

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL HOSEA HARDING,

Defendant-Appellant.

UNPUBLISHED

December 18, 1998

No. 205014

Recorder's Court

LC No. 93-008901

Before: Gage, P.J., and Michael J. Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's April 1997 order finding that he violated the probation imposed following his plea-based conviction for second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The court sentenced him to three to fifteen years' imprisonment.¹ We affirm.

Defendant first argues that he was denied due process because the trial court based its finding that he violated probation on uncharged conduct. A defendant charged with a probation violation is entitled to written notice of the charges against him, and probation may not be revoked for uncharged conduct. *People v Ison*, 132 Mich App 61, 67; 346 NW2d 894 (1984). Although the trial court did refer to uncharged conduct, defendant's past refusal to release medical information, in announcing its findings of fact and conclusions of law, there is no indication that the court relied on this behavior in finding that defendant violated probation. To the contrary, the court's comments clearly indicate that it relied on defendant's refusal to participate in and complete his therapy, as charged in the violation petition. Therefore, we conclude that defendant was not denied due process.

Second, defendant contends that insufficient evidence supported the court's finding that he violated probation by refusing to participate in court-ordered therapy sessions. Sufficient evidence exists to support a probation violation finding when a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could conclude that the essential elements of the charge were proven by a preponderance of the evidence. *Id.* at 66. Dr. Donald Aytch, a psychologist who attempted to evaluate and treat defendant, testified at the violation hearing that defendant initially stated

that he would not participate in the sex offender group therapy sessions that Aytch recommended. Aytch indicated that although he made special arrangements to accommodate defendant with individual therapy sessions, defendant was habitually at least twenty minutes late for the hour-long sessions and missed one session entirely. When defendant did attend, Aytch testified that he behaved in an oppositional and defiant manner and refused to answer questions. Aytch terminated defendant's treatment after five sessions because defendant's refusal to cooperate made it impossible to treat him. Aytch opined that defendant failed to meet any treatment objectives and remained a threat to himself and others. We conclude that, viewing Aytch's testimony in the light most favorable to the prosecution, a rational trier of fact could have found by a preponderance of the evidence that defendant violated his parole by refusing to participate in and complete his therapy.

Finally, defendant alleges that his sentence of three to fifteen years violates the principle of proportionality. We review a trial court's sentence for an abuse of discretion, which occurs when the sentence violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995).

This Court has concluded that a sentence imposed as a result of a probation violation essentially amounts to a revocation of the original probation order and a resentencing on the original offense as if the probation order had never existed. *People v Burks*, 220 Mich App 253, 258; 559 NW2d 357 (1996), citing MCL 771.4; MSA 28.1134. The sentencing information report regarding the original CSC II conviction reflected a minimum guideline range of one to four years' imprisonment.² The trial court's minimum sentence of three years fell within these guidelines, and was thus presumptively proportionate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Although a sentence within the guidelines can be an abuse of discretion in unusual circumstances, *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990), defendant's college enrollment and lack of prior offenses do not constitute such unusual circumstances. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Considering the nature of defendant's crime, which involved the molestation of his six-year old daughter, defendant's refusal to participate in treatment and the fact that the instant sentence fell within the guidelines calculated for defendant's CSC II conviction, we conclude that the trial court did not abuse its discretion in imposing a three to fifteen year sentence.

Affirmed.

/s/ Hilda R. Gage

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

¹ In Docket No. 191135, defendant appealed a prior violation of the probation imposed for his second-degree criminal sexual conduct conviction.

² We note that although guidelines of one to four years were originally calculated with respect to the underlying offense, no guidelines were calculated with respect to the instant probation violation.