

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN FRANCIS KIBILKO,

Defendant-Appellant.

UNPUBLISHED

October 28, 2008

No. 282959

Antrim Circuit Court

LC No. 06-004032-FH

Before: O’Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

Defendant appeals by leave granted his sentence of 24 to 48 months’ imprisonment for his plea-based conviction of one count of failure to pay child support, MCL 750.165. We affirm. This case has been decided without oral argument under MCR 7.214(E).

First, defendant argues that the trial judge improperly departed from the guidelines without articulating a substantial and compelling reason on the record. We review a trial court’s determination that there was a substantial and compelling reason to depart from the sentencing guidelines for an abuse of discretion. *People v Lowery*, 258 Mich App 167, 169; 673 NW2d 107 (2003). An abuse of discretion “occurs only when the trial court’s decision is outside the range of reasonable and principled outcomes.” *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

According to MCL 769.34(2), sentences imposed for felonies must be within the appropriate sentence range. However, a court may depart from the appropriate sentence range if there is a substantial and compelling reason and that reason is stated on the record. MCL 769.34(3).

A valid plea agreement is a substantial and compelling reason. “[A] sentence that exceeds the sentencing guidelines satisfies the requirements of MCL 769.34(3) when the record confirms that the sentence was imposed as part of a valid plea agreement.” *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005). In this circumstance, the trial court does not need to state any further substantial and compelling reasons to justify the departure. *Id.* Nevertheless, the sentencing information report should still be filled out “so that it is clear that the agreed-upon sentence constitutes a departure.” *Id.* at 154 n 1. Further, “a defendant waives appellate review of a sentence that exceeds the guidelines by understanding and voluntarily entering into a plea agreement to accept that specific sentence.” *Id.* at 154.

Here, defendant entered into a valid plea agreement on October 16, 2006. In the plea agreement, which was set forth on the record, the court agreed to delay defendant's sentence for one year, and defendant agreed to meet his child support obligations. According to the terms of the agreement, if defendant met his obligations, he would be given probation at the end of the year. If he did not meet his obligations, then the sentencing guidelines would be irrelevant and he would go to prison for the full minimum sentence that could be imposed on him legally.

Although defendant made three payments during the delay, he did not sufficiently meet his obligations to pay child support. On September 10, 2007, the trial court noted that defendant failed to fulfill the terms of the plea agreement and sentenced him to 24 to 48 months' imprisonment. This sentence was more lenient than the highest possible sentence that defendant could have received, which was 32 to 48 months' imprisonment under the two-thirds rule. See *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972).

The trial court made an allowable departure from the sentencing guidelines as a result of a substantial and compelling reason that was stated on the record, i.e., the express provision of the sentencing agreement, stipulating that defendant would be sentenced to prison and the sentencing guidelines would not be considered if he failed to meet his child-support obligations. There was no abuse of discretion.

Next, defendant argues that the sentencing departure violated the rule of proportionality. We review the proportionality of a sentence for an abuse of discretion. *People v Crawford*, 232 Mich App 608, 621; 591 NW2d 669 (1998).

A defendant who "pleads guilty . . . with knowledge of the sentence, and who later seeks appellate sentence relief under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), must expect to be denied relief on the ground that the plea demonstrates the defendant's agreement that the sentence is proportionate to the offense and offender." *People v Cobbs*, 443 Mich 276, 285; 505 NW2d 208 (1993). In this case, when defendant pleaded guilty, he agreed to be sentenced to the longest possible prison term if he did not meet his side of the plea bargain, although the trial court judge urged him not to accept the plea bargain unless he was sure he could get a job and make the payments. As discussed earlier, defendant's 24- to 48-month prison sentence is less than the maximum possible sentence. Because defendant was precluded from arguing that even the highest possible sentence would have been disproportionate because he agreed to the terms of the plea bargain, he cannot successfully claim that the sentence the trial court then imposed on him is disproportionately severe. There was no abuse of discretion.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher