

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW JEFFREY WOOLL,

Defendant-Appellant.

UNPUBLISHED

January 22, 2009

No. 279651

Alpena Circuit Court

LC No. 04-006014-FH

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

This case has been remanded for consideration as on leave granted by our Supreme Court. *People v Wooll*, 479 Mich 858; 735 NW2d 226 (2007). Defendant challenges his sentence of five to 20 years' imprisonment for his plea-based conviction of delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), following his conviction for probation violation. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In October 2004, defendant pleaded guilty to delivery of less than 50 grams of heroin. The trial court placed defendant on probation for two years under the Holmes Youthful Trainee Act (HYTA), MCL 762.11, and required defendant to serve 90 days in jail with work release. Defendant's first probation violation occurred in 2005 when he failed to report to his probation officer as required. Defendant pleaded guilty to the charge and the trial court sentenced defendant to serve three days in jail, but continued defendant's HYTA status. Following several additional violations of his probation, the trial court revoked defendant's HYTA status and sentenced defendant to five to 20 years' imprisonment for the original drug offense.

Defendant moved for resentencing in the trial court, arguing that the sentence imposed was based on inaccurate information involving the use of an incorrect guidelines range. The correct guidelines range to be applied was zero to nine months. However, during prior proceedings the trial court and attorneys incorrectly used the guidelines range of zero to eleven months. The trial court denied the motion for resentencing; noting that it would have exceeded the guidelines regardless of whether the correct range of zero to nine months had been used. Although the trial court did not specifically cite *People v Hendrick*, 472 Mich 555, 557; 697 NW2d 511 (2005), it specifically acknowledged the holding of that case regarding the application of the sentencing guidelines to probation violations, but indicated that the seriousness of defendant's offenses in repeatedly violating the terms of his probation permitted the court to "do what you could have done years ago, in other words, you can exceed the guidelines."

A trial court is mandated to impose a minimum sentence within the statutory guidelines range unless there exists “a substantial and compelling reason for th[e] departure and states on the record the reasons for departure.” MCL 769.34(3). “A substantial and compelling reason” has been defined as one that is (a) objective and verifiable, (b) keenly or irresistibly grabs the attention of the court, and (c) has “‘considerable worth’ in deciding the length of a sentence.” *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003) (citation omitted). This court has specifically determined that an “offender’s probation violation itself is an objective and verifiable factor worthy of independent consideration,” and that “the trial court in its discretion may conclude that th[is] factor provides a substantial and compelling reason to depart from the sentencing guidelines.” *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005). Specifically, “any probation violation represents an affront to the court and an indication of an offender’s callous attitude toward correction and toward the trust the court has granted the probationer.” *Id.* at 185-186.

We review de novo a trial court’s legal determination of whether a particular factor is objective and verifiable, *Babcock*, *supra* at 264-265, 273, and whether that factor constitutes a substantial and compelling reason to justify a guidelines departure for an abuse of discretion. *Id.* 264-265, 274.

Subsequent to his initial violation of probation in 2005, defendant absconded and did not report for probation for two additional periods in late 2005 and again in 2006, both necessitating the issuance of warrants for his arrest. Following his first arrest, defendant failed to appear in court for a hearing and another arrest warrant was issued. When arrested, defendant twice tested positive for heroin, cocaine and marijuana and was also found in possession of heroin on one occasion. In addition, defendant violated his probation by permitting a convicted felon to live in his home. A controlled buy occurred at defendant’s residence, involving other individuals, with the recovery of 25 packets of heroin from that location. Defendant was also charged, while on probation, with selling heroin. When defendant was arrested on March 10, 2006, after failing to appear in court, police found in his vehicle the dead body of another individual who had died of a drug overdose. In recorded jail conversations, defendant indicated to his girlfriend that he wanted “candy” (heroin) as soon as he was able to obtain bond and suggested to his mother that he would seek substance abuse treatment “so he could impress the judge.” The probation violation report recommended revocation of defendant’s HYTA status and sentencing exceeding the guidelines based on defendant’s repeated failure to make any “effort to rehabilitate himself,” his continued use, possession and sale of illegal drugs and because he “continued to be a danger to himself and the community.”

The trial court sufficiently articulated that it intended to depart from the sentencing guidelines based on the seriousness and frequency of defendant’s repeated violations of his probation. The probation violation report available to the trial judge delineated defendant’s ongoing use, possession and sale of illegal substances, in addition to numerous other violations of conditions imposed for his probation. Despite several opportunities provided by the trial court, defendant failed to demonstrate any rehabilitative potential and defendant’s criminal behavior appeared to be escalating. Further, the trial court clearly indicated that it would impose the same sentence regardless of its knowledge of the correct minimum guidelines range. “[W]hen a reviewing court determines that a sentencing court would prescribe the same sentence

notwithstanding a misunderstanding of the law or irregularity in the proceedings, the reviewing court may simply affirm the sentence.” *Schaafsma, supra* at 186.

Finally, defendant asserts on appeal that his sentence is disproportionate. This Court reviews a departure from the sentencing guidelines in accordance with the principle of proportionality, *Babcock, supra* at 264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), and the extent of a departure for an abuse of discretion, *Babcock, supra* at 264-265. The trial court sufficiently articulated that it would exceed the sentencing guidelines given defendant’s inability to conform his conduct to the restrictions of his probation and the seriousness of his repetitive violations, which “involved the use of a narcotic.” Because, as a matter of law, probation violations constitute objective and verifiable reasons for a departure from the sentencing guidelines and given defendant’s admitted repeated violation of the terms of his probation, we find the trial court did not abuse its discretion when it imposed a prison term of 5 to 20 years for defendant’s underlying conviction. *Id.* at 185-186.

Affirmed.

/s/ Michael J. Talbot
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher