

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GRANT GREGORY MARTEK,

Defendant-Appellant.

UNPUBLISHED

May 3, 2007

No. 268935

Grand Traverse Circuit Court

LC No. 04-009670-FH

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his sentence of 32 to 48 months in prison imposed on his plea-based conviction of failure to pay child support, MCL 750.165, after a conviction of probation violation. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant agreed to plead guilty to failure to pay child support in return for dismissal of a charge of desertion, MCL 750.161. In addition, defendant agreed that if he violated his probation, the guidelines could be disregarded for sentencing purposes.

The statutory sentencing guidelines recommended a minimum term of zero to 17 months.¹ The trial court sentenced defendant to serve a term of 60 months' probation, with the first six months in jail. Defendant received credit for 47 days served in jail.

Subsequently, defendant pleaded guilty to violating his probation by failing to report to his probation officer, failing to pay child support, failing to participate in counseling, and failing to pay court costs. The trial court sentenced defendant to 32 to 48 months in prison, with credit

¹ Under the statutory sentencing guidelines, if the upper limit of the recommended minimum sentence range is 18 months or less, the trial court must impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to commit the defendant 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 guidelines range or 12 months, whichever is less. MCL 769.34(4)(a). An intermediate sanction does not include a prison term. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

for 211 days. In imposing sentence, the trial court noted that defendant had failed on probation, and observed that when defendant entered his plea, he was informed that if he violated his probation, the guidelines could be disregarded.

The statutory sentencing guidelines apply to a sentence imposed after a probation violation. *People v Hendrick*, 472 Mich 555, 560; 697 NW2d 511 (2005).

A trial court may depart from the established guidelines if it has a substantial and compelling reason to do so, and clearly articulates that reason on the record. MCL 769.34(3). To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. A departure from the guidelines cannot be affirmed on the basis of a reason that the appellate court perceives but the trial court did not articulate. A substantial and compelling reason articulated by a trial court to merit a departure from the sentencing guidelines must justify the departure at issue. If the stated reasons are partially invalid and the appellate court cannot ascertain whether the trial court would have departed to the same extent regardless of the invalid factors, remand for resentencing or rearticulation is necessary. *People v Babcock*, 469 Mich 247, 257-261; 666 NW2d 231 (2003).

In determining whether a sufficient basis exists to depart from the sentencing guidelines, the trial court must ascertain whether the departure would result in a sentence more proportionate to the seriousness of the offense and the defendant's criminal history than would adherence to the guidelines range. In departing from the guidelines range, the trial court must determine whether the particular departure is proportionate to the circumstances of the offense and the offender. *Id.* at 262-264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

The determination of the existence of a factor for departing from the guidelines is reviewed for clear error, the determination that a factor is objective and verifiable is reviewed de novo, and the determination that objective and verifiable factors merited departure from the guidelines range is reviewed for an abuse of discretion. A trial court may depart from the guidelines range for nondiscriminatory reasons based on an offense or offender characteristic that was already considered in calculating the guidelines range if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 265-269.

“[A] sentence that exceeds the sentencing guidelines satisfies the requirements of MCL 769.34(3) when the record confirms that the sentence was imposed as part of a valid plea agreement. Under such circumstances, the statute does not require the articulation of additional ‘substantial and compelling’ reasons by the sentencing court.” *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005). Moreover, “a defendant waives appellate review of a sentence that exceeds the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence. MCR 6.302.” *Id.* (footnote omitted).

We affirm defendant's sentence. As part of his plea bargain, defendant agreed that if he violated his probation, the guidelines could be disregarded for purposes of sentencing. Upon sentencing defendant for the underlying offense following defendant's violation of probation, the trial court exceeded the guidelines and imposed a prison term rather than an intermediate

sanction. Defendant had agreed to accept a sentence that exceeded the guidelines; therefore, the trial court was not required to articulate substantial and compelling reasons for imposing the sentence that it did. *Id.* Defendant has waived appellate review of the sentence imposed. *Id.*

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello