute now provides that the sentence will be for not more than 20 years, or a fine of not more than $25,000, or both.

[4] MCL 769.34(4)(b) was deleted by 2002 PA 666.

Following the probation violation the sentence imposed should be based on the original scoring for the underlying offense. *Hendrick, supra* at 681 n 5. The score defendant originally received placed him within a zero to eleven month sentencing range. Under MCL 771.4, defendant was to be sentenced following the probation violation "in the same manner and to the same penalty as the court might have done if the probation order had never been made." Thus, under MCL 769.34(4)(b), the trial court was required to sentence defendant to a sentence of lifetime probation absent a departure because the sentencing range was less than eighteen months.[5] Defendant was therefore entitled to a sentence of lifetime probation absent a departure. The prosecutor's contention that the sentence imposed was a downward departure from the mandatory one-year minimum sentence contemplated by MCL 333.7401(2)(a)(iv) is misplaced[6], and the requested relief of remand for entry of a mandatory sentence of one year is not indicated. While at first glance this result may seem illogical in that a trial court that revokes probation is required to again impose a sentence of lifetime probation under MCL 769.34(4)(b), the result is not illogical because MCL 771.4 allows for a resentence of lifetime probation and subsection 34(4)(b) authorizes a departure from lifetime probation. Departures are authorized under subsection 7401(2)(a)(iv) "if the court finds on the record that there are substantial and compelling reasons to do so."

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald

[5] It does not appear that the trial court was thinking in terms of an upward departure at the time it imposed the sentence. The court rejected the probation agent's recommendation of a minimum term of one year as "too much," noting in part that "we're not talking about a substantial amount of cocaine [approximately four grams]."

[6] Had defendant cross-appealed, he would have been entitled to resentencing to another term of lifetime probation absent a departure; however, an upward departure from lifetime probation to four months' incarceration would likely have been viewed as justified based on the probation violation. See *Hendrick, supra* at 683.