

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN RICHARD AKERS,

Defendant-Appellant.

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UNPUBLISHED

March 16, 2001

No. 221845

Calhoun Circuit Court

LC Nos. 93-003146-FH

93-003147-FH

Before: Griffin, P.J., and Neff and White, JJ.

PER CURIAM.

In each of these consolidated cases defendant was found guilty of probation violation, his sentences of lifetime probation were revoked and he was sentenced to two consecutive prison terms of three to twenty years on his underlying convictions of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant appeals as of right and challenges the sufficiency of the evidence and the propriety of requiring his instant sentences to run consecutively to an unrelated federal sentence. We affirm defendant's convictions for probation violation, but remand for resentencing.

I

Defendant claims the evidence was insufficient to sustain the trial court's finding, by a preponderance of the evidence, that defendant violated the terms of his lifetime probation by delivering cocaine to a confidential informant. We disagree.

Probation violation proceedings are a two-step process: (1) a factual determination that a defendant is in fact guilty of violating probation, and (2) a discretionary determination of whether the violation warrants revocation. *People v Pillar*, 233 Mich App 267, 269; 590 NW2d 622 (1998). Factual findings of the trial court are reviewed for clear error. *People v Thenghkam*, 240 Mich App 29, 43-47; 610 NW2d 571 (2000). The prosecution has the burden of proving violation by a preponderance of the evidence. MCR 6445(E)(1). The trial court's decision to revoke probation is reviewed for an abuse of discretion. *People v Ritter*, 186 Mich App 701, 706; 464 NW2d 919 (1991).

In the present case the testimony of the police officer working with the confidential informant and the statements made by the informant immediately after she purchased cocaine from defendant establish by a preponderance of the evidence that defendant violated the terms of his lifetime probation. Moreover, although we recognize that the informant gave testimony at the probation violation hearing contrary to her written statement which was admitted in evidence, we note that the trial court clearly rejected the informant's testimony as "far fetched." The trial court was in a unique position to observe the informant's demeanor and determine her credibility. We do not resolve credibility challenges anew. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Accordingly, defendant's challenge to the sufficiency of the evidence fails.

Defendant also argues that he was not accorded due process when the trial court arbitrarily chose to credit the out-of-court inculpatory statement of the informant over the informant's exculpatory testimony in court. Again, we disagree. To satisfy due process, a finding of a probation violation must be based on "verified facts" and the decision to revoke probation must be based on "accurate knowledge of the [probationer's] behavior." *People v Pillar, supra* at 269-270. Our review of the record reveals that the trial court's lengthy statement finding defendant guilty of violating probation relied on verified facts including the testimony of the two state troopers about the events of the controlled buy, and the possession of cocaine by the confidential informant after the buy, all of which were corroborated by the informant's statements to officers shortly after the buy. Moreover, the decision of the trial court to revoke defendant's probation was based on an accurate knowledge of defendant's behavior. Accordingly, defendant has failed to demonstrate a due process violation.

## II

Finally, defendant argues that statutory authority does not exist to permit defendant's state sentences to run consecutively to his federal sentence. We disagree. The sentences on the present convictions are required by MCL 333.7401(3); MSA 14.15(7401)(3) to be consecutive to each other, and are required to be consecutive to the federal term of imprisonment that defendant was under at the time sentence was imposed for the present offenses. *People v Lee*, 233 Mich App 403, 406; 592 NW2d 779 (1999); *People v Hughes*, 217 Mich App 242, 245; 550 NW2d 871 (1996). However, the trial judge did not address the issue of whether the state sentences would run consecutively to the federal sentences at sentencing and the judgments of sentence entered in these cases do not order that defendant's sentences be served consecutively to his federal sentence. Under these circumstances, we must remand for a resentencing hearing to consider this issue. *People v Turner*, 459 Mich 928; 589 NW2d 288 (1998); *People v Burton*, 459 Mich 876; 585 NW2d 303 (1998).

Defendant's convictions for probation violation are affirmed and each case is remanded to the trial court for resentencing. We do not retain jurisdiction.

/s/ Richard Allen Griffin  
/s/ Janet T. Neff  
/s/ Helene N. White