

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MARTIN BURKE,

Defendant-Appellant.

UNPUBLISHED

February 10, 1998

No. 196033

Macomb Circuit Court

LC No. 93-003086 FH &

95-000061 FH

Before: Gage, P.J., and Murphy and Reilly, JJ.

MEMORANDUM.

After pleading guilty to separate charges of delivery of controlled substances under 50 grams in violation of §7401(2)(a)(iv) of the Public Health Code, defendant was placed on lifetime probation as to each charge. His probation was subsequently amended after he violated one of the initial terms, participation in the special alternative incarceration program (boot camp), MCL 771.3a; MSA 28.1133(1).

On February 7, 1996, defendant was charged with probation violation for having failed to report to his probation officer, as required, since November 5, 1995. At a formal hearing on this charge, at which defendant was represented by counsel, it was established that, following an injury to defendant's shoulder in a motor vehicle accident, he telephoned his probation officer on or about November 5, 1995, and received permission not to physically report while disabled. However, the probation officer testified that within a few days defendant had been released from the hospital, and was not staying at the residence registered with the probation office. Defendant did speak with his probation officer again in December, 1995, at which time he was given no further dispensation from his reporting obligations. Nonetheless, he failed to report that month or in January, 1996, as well as each subsequent month up to the date of the hearing. The trial court noted that, even excusing defendant for November and December, 1995, his subsequent failure to report, even by telephone, was neither excused nor justified, and that he was therefore guilty of violating his probation. Defendant argues that he was found guilty of failing to report in months subsequent to the date the probation violation charges were filed, but the record contradicts this contention. The trial court therefore did not improperly find defendant guilty

of probation violation based on conduct not charged in the petition. *Cf. People v Longmier*, 114 Mich App 351; 319 NW2d 579 (1982).

Because of the jurisdictional nature of the issue, this Court is obliged to *sua sponte* note that, following the probation violation adjudication, defendant received concurrent sentences of 3 to 20 years on each charge. On being advised by the Department of Corrections that consecutive sentences are mandated by §7401(3) of the Public Health Code, the trial court initially amended the sentences to run consecutively. Defendant then requested “correction” of the sentences so that the minimum terms would not add up to more than three years, and the trial court, without holding any formal hearings, imposed new judgments of sentence of 1½to 20 years on each count. This was error. Where a sentence is valid, the trial court is without power to correct or amend it; if the sentence is invalid, it must be corrected or amended. *People v Mitchell*, 454 Mich 145; ___ NW2d ___ (1997).

However, where the invalidity is in imposing concurrent sentences where consecutive sentences are mandated, the only acceptable method of correction is resentencing, at which both the defense and the prosecution may be heard to allocute concerning the parameters of consecutive sentences. *People v Thomas*, 223 Mich App 9; ___ NW2d ___ (1997); *People v Mapp*, ___ Mich App ___; ___ NW2d ___ (No. 186050, July 8, 1997). Accordingly, defendant’s sentences are vacated and the cause is remanded to the Macomb Circuit Court for resentencing.

Probation violation adjudication affirmed; sentences vacated and cause remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage

/s/ William B. Murphy

/s/ Maureen Pulte Reilly