

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EMANUEL WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

August 6, 2013

No. 306987

Wayne Circuit Court

LC No. 04-017409-FC

Before: JANSEN, P.J., and CAVANAGH and MARKEY, JJ.

PER CURIAM.

In 2005, defendant, who was 13 years of age when the offenses were committed, was tried as an adult, MCL 712A.2d, for first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), and carjacking, MCL 750.529a. The jury convicted defendant of first-degree felony murder and carjacking, but found him not guilty of first-degree premeditated murder. The circuit court imposed a blended sentence, pursuant to MCL 712A.18(1)(m), initially committing defendant to a high-security juvenile facility and placing him on probation. Then, in 2011, the circuit court imposed a prison sentence of 15 to 30 years for the carjacking conviction.¹ Defendant appeals as of right, and we affirm.

This case arises from a carjacking and shooting in Detroit on September 12, 2004. Defendant first argues that the lack of formal procedure, notice, and findings with respect to the circuit court's revocation of his juvenile sentence violated his rights to due process under the United States and Michigan Constitutions. We disagree.

To preserve a due-process issue for appellate review, a defendant must raise the issue in the trial court. *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). Because defendant did not object in the circuit court or move for resentencing on the basis of a due process violation, this issue is not preserved for appellate review. Unpreserved claims of constitutional error are reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). A plain error affects a

¹ No adult prison sentence was imposed for defendant's conviction of first-degree felony murder.

defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012).

The United States Constitution prohibits governmental actions that “deprive any person of life, liberty, or property, without due process of law,” US Const, Am XIV, and the Michigan Constitution provides that “[n]o person shall be . . . deprived of life, liberty[,] or property, without due process of law,” Const 1963, art 1, § 17. The circuit court has many options for deciding the fate of juveniles within its jurisdiction, including the imposition of a blended sentence, which allows the court to

delay imposing a sentence of imprisonment . . . for a period not longer than the period during which the court has jurisdiction over the juvenile under this chapter by entering an order of disposition delaying imposition of sentence and placing the juvenile on probation upon the terms and conditions it considers appropriate If the court delays imposing sentence under this section, [MCL 712A.18i] applies. [MCL 712A.18(1)(m).]

The delayed sentence may be imposed following a finding at a regularly scheduled review “that the juvenile has not been rehabilitated or . . . presents a serious risk to public safety,” MCL 712A.18i(3); see also MCR 3.956(A)(1)(a)(i), or on the basis of a probation violation, MCL 712A.18i(9)-(10); see also MCR 3.956(B). In addition, the court must conduct a final review of the juvenile's probation “not less than 91 days before the end of the probation period,” MCR 3.956(A)(1)(a)(iv), and annual reviews, MCR 3.956(A)(1)(a)(i). Notice of review hearings must be provided to the prosecuting attorney, the agency to which the juvenile has been committed, the juvenile, and the juvenile's parent, guardian, or legal custodian, clearly indicating that “the court may extend jurisdiction over the juvenile or impose sentence” and that the juvenile has a right to an attorney. MCL 712A.18i(5), (8); see also MCR 3.956(A)(1)(b).

Probation violation hearings are conducted in accordance with MCR 3.944(C), MCR 3.956(B)(3), only “[u]pon receipt of a sworn supplemental petition alleging that the juvenile has violated any condition of probation,” MCR 3.944(A)(1), and only after the juvenile is “notified . . . to appear for a hearing on the alleged violation, which notice must include a copy of the probation violation petition and a notice of the juvenile's rights as provided in [MCR 3.944(C)(1)],” MCR 3.944(A)(1)(a). Because it does not appear that defendant received such a notice of probation violation, and given that the hearing was held within 91 days of the end of defendant's probation, we treat the hearing of July 1, 2011, as a final review hearing, and the hearing of September 9, 2011, as an annual review hearing.

Defendant argues that his curfew violations were not “significant” and that the circuit court did not follow proper procedure for imposing an adult sentence. There is no caselaw that recognizes a distinction between probation violations that are significant and those that are not. To create two tiers of violations would be inconsistent with the status of probation as a privilege. “Probation is a matter of legislative grace. . . . and the probation order remains at all times revocable and amendable.” *People v Glenn-Powers*, 296 Mich App 494, 502; 823 NW2d 127 (2012). In any case, it appears that the circuit court imposed sentence on defendant following a final commitment review hearing, as opposed to a probation violation hearing.

With respect to procedure, defendant argues that he had a “due process right to a formal contested hearing before the juvenile sentence could be revoked,” and that he was entitled to

written notice of the claimed violations[,] disclosure of the evidence against [him,] the opportunity to be heard in person and to present witnesses and documentary evidence[,] the right to confront and cross-examine adverse witnesses[,] a neutral and detached decision maker[,] and a written statement of the evidence relied upon and the reasons for revoking probation.

See *Gagnon v Scarpelli*, 411 US 778, 786; 93 S Ct 1756; 36 L Ed 2d 656 (1973); *People v Hardin*, 70 Mich App 204, 206-207; 245 NW2d 566 (1976) (listing six due-process requirements of probation revocation hearings). Each of the requirements enumerated in *Hardin* was satisfied in this case, with the possible exception of written notice. Even so, defendant and his attorney unquestionably had more than two months’ *verbal* notice of the violations of which defendant was accused. Indeed, at a previous hearing, on July 1, 2011, the circuit court stated on the record that defendant violated his curfew on May 29, 2011, June 22, 2011, and June 23, 2011. The same appointed attorney represented defendant at each hearing, and the hearing was postponed from its original date.

To the extent that defendant argues he did not receive notice of a review hearing as required by MCL 712A.18i(5) and MCR 3.956(A)(1)(b), his notice argument is waived. See *People v Sweet*, 124 Mich App 626, 630; 335 NW2d 110 (1983). Defendant was certainly aware that he risked imprisonment. Indeed, the majority of the discussion between the circuit court and defense counsel at the review hearing of July 1, 2011, concerned the possibility of an adult prison sentence. At the conclusion of the hearing, the circuit court ordered a presentence investigation report and stated, “[V]ery frankly, I think I’m going to have to send this young man to prison. . . . Give us a sentencing date.” Moreover, the physical presence of defendant and his attorney at the sentencing hearing demonstrates that they were aware of the date and time of the hearing, as does the fact that defendant’s attorney prepared a sentencing memorandum. If the purposes of the statutory notice provisions are to ensure that a defendant is aware of the time and place of a hearing, and what is at stake at the hearing, they were satisfied in this case. Even if the lack of written notice was erroneous, defendant cannot show that it affected the outcome of the proceedings. See *Vaughn*, 491 Mich at 665.

Nor was the sentencing hearing itself procedurally defective. It was contested, defendant was represented by appointed counsel, and he does not argue on appeal that he received ineffective assistance of counsel. Counsel acknowledged defendant’s guidelines range for the carjacking conviction and requested a downward departure from the guidelines “[c]onsidering everything that [defendant] has been through at Maxey, . . . and the attempts that he did make in terms of getting a job, trying to go to school, [and] that little bit of time that [the court] allowed him to be out in our community.” Defendant was allowed to speak, and he did, apologizing for the crimes he committed and promising never to break another law.

The circuit court record contains letters from the Wayne County Sheriff Electronic Monitoring Program informing the court of the dates and times on which defendant returned to his grandmother’s house past his curfew, as well as several screen captures of the software program used to track defendant. Neither party called witnesses. Nor did defendant allege that

the circuit court was anything other than “neutral and detached.” Because defendant has not identified a specific procedural defect in the sentencing hearing, he is not entitled to relief with respect to this issue.

Defendant next argues that the circuit court abused its discretion by revoking his juvenile sentence and sentencing him to prison. We disagree.

This issue is also unpreserved for appellate review because defendant did not object or move in the circuit court for resentencing. Unpreserved claims are reviewed for plain error affecting the defendant’s substantial rights. *Carines*, 460 Mich at 763-765. As explained previously, the circuit court may

delay imposing a sentence of imprisonment . . . for a period not longer than the period during which the court has jurisdiction over the juvenile under this chapter by entering an order of disposition delaying imposition of sentence and placing the juvenile on probation upon the terms and conditions it considers appropriate[.] If the court delays imposing sentence under this section, [MCL 712A.18i] applies. [MCL 712A.18(1)(m).]

“[I]f the court has entered an order of disposition . . . delaying imposition of sentence, the court shall conduct an annual review of the probation The court may order changes in the juvenile’s probation based on the review including but not limited to imposition of sentence.” MCL 712A.18i(2); see also MCR 3.956(A)(1)(a)(i). “If the court determines that the juvenile has not been rehabilitated or . . . presents a serious risk to public safety,” it may impose the delayed adult sentence on the juvenile. MCL 712A.18i(3). In making this determination, MCL 712A.18i(3) requires that the court consider:

- (a) The extent and nature of the juvenile’s participation in education, counseling, or work programs.
- (b) The juvenile’s willingness to accept responsibility for prior behavior.
- (c) The juvenile’s behavior in his or her current placement.
- (d) The prior record and character of the juvenile and his or her physical and mental maturity.
- (e) The juvenile’s potential for violent conduct as demonstrated by prior behavior.
- (f) The recommendations of any institution or agency charged with the juvenile’s care for the juvenile’s release or continued custody.
- (g) Other information the prosecuting attorney or juvenile may submit.

One condition of defendant’s probation was a curfew that required him to report to his grandmother’s house by 9:00 p.m. each night. At the review hearing on July 1, 2011, the court found that defendant had violated his curfew on May 29, 2011, June 22, 2011, and June 23,

2011, and set a date for sentencing. At the sentencing hearing, the court found that “what they did in [Maxey] has not rehabilitated [defendant],” “he has the same problems that he had when he first became involved in the killing of a deacon of a church . . . [a]nd he doesn’t seem to recognize it,” and “[t]here is nothing in these reports that shows . . . he has changed one single bit.” Further, the court noted that defendant “ke[pt] thinking that everything is everybody else’s fault,” but “all he had to do was come into his grandmother’s house on time[, n]ot lie about his uncle and drugs[, and n]ot have drugs in his system. He didn’t have to do any of that stuff.” Referring to defendant’s grandmother, the court said that defendant was “blowing her off. He doesn’t respect her. He does not see that what she has tried to do, she’s tried to do out of love and in his best interest. And those . . . cousins who’ve been telling him the wrong thing, and disrespecting grandmother, are destroying him.” Addressing defendant, the circuit court stated that “the reason you’re here today is because . . . I can’t sleep at night if I knew . . . all this time I’m sending somebody back out there in the community to kill another deacon.”

These remarks indicate that the circuit court did not consider defendant rehabilitated and considered him a threat to public safety. While the court did not run down the list of statutory criteria set forth in MCL 712A.18i(3), it clearly believed that “the juvenile present[ed] a serious risk to public safety.” MCL 712A.18i(3). The prosecution argues, citing *People v Petty*, 469 Mich 108; 665 NW2d 443 (2003), that the court is “not required to make a finding of fact on the record listing every factor suggested in the statute or court rule.” Although the *Petty* Court was addressing the six statutory criteria of MCL 712A.18(1)(m)(i)-(vi), and not those of MCL 712A.18i(3), the same reasoning holds. While the court need not “undertake a mechanical recitation of the statutory criteria,” it “should consider the enunciated factors . . . to assist it in choosing one option over the others.” *Petty*, 469 Mich at 117 (emphasis in original).

The circuit court’s decision to impose a delayed sentence for defendant’s carjacking conviction was informed by the statutory criteria. “The extent and nature of [defendant’s] participation in education, counseling, or work programs,” MCL 712A.18i(3)(a), defendant’s “behavior in his . . . current placement,” MCL 712A.18i(3)(c), and “[t]he prior record and character of the juvenile and his . . . physical and mental maturity,” MCL 712A.18i(3)(d), were not satisfactory to the court. The court was also “very disturbed about what [it] saw they were doing in the juvenile system,” and found that “[w]hat they did for the majority of his time in [Maxey] was of no use.” The circuit court found that defendant’s “willingness to accept responsibility for prior behavior,” MCL 712A.18i(3)(b), was lacking, observing that “[h]e gives all kinds of excuses for why he’s not doing what he ought to do” and “feel[s] sorry and concerned about me, me, me.” The court’s concern that freeing defendant would result in the death of “another deacon,” however hyperbolic, touched on defendant’s “potential for violent conduct as demonstrated by prior behavior.” MCL 712A.18i(3)(e).

In sum, defendant’s argument that the court failed to “state why returning home late three times” justified his prison sentence frames the issue incorrectly. Defendant was tried as an adult and found guilty of first-degree felony murder and carjacking. Instead of spending the rest of his life in prison, he was initially offered the opportunity to be freed by his 19th birthday, subject to the terms of his probation. After extending its jurisdiction over defendant until his 21st birthday, the circuit court found that the juvenile system had failed to rehabilitate defendant, and that the best interests of the public precluded his release. In the end, defendant was sentenced not for

tardiness and curfew violations, but for one of the serious crimes of which he was convicted in 2005.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Jane E. Markey