STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2004
v	No. 250026 Wayne Circuit Court
TIMOTHY MICHAEL STAPULA, Defendant-Appellant.	LC Nos. 89-013598 ; 89-013600

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from plea-based convictions of possession of less than fifty grams of cocaine with intent to deliver, MCL 333.7401(2)(a)(iv), for which he was sentenced to eighteen months to twenty years in prison following a determination that he violated the terms of his probation. We affirm but remand for recalculation of credit for time served with respect to the judgment of sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court erred in denying his motion to withdraw his plea to violation of probation. A motion to withdraw a guilty plea after sentencing is a matter within the trial court's discretion. *People v Davidovich,* 238 Mich App 422, 425; 606 NW2d 387 (1999), aff'd 463 Mich 446; 618 NW2d 579 (2000). This Court "will not disturb the trial court's decision unless the court clearly abused its discretion, resulting in a miscarriage of justice." *Id.*

We note that defendant's probation was revoked because he admitted to having acquired new criminal convictions while on probation and to failing to report. While defendant challenges the plea proceeding as to the charge of failure to report, the validity of the remainder of his plea is uncontested. Defendant's admission of guilt as to that aspect of the charge was sufficient in itself to support the court's decision to revoke probation. *People v Billy Williams,* 66 Mich App 67, 71; 238 NW2d 407 (1975). That aside, we find defendant's claim of error to be without merit. A review of the transcript shows that he did not simply admit his guilt to the failure to report charge, he admitted that he failed to appear on his scheduled report date due to a lack of transportation and instead reported the following week. Thus, defendant provided an adequate factual basis for his plea to failure to report. *People v Brownfield (After Remand),* 216 Mich App 429, 431; 548 NW2d 248 (1996).

Defendant next contends that he is entitled to resentencing because his sentence was disproportionate.[1] "Sentencing issues are reviewed by this Court for an abuse of discretion by the trial court." *People v Garza*, 246 Mich App 251, 256; 631 NW2d 764 (2001). "A trial court abuses its discretion when it imposes a sentence that is not proportional to the seriousness of the circumstances surrounding the offense and the offender." *Id.*

Given that the offenses carried a mandatory minimum sentence of one year,[2] that another controlled substance charge was dismissed as part of the plea bargain, that defendant had been convicted of violation of probation three times and such violations were predicated in part on convictions of at least four new offenses, and that, according to the presentence report, defendant repeatedly violated probation after random drug testing was eliminated by using marijuana on a regular basis until May 2002, defendant's minimum sentence of eighteen months was not disproportionate. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant lastly contends that he is entitled to have the judgment of sentence amended regarding the number of days' credit for time served. Defendant did not raise this issue below and thus it has not been preserved for appeal. *People v Connor*, 209 Mich App 419, 431; 531 NW2d 734 (1995). Therefore, defendant must establish plain error that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing." MCL 769.11b. This statute authorizes credit for time served on the offense of which the defendant is ultimately convicted. *People v Givans*, 227 Mich App 113, 125-126; 575 NW2d 84 (1997). If a defendant is incarcerated because of a sentence on another conviction, he is not entitled to credit. *Id.*

The presentence report indicates that these were defendant's first offenses. The record shows that bond was originally set at $100,000 or ten percent at arraignment on October 28, 1989. It was reduced on November 3, 1989, to $50,000/ten percent and reduced again on December 5, 1989, to $10,000/ten percent, at which time defendant posted bond. At the original sentencing date, defense counsel asserted that defendant had "served 39 days on these matters," the exact number of days between October 27th, the date of the offense in case 89-013600 and defendant's arrest, and December 5th, and the order of probation does contain the notation "39 da

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[1] Defendant committed the underlying offenses in October 1989 and thus the legislative sentencing guidelines are not applicable. MCL 769.34(1) and (2). The judicial sentencing guidelines were in effect, but they did not apply to sentences imposed upon violation of probation. *People v Hendrick*, 261 Mich App 673, 677; 683 NW2d 218 (2004); *People v Reynolds*, 195 Mich App 182, 184; 489 NW2d 128 (1992).

[2] Although the mandatory minimum sentence of one year was deleted from MCL 333.7401(2)(a)(iv) by 2002 PA 665, effective March 1, 2003, it is applicable here as the crime was committed in 1989 and the statutory amendment in regard to sentencing does not apply retroactively. *People v Doxey*, 263 Mich App 115, 123; 687 NW2d 360 (2004).

cr" beneath the probation term. The presentence report prepared for the June 2003 sentencing date indicated that defendant was entitled to three days' credit for time served, two days for October 27-28, 1989, and one day for May 15, 2003. Because it appears that defendant was incarcerated from October 27 to December 5, 1989, and again on May 15, 2003, due to his inability to furnish bond in these cases, the calculation of sentence credit at three days would constitute plain error that prejudiced defendant. Therefore, we remand for recalculation of credit for time served, which shall then be reflected in an amended judgment of sentence.[3]

Affirmed but remanded for recalculation of credit for time served. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly

[3] Of course, should the sentencing court, after review of the pertinent documents and any relevant evidence, determine that the credit for three days was proper, the judgment of sentence need not be amended.