

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD JOSEPH HERZBERG, JR.,

Defendant-Appellant.

UNPUBLISHED

June 14, 2005

No. 255779

Saginaw Circuit Court

LC No. 01-020134-FH

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant was placed on two years probation following a plea of nolo contendere to one count of felonious assault, MCL 750.82. He also pleaded nolo contendere to one count of domestic violence, MCL 750.81(2), and was sentenced to ninety-three days in jail, with credit for time served. After revoking probation, the trial court sentenced defendant to two to four years' imprisonment with credit for 221 days he had previously served. Defendant now appeals by leave granted.¹ We affirm defendant's probation revocation, but remand for resentencing and a correction of defendant's judgment of sentence.

Defendant first argues there was insufficient evidence presented at the probation violation hearing for the trial court to conclude that he violated his probation. We disagree.

When reviewing a claim of insufficient evidence, we view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact would conclude that a preponderance of the evidence indicated that the defendant violated a condition of probation. *People v Reynolds*, 195 Mich App 182, 184; 489 NW2d 128 (1992). One term of defendant's probation was that he abide by the conditions of a personal protection order (PPO) that the victim, his then wife, had against him. Under the PPO, defendant was prohibited from communicating with the victim.

¹ This Court granted defendant's application for leave to appeal on January 18, 2005. *People v Herzberg*, unpublished order of the Court of Appeals, entered January 18, 2005 (Docket No. 255779).

In a separate contempt hearing, the court found defendant violated the PPO by asking his adult son to give a message to defendant's ex-wife. This conclusively established a probation violation. See *Carchman v Nash*, 473 US 716, 731; 105 S Ct 3401; 87 L Ed 2d 516 (1985) (a criminal conviction conclusively establishes a probation violation). The finding of criminal contempt was established beyond a reasonable doubt at a hearing at which the rules of evidence applied. MCR 3.708(H)(3). Because a probation violation finding need only be shown by a preponderance of the evidence in a hearing in which the rules of evidence do not apply, the finding of criminal contempt for violating the PPO conclusively established that defendant violated the probation condition that he abide by the PPO. Regardless, sufficient evidence was presented at the probation violation hearing to establish by a preponderance of the evidence that defendant attempted to communicate with the victim through their adult son in violation of the PPO.

Defendant next argues that the trial court erred when it departed from the sentencing guidelines without stating a substantial and compelling reason to do so on the record. We agree.

In reviewing a sentence where the trial court departs from the guidelines, the existence of a particular factor is reviewed for clear error, whether the factor is objective and verifiable is reviewed de novo, and whether the objective and verifiable factor constitutes a substantial and compelling reason to depart from the guidelines is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). This Court recently held in *People v Hendrick*, 261 Mich App 673, 675; 683 NW2d 218, lv gtd 471 Mich 914 (2004), that the legislative guidelines apply to sentences that are imposed after probation violations. Defendant's guidelines in this case were from zero to seventeen months. MCL 769.34(4)(a) provides as follows:

If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in [MCL 777.1 *et seq.*] is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

In sentencing defendant to two to four years in prison, the trial court explained the reasoning behind the sentence. However, it is not clear to us that the trial court understood that it was departing from the guidelines by not imposing an intermediate sanction, especially considering that when defendant was sentenced, *Hendrick* had not been decided and case law indicated that the sentencing guidelines did not apply to sentences imposed after probation revocations. See, e.g., *People v Smith*, 195 Mich App 147, 149; 489 NW2d 135 (1992). "An 'intermediate sanction' can mean a number of things, but it does not include a prison sentence." *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002). We cannot "affirm a sentence merely because we find there to be a substantial and compelling reason to depart from the guidelines. Rather, it is necessary that the trial court do so." *People v Johnigan*, 265 Mich App 463, 469; ___ NW2d ___ (2005). The trial court must not only articulate a reason for departing from the guidelines, "but it must also 'explain why this reason justified *that* departure.'" *Id.*, quoting *Babcock*, *supra* at 272. Therefore, although the trial court did explain the reasons it imposed the

sentenced that it did, the court did not explain why it found an intermediate sanction to be inadequate. As we stated in *Johnigan*, “while the reasons the trial court stated for the sentence imposed may well constitute substantial and compelling reasons for a departure, the trial court did not identify them as such because the trial court did not recognize that it was imposing a sentence that represented a departure from the guidelines.” *Johnigan*, *supra* at 477-478. Therefore, we remand the case to the trial court for resentencing.

We also agree that defendant’s sentence for domestic violence was invalid. Defendant’s amended judgment of sentence reflects that after the probation revocation, he was sentenced to two to four years’ imprisonment for the domestic violence conviction. Defendant was not placed on probation for the domestic violence charge because at the time of his original sentencing, he had already served the statutory maximum sentence for the charge. MCL 750.81(2). Therefore, the two to four year sentence on the domestic violence conviction that appears on the amended judgment of sentence is invalid. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). On remand, the amended judgment of sentence should be corrected to reflect that the sentence imposed for the probation violation was only for the felonious assault conviction.

Defendant’s probation revocation is affirmed, but we remand to the trial court for resentencing and a correction of defendant’s amended judgment of sentence. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff