

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EMMETT ALLEN LUBERDA,

Defendant-Appellant.

UNPUBLISHED

July 10, 1998

No. 201795

Livingston Circuit Court

LC No. 91-006483 FH

Before: Murphy, P.J., and Young, Jr. and M. R. Smith*, JJ.

MEMORANDUM.

After his original jury convictions were reversed on prior appeal of right, Docket No. 147092, defendant pleaded nolo contendere to criminal sexual conduct in the second-degree, MCL 750.520c; MSA 28.788, third-degree child abuse, MCL 750.136b(4); MSA 28.331(2)(4), and to being a second offender, MCL 769.11; MSA 28.1083. The plea was a result of a bargain, pursuant to which it was agreed defendant would be placed on five years' probation.

Subsequently, on May 9, 1996, defendant was adjudicated guilty of violating his probation and sentenced to terms of imprisonment, of two to three years for child abuse, as enhanced by his second offender status, and seven to fifteen years, as enhanced, for the second-degree criminal sexual conduct offense. Defendant now appeals by right. We affirm.

In a brief citing no pertinent authorities, defendant contends that because the order of probation was not filed until April 11, 1996, with the clerk of the circuit court, it did not become valid until that time, and his violation of the terms of that order prior to that date cannot serve as the basis for adjudication as a probation violator. He further contends that because the proceedings subsequent to entry of his pleas were never properly completed, he was never advised of his appellate rights and deprived of the opportunity for appellate review under the then applicable provisions of Const 1963, art 1, § 20. We disagree.

* Circuit judge, sitting on the Court of Appeals by assignment.

The record contains a transcript of February 9, 1995, at which the trial court sentenced defendant to five years' probation, with numerous special conditions. At the conclusion of this sentencing proceeding, defendant was advised of his appellate rights, which he failed to exercise. On the same date, defendant signed the two-page order of probation, placing his signature on each page of that order, and acknowledging that "I have read or heard the above order of probation and have received a copy. I understand and agree to comply with this order." Accordingly, any contention that defendant was unaware of the terms of the probationary sentence is insupportable in the face of the record.

The record fails to indicate why the order of probation was not timely entered. Defendant indicates that the trial judge became ill shortly after the sentencing, and this may explain why a substitute, a retired Ingham Circuit Judge, signed the order of probation on February 21, 1995. The delay in filing the signed order is unexplained, but the reasons for this omission are unimportant. Where, as here, a judgment has been rendered and signed by the presiding judge or his substitute or successor, but not filed with the clerk, it may be entered nunc pro tunc on discovering the omission of the clerk to record it or the judge to file it. *Shifferd v Gholston*, 184 Mich App 240; 457 NW2d 58 (1990); *Newton v Newton*, 166 Mich 421; 132 NW 91 (1911); *In re Shepard*, 109 Mich 631; 67 NW 971 (1896). As the actions of defendant forming the gravamen of the probation violation charge occurred subsequent to February 21, 1995, he has been properly adjudicated a probation violator and his consequent sentences were therefore properly imposed.

Affirmed.

/s/ William B. Murphy
/s/ Robert P. Young, Jr.
/s/ Michael R. Smith