

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY RANDOLPH HANEY,

Defendant-Appellant.

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UNPUBLISHED

January 26, 2010

No. 289382

Ionia Circuit Court

LC No. 2007-013562-FH

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant was convicted of operating a motor vehicle while intoxicated (OUIL), MCL 257.625(1), and malicious destruction of fire- or police-department property, MCL 750.377b. He was sentenced to two years' probation, with the first 204 days to be served in jail. On September 30, 2008, the trial court found defendant guilty of violating his probation after a hearing. Defendant was sentenced to 32 to 48 months in prison for the malicious destruction conviction and to time served for the OUIL conviction. Defendant appeals as of right. We affirm.

As a condition of probation, defendant was to complete an outpatient or residential substance abuse treatment program. During the probation violation hearing, a clinician at the Pine Rest Jellema Treatment center testified that defendant arrived at the facility for inpatient treatment on February 23, 2008. However, defendant did not complete the treatment and left the facility on May 7, 2008. When asked why, the clinician stated that defendant "made a decision to leave treatment against staff advice," after the clinician informed defendant that he would have to either discontinue using Oxycontin and Xanax while in treatment, or risk being medically discharged from the program. The clinician testified that the center would have attempted to assist defendant with managing his pain with non-narcotic painkillers. However, defendant testified that he believed that he had been medically discharged from the program because it could not accommodate his medical conditions, and that the actual discharge was a matter of completing paperwork.

Defendant first argues that the prosecutor failed to show that defendant had violated his probation by voluntarily leaving the treatment facility against staff advice. We disagree.

"The decision to revoke probation is a matter within the sentencing court's discretion." *People v Ritter*, 186 Mich App 701, 706; 464 NW2d 919 (1991). In order to revoke a

defendant's probation, "[t]here must be verified facts in the record from which the court can find by a preponderance of the evidence that a violation was committed." *People v Pillar*, 233 Mich App 267, 270; 590 NW2d 622 (1998). See also MCR 6.445(E)(1). Here, the evidence presented established that defendant's probation required him to attend inpatient or outpatient treatment when ordered to do so, and that defendant knowingly did not complete this treatment. While defendant and the clinician both testified that defendant's Oxycontin prescription was not compatible with enrollment in the program, the clinician testified that defendant had other alternatives to using the drug, and could have remained in the program had he chosen to do so. In addition, the clinician refuted defendant's claim that the clinician discharged defendant from the program. The clinician maintained that defendant left on his own. Witness credibility is the province of the factfinder. See *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). We find that defendant's claim of error is without merit.

Defendant next argues that the trial court erred when it sentenced defendant outside the sentencing guidelines of zero to nine months for his conviction for malicious destruction of property, without providing substantial and compelling reasons for its decision to depart. Where a trial court departs from the guidelines range at sentencing, this Court will review the issue regardless of whether the defendant has taken steps to preserve the issue for review. *People v Kimble*, 470 Mich 305, 311-312; 684 NW2d 669 (2004). However, unless the defendant has raised a challenge to the trial court's decision to depart from the guidelines range at sentencing, in a motion for resentencing, or in a motion to remand, this Court will review this issue under the plain error standard set forth under *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). *Kimble*, 470 Mich at 312. Here, defendant failed to assert that there were no substantial and compelling reasons for the trial court to depart from the guidelines. Thus, review is for plain error affecting defendant's substantial rights. *Id.*

A court may depart from the sentencing guidelines if it has substantial and compelling reasons to do so, and states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from the sentencing guidelines based on an offense or offender characteristic already considered in determining the guidelines unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). This Court also reviews a departure from the guidelines to determine whether the sentence imposed is proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock*, 469 Mich at 263 n 20, 264. See also *People v Smith*, 482 Mich 292, 298-300, 318-319; 754 NW2d 284 (2008).

Here, the trial court based its decision to depart on defendant's repeated probation violations while on probation for the instant offense, as well as defendant's continued drug and alcohol use, after finding that these factors were not adequately accounted for in the guidelines. The trial court's reasons for departure were objective and verifiable. Defendant's repeated probation violations, including his continued cocaine and Oxycontin use, are well documented in his presentence investigation report and in the hearing transcript.

A trial court is permitted to take into account a defendant's attitude toward his criminal behavior, his social and personal history, and his criminal history, including subsequent offenses, when imposing a sentence. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). Moreover, a defendant's conduct while on probation, including the conduct of the violation itself, may serve as a substantial and compelling reason for departure. *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005). Defendant's history and his callous disregard for the boundaries set by the trial court and the probation department underscores his inability to conform his conduct to the rules of society, and support the trial court's decision to depart. See, generally, *People v Hansford*, 454 Mich 320, 326; 562 NW2d 460 (1997).

The extent of the departure is substantial, especially in light of the maximum sentence allowable for the offense. However, under the *Carines* standard of review appropriate here, defendant has not shown that the extent of departure was clearly disproportionate to the offense and the offender, given defendant's two previous chances at probation and his attitude toward the court's previous attempts to rehabilitate him.

Affirmed.

/s/ Pat M. Donofrio  
/s/ Patrick M. Meter  
/s/ Christopher M. Murray