

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY PAUL RHODY,

Defendant-Appellant.

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UNPUBLISHED  
February 26, 2009

No. 282870  
Genesee Circuit Court  
LC No. 01-007617-FC

Before: Whitbeck, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his plea-based conviction of criminal sexual conduct in the second degree (CSC II), MCL 750.520c(1)(a), and the sentence of 96 to 180 months in prison imposed following a conviction of probation violation. We affirm defendant's conviction and sentence, but vacate that portion of the judgment of sentence requiring defendant to pay court-appointed counsel fees, and remand for further proceedings consistent with this opinion.

Defendant was charged with one count of criminal sexual conduct in the first degree, MCL 750.520b(1)(a), and one count of CSC II for engaging in sexual penetration and sexual contact with a nine-year-old girl in October 2000. In 2001 defendant pleaded guilty to CSC II, and was sentenced to five years' probation, with the first year in jail.

In June of 2002, defendant pleaded guilty to violation of probation. Because defendant intended to move to Missouri, the trial court continued probation and remanded defendant to jail pending the move. Defendant was unable to move to Missouri as planned; therefore, the trial court, over defendant's objection, revoked probation and sentenced defendant to 36 to 180 months in prison. The trial court denied defendant's postjudgment motion to withdraw his plea. Subsequently, due to irregularities in the plea proceeding, a panel of this Court reversed the trial court's decision, and remanded to allow defendant to withdraw his plea to violation of probation.<sup>1</sup>

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<sup>1</sup> *People v Rhody*, unpublished per curiam opinion of the Court of Appeals, issued March 15, 2005 (Docket No. 251664).

On remand, defendant withdrew his plea. After a hearing on June 20, 2005, defendant was found guilty of violating his probation, and was sentenced to 60 months' probation and placement on a tether for six months. In 2006, defendant again violated his probation, and was sentenced on November 16, 2006, to extended probation and placement on a tether for a further six months.

In 2007, defendant pleaded guilty to violating the terms of his probation. During sentencing on August 30, 2007, the prosecution noted that, in addition to the instant violation, defendant had pleaded guilty to possession of less than 25 grams of cocaine. The trial court departed from the guidelines range of 12 to 24 months, and sentenced defendant to 96 to 180 months in prison.

Defendant first argues that the trial court erred when it exceeded the guidelines. 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 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*, *supra* at 263 n 20, 264. See also *People v Smith*, 482 Mich 292, 298-300, 318-319; 754 NW2d 284 (2008).

In reviewing a departure from the guidelines, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *Babcock*, *supra* at 264-265; *Abramski*, *supra* at 74. In ascertaining whether the departure was proper, this Court defers to the trial court's knowledge of the facts and familiarity with the offender. *Babcock*, *supra* at 270.

Defendant contends that his failures as a probationer were clearly the result of his mental limitations,<sup>2</sup> and that the criminal justice system is a flawed instrument with which to deal with mentally disabled probationers. He also maintains that his 2007 probation violations do not warrant the extent of the imposed departure, and that a number of the trial court's findings were speculative, and unverified.

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<sup>2</sup> Defendant sustained a closed head injury in a 1979 car accident.

We disagree. The trial court's reasons for departure were objective and verifiable. Defendant's repeated probation violations, his activities with prostitutes, and his continued cocaine and alcohol use are well documented in his presentence investigation report (PSIR). Contrary to defendant's assertion, the trial court's finding that defendant was exchanging cocaine for sex is also supported by defendant's statement to his probation officer following an earlier probation violation. Defendant's improper advances toward an employee at the probation department and a clerk at defendant's bank are also set forth in the PSIR.<sup>3</sup>

Defendant's history demonstrates that repeated terms of probation and other alternative sentencing have had no positive effect on his behavior, and have not served to curb his alcohol or cocaine use. 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 repeated, utter disregard for any boundaries set by the trial court or the probation department underscores his inability to conform his conduct to the rules of society, and support the trial court's decision. See *People v Hansford*, 454 Mich 320, 326; 562 NW2d 460 (1997). The extreme extent of defendant's "callous attitude toward correction and toward the trust the court has granted the probationer", *Schaafsma, supra* at 186, keenly grabs one's attention. We also find the imposed sentence proportionate under the circumstances. Thus, we find no error in the trial court's sentencing decision.

Defendant also argues that the trial court erred when it ordered him to pay \$500 in attorney fees without inquiring into his ability to pay. We agree. *People v Trapp*, 280 Mich App 598, 601; \_\_\_ NW 2d \_\_\_ (2008), citing *People v Arnone*, 478 Mich 908; 732 NW2d 537 (2007); *People v Dunbar*, 264 Mich App 240, 254-256; 690 NW2d 476 (2004).

We affirm defendant's conviction and sentence, but vacate that portion of the judgment of sentence requiring defendant to repay his court-appointed attorney fees, and remand with instructions that the trial court consider the attorney fees in light of defendant's ability to pay. An evidentiary hearing is not required on remand. The trial court can instead rely on updated financial information provided by the probation department. *Trapp, supra* at 601; *Dunbar, supra* at 255 n 14. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Donald S. Owens

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<sup>3</sup> The trial court also noted that it was concerned that defendant's self-destructive behavior might cause him to contract a venereal disease. However, contrary to defendant's assertion on appeal, this does not appear to have been used as a justification for the sentence.