STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL D. WALLER,

Defendant-Appellant.

UNPUBLISHED
April 29, 1997

No. 191960
Oakland Circuit Court
LC No. 92-120127-FH

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant was found guilty by the trial court of violating probation on his underlying conviction of malicious destruction of police property, MCL 750.377b; MSA 28.609(2), and was sentenced to 365 days in the county jail with credit for ninety days served. He appeals as of right. We affirm.

Defendant first argues that the evidence presented at the probation violation hearing was insufficient to support the trial court's finding that he violated his probation. The burden was on the prosecution to establish a probation violation by a preponderance of the evidence. MCR 6.445(E)(1). Evidence is sufficient to sustain a conviction for a probation violation if the evidence, when viewed in a light most favorable to the prosecution, would enable a rational trier of fact to conclude that the essential elements of the charge were proven by a preponderance of the evidence. *People v Ison*, 132 Mich App 61, 66; 346 NW2d 894 (1984).

The prosecution met its burden in this case. Evidence at the probation hearing established that defendant was aware of the requirement to report to the probation department per the court's sentencing decision. Although defendant disagreed with the probation order proposed by the probation department, he was told to contact his attorney when he disagreed with portions of the probation department's order. Defendant was not explicitly told by the intake officer to report at his next appointment, but he also was not told that he did not need to report. Defendant's probation officer sent a letter with instructions to report, but that letter was refused. The fact that the letter was marked refused, not undeliverable, and that it was sent to his last known address (where he accepted a different return receipt letter a short time before) suggests that defendant himself intentionally refused to take

delivery of the letter. In light of this evidence, it was reasonable for the trial court to conclude that defendant refused to accept the letter and, therefore, willfully refused to report to the probation department.

Defendant also argues that he was denied due process of law at the probation violation hearing. Because defendant was already convicted of a crime, he was not entitled to the full range of due process rights associated with criminal proceedings. Due process only requires that probation violation proceedings be conducted in a fundamentally fair manner. *People v Ritter*, 186 Mich App 701, 706; 464 NW2d 919 (1991). Minimal due process protections for a probationer at a violation hearing include the right to appear, present evidence in his own behalf, and confront and cross-examine adverse witnesses. *Gagnon v Scarpelli*, 411 US 778, 786; 93 S Ct 1756; 36 L Ed 2d 656 (1973).

There is no record support for defendant's claim that evidence of the contents of the letter from June 1994 was wrongfully excluded from the hearing. There was testimony from the probation officer about the contents of the letter. If defendant wanted the actual contents admitted into evidence, there is no reason to believe he would have been barred from pursuing its admission. Even if the contents of the letter were not admitted into evidence, there was still evidence presented at the hearing to support the finding that defendant was instructed by letter to report to the probation department.

Defendant has failed to provide any authority to support his claim that he was entitled to prior notice that the prosecution would rely upon a return receipt from the post office purportedly signed by him in May 1994 as evidence at the probation hearing. The return receipt was merely evidence of defendant's home address and it did not form the basis for any additional probation violation.

Defendant was also not denied due process by the trial court's refusal to adjourn the hearing to allow him time to contact a handwriting expert. There is no evidence to suggest that the handwriting expert's testimony was necessary to the defense. If defendant disputed his purported signature on the return receipt form, there were other ways for him to prove that point short of hiring of an expert. Defendant failed to pursue any of these options.

Defendant next argues that his trial counsel was ineffective. Our review of this issue is limited to the current record because the issue was not raised in the trial court or by a motion to remand in this Court. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

For this Court to reverse due to ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defense that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant is also required to overcome the presumption that his counsel's performance involved sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Defendant's counsel was officially appointed on the day of the hearing, but there was no objection made below to the timeliness of the appointment and no suggestion that counsel did not have enough time to prepare for the hearing. Defendant has failed to make an offer of proof regarding

witnesses or evidence that his counsel could have presented at the hearing if he had more time to prepare, including a handwriting expert. Based upon the existing record, defendant has failed to overcome the presumption that his counsel's actions involved sound trial strategy. *Tommolino, supra*.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Hilda R. Gage