

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 22, 2011

v

ANTHONY L. JOHNSON,

Defendant-Appellant.

No. 301541
Wayne Circuit Court
LC No. 03-010036-FH

Before: SERVITTO, P.J., and MARKEY and K.F. KELLY, JJ.

PER CURIAM.

Defendant pleaded guilty to a charge of probation violation. His probation was revoked and he was sentenced to a prison term of 17 to 60 months on the underlying convictions. Defendant now appeals as of right. MCR 6.445(H)(1)(a). We vacate and remand for resentencing.

I. PROCEDURAL BACKGROUND

Following a jury trial, defendant was convicted of failure to stop at the scene of a serious injury accident, MCL 257.617, and driving while license suspended, MCL 257.904(3)(b). A Presentence Investigation Report (PSIR) provided for a minimum sentence of 0-17 months. At sentencing, defendant was ordered to pay \$5,000 in restitution and sentenced to 60 months' probation with the first 12 months to be served in jail. The restitution was due and the jail term was to commence on January 23, 2004, though the court said it would reconsider the jail term if the restitution was paid by January 16, 2004. Defendant failed to pay and failed to appear at the continued sentencing hearing held on January 23, 2004. Defendant was not apprehended until October 1, 2010.

Defendant pleaded guilty to violating probation. At the plea hearing, the following exchange took place between the trial court and defendant:

THE COURT: Okay. Why didn't you show back up?

DEFENDANT JOHNSON: On the day that I was supposed to show back up, what I can recall back then is you had informed me to go get some of the – to go get the rest of the money. I came into the court with a cashier's check for three

thousand dollars, and I had bonds for twenty-five hundred. It was with Third Circuit Court.

And I went to borrow the rest of the money. My attorney told me I couldn't use any of my cash that I had and bonds toward my – toward my fines and costs and things; that I couldn't use it.

I mean, when I came in that day, I had a total of about five grand, actually.

THE COURT: So you came in that day?

DEFENDANT JOHNSON: No. I mean, the day that – the last day I spoke with you. The last day that you let me out the door I had that money and bonds in my hand, and some cash with me in the form of a cashier's check.

THE COURT: And? So, why didn't you come back, is what I'm trying to find out?

DEFENDANT JOHNSON: I felt my attorney was not representing me properly . . .

. . .

THE COURT: Okay. [Defendant] didn't show up because he got poor advice from his attorney. All he had to do was to walk into this court and tell us his problem that day, but he didn't do that.

A new PSIR was prepared. The minimum sentencing guidelines for the original failure to stop offense remained the same – 0 to 17 months. Defendant was re-sentenced on October 18, 2010. The trial court stated:

THE COURT: I'm going to tell you, because of the disrespect shown – see, it's a very strange thing. Think about this. There was an accident, and he left the scene of a serious accident which resulted in the death of a person.

He comes in for trial. He gets convicted. We do a partial sentencing and give him some time to come up with the money to make restitution to the alleged victim. He faints here in the courtroom. Then he doesn't come back. Once again, leaving the scene.

Excuse me. What do you want to say now?

DEFENDANT JOHNSON: Ma'am, when I came here I had the restitution money when I came in for the first time. I had then \$2,500 in bond, and I had a cashier's check for \$3,000 that day.

THE COURT: And?

DEFENDANT JOHNSON: I was wondering why –

THE COURT: Did I know you had that in your pocket?

DEFENDANT JOHNSON: Yes, because I told Mister –

THE COURT: No, no. Did I know you had that in your pocket? Did you tell the Court, “Well, Judge, I can pay the restitution today”?

DEFENDANT JOHNSON: You told me not to talk. You told me to be quiet that day.

THE COURT: No.

DEFENDANT JOHNSON: But I held the money up. I said, “I have the money. I have the money.” I had a cashier’s check in one hand for three grand. I swear to God, I did.

THE COURT: Okay. Yeah, all right. Anything else? That’s why you didn’t come back the day that you were supposed to make the payment; right?

DEFENDANT JOHNSON: I wanted to hire another attorney because I kept trying to correspond with him, and it just didn’t – I mean, he didn’t provide anything for me at that point.

But this restitution here today, this right here, I can – I can get this. I can get this.

THE COURT: Anything else?

DEFENDANT JOHNSON: Ma’am, I apologize for any disrespect that I may have caused.

The trial court then sentenced defendant to 17 to 60 months in prison on the underlying failure to stop at the scene of a serious injury accident conviction and to time served on the underlying conviction of driving while license suspended.

II. RESTITUTION

Defendant first argues that he was given a higher sentence due to indigency and his inability to pay restitution. We disagree. We review this constitutional issue de novo. *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009).

MCL 780.766(14) provides:

Notwithstanding any other provision of this section, a defendant shall not be imprisoned, jailed, or incarcerated for a violation of probation or parole or otherwise for failure to pay restitution as ordered under this section unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not

made a good faith effort to do so.

Thus, defendant could not be incarcerated for failing to pay restitution in the absence of a determination that he had the ability and resources to pay the restitution, but failed to make a good faith effort to do so. *People v Gahan*, 456 Mich 264, 277; 571 NW2d 503 (1997). That defendant would receive a suspended sentence for payment of restitution is no different from defendant being incarcerated for failing to pay. This Court has explained:

The sentencing order that allowed defendant reduced jail time if he paid restitution is not materially different from a sentence order that would require defendant to serve additional jail time if he did not pay restitution. Regardless of how the trial court phrases its order, the result is a shorter term for defendant if he can and does pay, a longer term if he cannot and does not pay - a result clearly prohibited by the Equal Protection Clause and the statute. Accordingly, defendant cannot be required to serve the “suspended” portion of the jail sentence absent a finding that he had the ability to pay and was in wil[1]ful default. [*People v Collins*, 239 Mich App 125, 136; 607 NW2d 760 (1999).]

However, in this particular case, the record is clear that defendant’s ability or inability to pay restitution played no part in the resentencing proceedings. The trial judge disregarded defendant’s assertion that he was willing and able to pay his remaining restitution, stating “it’s not about the restitution.” Further, as set forth above, defendant’s repeated assertions that he could pay restitution in 2004 defeat his argument; if he had the ability to pay and refused or neglected to do so, the non-payment was willful. The imposition of a higher sentence for a willful failure to pay restitution is not a violation of due process or equal protection. See *Tate v Short*, 401 US 395, 400; 91 S Ct 668; 28 L Ed 2d 130 (1971).

III. SENTENCING DEPARTURE

Defendant next argues that he must be resentenced because the trial court did not articulate substantial and compelling reasons for its departure from the sentencing guidelines, nor did it give justification for the extent of the departure. We agree.

Sentencing guidelines apply to sentences imposed after a probation violation. *People v Hendrick*, 472 Mich 555, 557; 697 NW2d 511 (2005). The sentencing guidelines in this case provided for a 0 to 17 month minimum sentence, which falls into an intermediate sanction cell. *People v Harper*, 479 Mich 599, 617-618; 739 NW2d 523 (2007). MCL 769.34(4)(a) provides:

(4) Intermediate sanctions shall be imposed under this chapter as follows:

(a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

A court may depart from sentencing guidelines if it has a substantial and compelling reason to do so that is objective and verifiable, and the court clearly states that reason on the record sufficiently to allow for effective appellate review. *People v Smith*, 482 Mich 292, 299, 303; 754 NW2d 284 (2008); *People v Babcock*, 469 Mich 247, 256-257; 666 NW2d 231 (2003). The sentence must also be proportionate to the gravity of the crime in light of the defendant's criminal history. *Smith*, 482 Mich at 299-300; *Babcock*, 469 Mich at 262. Here, the trial court could not impose a prison sentence on defendant without adequately articulating substantial and compelling reasons for departing from the guidelines and for the extent of the departure.

Probation violation may constitute substantial and compelling reason for departure. *Hendrick*, 472 Mich at 557; *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005). However, it is not enough that an adequate reason exists for a departure from the guidelines range; rather, the sentencing court must articulate the reasons for the departure on the record. *Babcock*, 469 Mich at 258. This Court may not affirm a sentence simply because a reason exists for departure if that reason is not stated clearly on the record by the sentencing court. *Id.* at 258-259. Here, the sentencing court did not clearly articulate that it was deviating from the guidelines based on defendant's probation violation. While such a justification may have been warranted under the circumstances, because the sentencing court did not specifically articulate its reasons for departing from the sentencing guidelines, we must remand for resentencing.

Vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly