

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYAN DARNELL THOMPSON, JR.,

Defendant-Appellant.

UNPUBLISHED

April 23, 2020

No. 348017

Monroe Circuit Court

LC Nos. 17-244114-FC;

18-244200-FH

Before: RIORDAN, P.J., and FORT HOOD and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals as on leave granted¹ his February 2, 2018 guilty-plea convictions of two counts of unarmed robbery, MCL 750.530. On April 5, 2018, defendant was sentenced to 270 days’ confinement in the Monroe County Jail and three years’ probation for each conviction. Subsequently, on July 20, 2018, defendant pleaded guilty to violating his probation while in jail. Defendant’s probation was revoked, and defendant was sentenced to 36 to 180 months’ imprisonment. We reverse and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

This matter involves two consolidated lower court cases. In Lower Court No. 17-244114-FC, defendant was charged with one count of armed robbery, MCL 750.529, and one count of unarmed robbery for robbing a victim of his wallet with “a very realistic looking BB pistol.” In Lower Court No. 18-244200-FH, defendant was charged with one count of unarmed robbery for pulling a separate victim’s sweatshirt over the victim’s head, and stealing that victim’s wallet. After the cases were consolidated, defendant agreed to plead guilty to the two counts of unarmed robbery in exchange for dismissal of the armed robbery charge. Defendant’s minimum sentencing guidelines range was calculated at 10 to 19 months, but the trial court ultimately sentenced

¹*People v Thompson*, 935 NW2d 41 (Mich, 2019).

defendant slightly below that range to 270 days in the Monroe County Jail and three years' probation.

On June 14, 2018, defendant was given notice of allegations that he violated his probation while in jail. The first allegation stated that defendant was discharged from a cognitive behavioral program on June 1, 2018. The second allegation stated that, on that same day, defendant "engaged in assaultive, abusive, threatening or intimidating behavior against Walter Labeau." At an arraignment on the probation violations on July 20, 2018, defendant pleaded guilty to the latter allegation, and in exchange for defendant's plea, the trial court dismissed the first allegation. The trial court then revoked defendant's probation and sentenced defendant to 36 to 180 months' imprisonment.

II. MCR 6.445(F)

Defendant first argues that his guilty plea for the probation violation must be vacated because the trial court failed to comply with MCR 6.445(F). Defendant is barred, however, from raising this argument under MCR 6.310(D). That rule provides:

A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

That is, under MCR 6.310(D), a defendant must file a motion to withdraw his guilty plea in the trial court or he is barred from raising the issue in this Court. See *People v Armisted*, 295 Mich App 32, 48; 811 NW2d 47 (2011) (declining to address the defendant's argument that his guilty plea should be vacated as the product of coercion because the defendant never sought to withdraw his plea in the trial court). Cf. *People v Pointer-Bey*, 321 Mich App 609, 615; 909 NW2d 523 (2017) (holding that the defendant preserved the issue of whether his plea was knowingly and voluntarily made by filing a motion to withdraw the plea in the trial court). Defendant never filed a motion to withdraw his pleas in the trial court, and accordingly, MCR 6.310(D) precludes this Court from reviewing the issue.

III. PROBATION REVOCATION

Defendant next argues that the trial court violated his due-process rights when it relied on conduct that was not charged in the motions and affidavits for the probation violations in deciding to revoke defendant's probation. With this we agree.

Defendant failed to object below to the trial court's consideration of facts not alleged in the motions and affidavits for the probation violations, and accordingly, we review this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[P]robation is a matter of grace conferring no vested right to its continuance." MCL 771.4. However, some due process is afforded to probationers "because of the potential loss of liberty." *People v Pillar*, 233 Mich App 267, 269; 590 NW2d 622 (1998). In Michigan, probation revocation is a two-step process. *Id.* The trial court must first make a factual determination that the probationer has violated probation before then deciding whether the

probation violation warrants revocation. *Id.* In this case, whether defendant violated his probation is not at issue because defendant specifically pleaded guilty to violating his probation by pushing Labeau. See *People v Kaczmarek*, 464 Mich 478, 485; 628 NW2d 484 (2001) (“A defendant’s plea of guilty on the allegation that he violated his probation subsumes any factual question whether the probation was violated.”). However, defendant takes issue with the trial court’s decision to revoke his probation. With respect to that determination, “[t]here must be verified facts in the record from which the court can find by a preponderance of the evidence that a violation was committed,” and “only evidence relating to the charged probation violation activity . . . may provide the basis for a decision to revoke one’s probation.” *Pillar*, 233 Mich App at 270.²

In this case, the trial court stated the following with respect to the revocation of defendant’s probation:

Sentencing guidelines were originally [10] to 19 months. Nothing has been paid. In fact, you’re right. [Defendant] hasn’t even gotten out of jail from his original sentence, which was I think pretty reasonable in light of two unarmed robberies. However, while doing the original sentence[,] he violated probation. There’s been multiple rule violations in jail, fighting, interference with the officer’s duty, got removed from the GED class, hasn’t been able to follow the rules in jail. So, I don’t know why I’d put him back there where he has done little or nothing to show that he would be a success. I mean I don’t think probation believes that he will be a success at community service and frankly I don’t either in light of his performance in just the last couple of months.

For those reasons in each case[,] I find the following to be a reasonable and proportionate sentence. You’re to serve 36 months to 180 months [in the] Michigan Department of Corrections . . . Probation is revoked in each case.

The only conduct that the trial court was permitted to consider was defendant’s altercation with Labeau, which was the conduct to which defendant pleaded guilty as a violation of his probation. However, as evidenced above, the record indicates that the trial court considered far more than the altercation with Labeau—defendant’s rule breaking, removal from an educational class, and obstruction of an officer’s duty—to revoke probation.

The trial court’s reliance on the uncharged and unverified conduct was plainly erroneous, and that plain error affected defendant’s substantial rights because it led to the revocation of

² In *Pillar*, this Court reversed the trial court’s decision to revoke probation because the trial court relied on uncharged conduct. *Pillar*, 233 Mich App at 270-271. We held that it was improper for the trial court to rely on the defendant’s “allegedly improper visitation” with his daughter to revoke probation when that allegation was neither confirmed with evidence obtained on the record nor charged as conduct in violation of any term of probation. *Id.* at 270.

defendant's probation and the imposition of a significantly longer sentence.³ Accordingly, we must reverse the trial court's orders of probation revocation and remand for the trial court to determine whether, only on the basis of charged and verified conduct, probation revocation is warranted.⁴

IV. SENTENCING

Given our resolution of the probation revocation issue, we need not address defendant's arguments concerning the departure sentence that was imposed. However, because we see potential merit to some of defendant's arguments, we take this opportunity to remind the trial court that, with respect to upward departure sentences, this Court will not uphold a sentence when the reasons for the extent of the departure are unclear. To aid appellate review, trial courts must explain "why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *People v Smith*, 482 Mich 292, 311; 754 NW2d 284 (2008). "A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear." *Id.* at 304. Some relevant factors to determine whether a departure sentence is more proportionate than a sentence within the guidelines range "include (1) whether the guidelines accurately reflect the seriousness of the crime, (2) factors not considered by the guidelines; and (3) factors considered by the guidelines but given inadequate weight." *People v Dixon-Bey*, 321 Mich App 490, 525; 909 NW2d 458 (2017). After consideration of only the appropriate evidence, should the trial court find that a probation revocation and an upward departure sentence are still warranted, the trial court should make sure to develop the record so that this Court can properly determine whether the chosen sentence is reasonable and proportionate to the offense and the offender.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Karen M. Fort Hood
/s/ Brock A. Swartzle

³ The trial court's 36-month sentence constituted an upward departure from defendant's minimum sentencing guidelines range of approximately 17 months.

⁴ We note that defendant urges this Court to remand this matter for consideration by a different judge. We decline to do so because there is nothing in the lower court record to indicate that the current trial judge would be unable to set aside his previous considerations. See *Pillar*, 233 Mich App at 270 ("A case should be assigned to a different judge if it would be unreasonable to expect the trial judge, given her handling of the matter, to be able to put previously expressed findings out of mind without substantial difficulty.").