

2012 IL App (2d) 111017-U
No. 2-11-1017
Order filed December 20, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-3889
)	
LARRY D. BORDEN,)	Honorable
)	Daniel B. Shanes,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's revocation of defendant's probation was against the manifest weight of the evidence: defendant's failure to appear in court in response to the State's written notice did not violate a provision requiring him to appear before or report to the probation office or a provision requiring him to appear in court on oral notice of his probation officer.

¶ 2 Defendant, Larry D. Borden, appeals an order revoking his probation and resentencing him to five years' imprisonment for aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2010)).

On appeal, he contends that the State failed to prove that he violated any condition of his probation.

We agree and reverse.

¶ 3 On January 14, 2011, defendant pleaded guilty to aggravated domestic battery and was sentenced to 24 months' probation. Under paragraph 2 of the sentencing order, he was required to "[a]pppear in person before the Lake County Adult Probation Services Division and report as it directs." Under paragraph 25(i), he was required to "[a]pppear in Court on oral notice of the Probation Officer."

¶ 4 A "Notice," filed July 6, 2011, informed defendant that Victor O'Block, the assistant State's Attorney assigned to defendant's case, would appear in court at 9 a.m. on July 6, 2011, and request leave to file a petition to revoke probation (PTR or first PTR). The Notice added, "**AT WHICH TIME YOU MUST APPEAR OR A WARRANT MAY BE ISSUED FOR YOUR ARREST!**" and a sworn statement that, on June 27, 2011, a copy of the Notice was mailed to defendant.

¶ 5 On July 6, 2011, the trial court held a hearing, Judge Shanes presiding. Defendant did not appear either in person or by counsel. The court allowed O'Block to file the PTR, which alleged that defendant had violated a condition prohibiting contact with the complaining witness.

¶ 6 On July 8, 2011, the court held a hearing, Judge Mark Levitt presiding, at which O'Block, defendant, and his attorney appeared. The judge asked defendant's attorney why defendant had missed the July 6, 2011, hearing. She responded that defendant "didn't receive the actual PTR that was sent"; that he "was keeping in contact with his Probation Officer to give him an update on the assessment that he was to schedule"; that the officer "advised him of the date on the 6th"; and that defendant was "here today trying to find out what the situation [was]." The hearing was continued.

¶ 7 On July 21, 2011, the State filed a second PTR, alleging that defendant had violated a condition of probation by testing positive for cocaine the previous month. On July 22, August 8, and August 15, 2011, the trial court held an evidentiary hearing on the second PTR. As pertinent here,

defendant testified as follows. On July 6, 2011, he called his probation officer, Brian Isom, about an upcoming drug evaluation. Isom told defendant that he was supposed to have appeared in court earlier that day. From the conversation, defendant learned that a warrant had been issued for his arrest. He tried to find someone to care for his two young children. On July 8, he “turned [himself] in,” and he had been in custody since.

¶ 8 At the close of the hearing, the court denied the second PTR. The State immediately filed a third PTR. It alleged that defendant had violated a condition of his probation in that, “on July 6, 2011, the defendant failed to appear in court upon proper notice.” The State withdrew the first PTR. On August 19, 2011, at the hearing on the third PTR, the parties stipulated that the “proper notice” alleged was the copy of the first PTR mailed to defendant and that this mail had been “delivered.” Further, Isom would testify that, on June 26, 2011, he spoke to defendant and set up an appointment for July 7, 2011; and that, on July 6, 2011, shortly after the arrest warrant was issued, he spoke to defendant and told him to turn himself in.

¶ 9 In argument, O’Block contended that, by failing to appear in court on July 6, 2011, defendant had violated paragraph 2 of the probation conditions. O’Block argued as follows. First, although paragraph 2 required defendant to “appear in person before the *Lake County Adult Probation Services* and report as it directs” (emphasis added), this language was “broad enough to contain even a notice from the State,” such as that mailed to defendant. Second, it was “intrinsic in the probation order” that defendant report to court as ordered. Finally, paragraph 25(i) of the probation order required defendant to “appear in Court on oral Notice of the Probation Officer.” Although there was no evidence that Isom orally notified defendant in advance of July 6, 2011, paragraph 25(i) required defendant “to report as noted in the probation order.”

¶ 10 In response, defendant argued that the plain language of both paragraphs excluded reporting to court as a condition of probation and that to interpret them as broadly as the State urged would be unfair to defendant. By failing to appear in court on July 6, 2011, defendant could have forfeited his right to confrontation or exposed him to arrest, but he did not violate any condition of probation.

¶ 11 In deciding the third PTR, the trial judge stressed that, although defendant had learned on July 6, 2011, that he had been required to appear in court on the first PTR and that there was a warrant out for his arrest, he had waited until July 8, 2011, to turn himself in. Turning to paragraph 25(i) of the probation order, the judge explained:

“The condition of probation in this case, that the defendant appear in court upon oral notice of probation officer [*sic*], is because—and that that condition is sometimes employed in the first place is because of a recognition that standard notice, first class mail notice, may not always be efficient, prudent, or timely. In other words, the oral notice of the probation officer is considered a lesser form of notice and in a usual legal context it certainly would not be sufficient notice. A complaint has to be served with notice. Oral notice of an attorney doesn’t achieve service of a complaint, for example. But for a defendant who is on probation with all of the consequences of that probation *** the law recognizes that a lesser form of notice, such as by a phone call from a probation officer, can be and is sufficient in that context, though it would probably not be sufficient in any other context.

If a lesser form of notice is sufficient and can clearly constitute [*sic*] a violation of probation by its express terms, ignoring a greater form of notice has to implicitly also constitute a violation of probation. It just doesn’t make any sense otherwise.”

The judge concluded that the foregoing might be academic, as there was another ground on which to base a finding that defendant violated his probation:

“[F]actually the Court finds the defendant did receive notice and failed to appear. The evidence *** is that the defendant received notice and talked to his probation officer on July 6. That’s notice. He waited a couple of days before he came back. *** So the defendant could have come in late on the morning of July 6, could have come in the afternoon of July 6, could have come in the evening of the [*sic*] July 6, could have come in anytime on July 7. He chose not to. He failed to. And willful is not an element of this anyways, but he did not.”

¶ 12 Thus, because defendant had “received oral notice from probation and failed to appear promptly,” he had violated a condition of his probation. Defendant moved to reconsider, arguing first that, because the Notice had been sent by ordinary United States mail, there was no proof that he had received it before the hearing of July 6, 2011. Moreover, he contended, the third PTR had not alleged that he had violated his probation by failing to turn himself in promptly after learning of the arrest warrant. At the hearing on the motion, the trial judge stated that there was no need to consider defendant’s first argument, because the State had proved that, after Isom told him of the hearing and the arrest warrant, defendant did not appear in court until July 8, 2011. Also, any variance between the third PTR and the State’s proof was *de minimis*. The court denied defendant’s motion, and he timely appealed.

¶ 13 On appeal, defendant contends that the judgment must be reversed because the trial court’s finding that he violated a condition of probation was against the manifest weight of the evidence. Defendant maintains that nothing in the underlying judgment order required him, *as a condition of*

his probation, to appear in court on July 6, 2011, on the State’s motion for leave to file the first PTR. Thus, whatever consequences flowed from his failure to do so, it could not be a basis on which to revoke his probation and resentence him on his conviction. The State responds that defendant’s failure to turn himself in promptly, even after Isom notified him of the prior hearing and the arrest warrant, violated the conditions of his probation.¹ We agree with defendant.

¶ 14 In a probation-revocation proceeding, the defendant must be accorded “ ‘minimal due process.’ ” *People v. Saucier*, 221 Ill. App. 3d 287, 291 (1991) (quoting *People v. Hill*, 208 Ill. App. 3d 887, 891 (1991)). The defendant must be able to know in advance what behavior is expected or prohibited. *Id.* at 292. Thus, he must reasonably be informed in writing of what conduct is expected of him. *People v. McClellan*, 353 Ill. App. 3d 1027, 1035 (2004). Although a generally-phrased prohibition may still operate to prohibit specific conduct that is clearly and fairly within its terms (*Saucier*, 221 Ill. App. 3d at 292), a defendant who has not violated the letter of a probation order may not have his probation revoked for violating the “spirit” of the order (*People v. Prusak*, 200 Ill. App. 3d 146, 149 (1990)). The State must prove by a preponderance of evidence that the defendant violated a condition of his probation. *McClellan*, 353 Ill. App. 3d at 1033.

¹The State does not contend, and did not contend in the trial court, that defendant’s failure to appear at the July 6, 2011, hearing violated section 5-6-3(a)(2) of the Unified Code of Corrections, which makes one condition of any sentence of probation that the defendant “report to or appear in person before such person or agency as directed by the court.” 730 ILCS 5/5-6-3(a)(2) (West 2010). The trial court did not base its finding on this provision or, indeed, mention it at all. Therefore, we decline to consider whether the judgment can be affirmed on this ground.

¶ 15 Here, the third PTR alleged that defendant had violated his probation in that, on July 6, 2011, he failed to appear in court upon proper notice, *i.e.*, the mailing of the copy of the first PTR. In arguing that this conduct violated the conditions of probation, the State relied on paragraphs 2 and 25(i) of the probation order in the criminal judgment. The trial court based its ruling on paragraph 25(i) only. However, because we may affirm the trial court's judgment on any ground of record, regardless of whether its reasoning was correct (*People v. Smith*, 406 Ill. App. 3d 747, 752 (2010)), we consider whether the evidence supported revoking defendant's probation on either ground.

¶ 16 We hold first that paragraph 2 does not support the judgment, because there was no evidence that defendant violated that provision. Paragraph 2 requires only that defendant "appear in person before the *Lake County Adult Probation Services Department* and report as it directs" (emphasis added). It simply does not apply to a State notice to appear in court. Paragraph 2 did not give defendant reasonable notice that he would be violating his probation by failing to appear at a court hearing. The evidence did not prove that defendant violated paragraph 2 by failing to appear before or report to the probation office.

¶ 17 The trial court relied on paragraph 25(i), but we find that unavailing also. Paragraph 25(i) requires defendant to "[a]pppear in Court on oral notice of the Probation Officer." The third PTR did not allege that defendant violated this restriction, but only that, on July 6, 2011, he failed to appear in court after he was mailed a copy of the first PTR. Notice by mail from the State is simply not oral notice from the probation officer, for two obvious reasons. While defendant's failure to appear at the July 6, 2011, hearing on the first PTR could not be excused, and also subjected him to arrest and incarceration, it did not violate paragraph 25(i), and no evidence supported the allegation that, by

failing to appear after receiving written notice from the State, defendant violated that condition of his probation.

¶ 18 In holding that defendant did violate paragraph 25(i), the trial court reasoned in part that, although that paragraph required “oral notice [by] the Probation Officer,” the mailed notice from the State sufficed as a trigger, because oral notice from Isom was a “lesser form of notice.” There are two problems with this analysis. First, it ignores the plain language of the probation condition, which could have added phraseology such as “or upon written notice from the State” but did not. Second, the court’s own reasoning undermines its conclusion that, if oral notice from the probation officer is sufficient, then written notice from the State must, *a fortiori*, be sufficient. The judge observed that oral notice from the probation officer “is sometimes employed in the first place *** because of a recognition that standard notice, first class mail notice, may not always be efficient, prudent, or timely.” By this reasoning, the two forms of notice are not “lesser” and “greater” but different—and one cannot simply fill in for the other. If anything, the quoted reasoning implies that oral notice from the probation officer is the “greater” of the two—because it is the more reliable way to give the defendant fair warning of his obligation. If oral notice from the probation officer was made a precondition of appearing because it was considered more reliable and fair than written notice from the State, then the latter cannot be an implied substitute for the former.

¶ 19 The trial court also held that, whether or not defendant violated paragraph 25(i) by failing to appear for the July 6, 2011, hearing that was referenced in the State’s written notice, he violated that paragraph by failing to turn himself in for two days after Isom informed him of the hearing and of the warrant for his arrest. However, the State did not allege this in the third PTR. Moreover, we cannot agree with the trial court that the difference between the third PTR’s allegation and the

court's theory was *de minimis*. The third PTR referenced the hearing of July 6, 2011, and the State's mailed notice thereof, not defendant's failure to turn himself in based on what Isom told him after the hearing was over. By relying on this rationale, the trial court improperly broadened the scope of the revocation proceeding. See generally *People v. Bedenkop*, 252 Ill. App. 3d 419, 423 (1993). To affirm the judgment on this ground would rewrite the third PTR and deny defendant due process.

¶ 20 We stress that defendant's failure to appear at the July 6, 2011, hearing was inexcusable (as far as the record shows). Defendant was arrested, as he had been warned, and was denied his liberty as a result of his failure to obey the court's order to appear. However, the State failed to prove that that failure violated any condition of defendant's probation. Therefore, the judgment revoking his probation and resentencing him cannot stand.

¶ 21 The judgment of the circuit court of Lake County is reversed.

¶ 22 Reversed.