IN THE COURT OF APPEALS OF IOWA

No. 3-678 / 12-2040
Filed October 2, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD OSMOND MCLACHLAN JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Defendant appeals the district court's revocation of his deferred judgment. **CONVICTIONS AFFIRMED; SENTENCES VACATED AND REMANDED FOR RESENTENCING.**

Stephen P. Dowil of Booth Law Firm, Osceola, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, John Sarcone, County Attorney, and Joseph Crisp, Assistant County Attorney, for appellee.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

BOWER, J.

Richard Osmond McLachlan Jr. appeals the district court's decision revoking his deferred judgments. He asserts the district court erred in finding he violated his probation agreement by possessing marijuana. He also seeks resentencing, contending "at no time did the hearing court grant [him] allocution." We affirm his convictions, vacate the sentences imposed, and remand for the limited purpose of resentencing.

I. Background Facts and Proceedings

McLachlan was placed on probation for domestic abuse assault, a simple misdemeanor in March 2011. At the same time McLachlan's probation officer, Elliot, was supervising him on intensive pretrial release for a pending drug charge. Because McLachlan violated the terms of his probation and release, in May 2011 the court found him in contempt, ordered him to serve nine days in jail while crediting nine days served, and revoked his pretrial release on the pending drug charge.

In July 2011, after McLachlan's entry of an *Alford* plea[1] to the lesser-included charge of possession of crack cocaine with the intent to deliver, he was granted a deferred judgment and placed on supervised probation. On August 23, 2011, Elliot again discussed the probation rules with McLachlan, and he signed a new probation agreement. McLachlan did not make progress on probation. He missed appointments with his probation officer, tested positive for drug use,

[1] An Alford plea allows a defendant to consent to the imposition of a sentence without admitting to participation in the crime. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

failed to maintain employment, had a curfew violation, and did not attend treatment.

At a November 2011 probation violation hearing, the court required McLachlan to reside in the Fort Des Moines residential correctional facility (the Fort). On July 31, 2012, McLachlan successfully completed the Fort program, was released, went directly to Elliot's office, and met with her around 5:00 p.m. Elliot reviewed the terms of probation—including a 10:00 p.m. curfew. Within hours, shortly after midnight on August 1, 2012, McLachlan was arrested on a new drug charge when the Des Moines police responded to reports of shots fired in the area of Good Park. The area is known to the police to have gang and drug activity.

Officer Jacob Hedlund arrived first and spotted a group of four to five people walking through the park. As Officer Hedlund approached the group in his marked patrol car, McLachlan broke away from the group, ran to the south side of the street, ran through a driveway, and ran behind a house. Officer Hedlund testified McLachlan disappeared for about twenty seconds. During that time, the others in McLachlan's group remained on the north side of the street.

Officer Hedlund stopped his car, and McLachlan emerged from behind the house. Based on his experience and the nature of the call, the officer suspected McLachlan may have attempted to "ditch" a weapon. He detained McLachlan and waited for other officers to arrive. When the officers arrived, including Officer Theodore Stroope, Officer Hedlund placed McLachlan in his patrol car and retraced McLachlan's path through the yard. Officer Hedlund found three bags

containing a large amount of marijuana in the yard's shrubbery.[2] At no time did Officer Hedlund observe anyone other than McLachlan in that area. The baggies appeared to be new—they were not dirty, wet, covered in cobwebs, or weathered. McLachlan denied ownership of the marijuana and claimed the marijuana belonged to someone else but refused to identify the owner. Officer Hedlund then spoke with the people who had remained on the north side of the street. They denied ownership of the marijuana.

Meanwhile, Officer Stroope searched the north area. In nearby shrubbery, he found a Lexus car key and several small plastic baggies of marijuana. Additionally, hundreds of empty baggies were blowing in the wind in the north area. It was apparent to the experienced officers that someone within the group had discarded the small baggies, the key, and the smaller amounts of marijuana, but they were unable to determine who had done so.

While McLachlan was in the patrol car, he repeatedly requested permission from Officer Hedlund to talk with his companions so he could ask someone to "take the charge." When the jail transportation vehicle arrived to transport McLachlan, he looked at one of his companions and said, "Tell them it's yours. I'm looking at ten years for this." Despite a previous denial of responsibility for the marijuana, the person responded, "Oh, yeah, it's mine." Officer Hedlund, noting the person changing his story had never been on the south side of the street, decided not to detain him. At the revocation hearing Officer Hedlund opined: "Due to the evidence [McLachlan] was the only one I

[2] The amount of marijuana recovered by officer Hedlund was later determined to be seventy-seven grams.

saw cross the street onto the south side of the street, I believed [McLachlan] was wanting somebody else to take the charges due to the fact [he] is on probation."

Officers Hedlund and Stroope both determined the amount of marijuana from the yard on the south side of the street was consistent with sales, not personal use. Officer Warren Steinkemp—a twenty-six year police veteran with twenty-one years of experience as a narcotics officer—also determined the amount was consistent with distribution. Officer Steinkemp testified because marijuana is valuable, large quantities typically are not left out in the open around shrubbery. Further:

> Q. Is it common for an individual to try to take responsibility of drugs for someone else? A. It happens quite often, yes.
>
> Q. And can you tell the court the reason someone may do that. A. Many times . . . in marriages, boyfriends, girlfriends, even people in the same car, people have previous drug arrests or are out on bond . . . they'll ask someone else to take it so they don't get charged with it again and have a second or third offense against them.

Elliot testified during the probation revocation hearing and described her July 31 probation meeting with McLachlan: "We went back over the rules again. Talked about . . . making sure he's not hanging around the wrong people [and] talked about a curfew [of] ten o'clock." Elliot recommended the court revoke McLachlan's probation if the court found McLachlan had violated probation:

> The basis for that opinion is he's already been given the opportunity to do [the Fort] treatment facility. After having two previous probation violation hearings, he was given the opportunity to do [the Fort]. He comes out of [the Fort] program and he's back out doing things that he's not supposed to be doing when he's on probation not even five, six hours later. I feel . . . the Department of Corrections has given him a chance to rehabilitate by doing the Fort program, and at this point . . . measures are exhausted . . . .

Defense counsel argued successful completion of the Fort program shows McLachlan is "a young man attempting to put his life back together." Counsel admitted McLachlan was "in a high traffic, high crime neighborhood. That shows a lack of judgment on his part." He argued it "is possible the drugs had been placed there prior to Mr. McLachlan's arrival."

The court ruled:

> Based upon the nature of [this] violation and the previous violations . . . as well as the fact this violation occurred within hours of [McLachlan] having been released from the [Fort] residential correctional facility, the court is in agreement with the recommendation of the Department and the State that the nature of these violations and the exhaustion of other available options within the community convince[s] this court [McLachlan's] previous deferred judgments [should] be revoked, [and] also the previous probations revoked and sentences imposed.

The court proceeded to sentencing. On the simple misdemeanor charge, the court sentenced McLachlan to thirty days in jail with credit for time served. On the possession of crack cocaine with the intent to deliver charge, the court sentenced him to a term of incarceration of not more than ten years. This appeal followed.

II. Scope and Standards of Review

We review the district court's revocation decision for the correction of errors at law. Iowa R. App. P. 6.907. "Grounds for probation revocation must be proved by a preponderance of the evidence; thus, on review there must be sufficient evidence to support the district court's revocation of probation." *State v. Allen*, 402 N.W.2d 438, 443 (Iowa 1987). We examine whether the district

court's reported findings show a factual basis for the revocation. *State v. Kirby*, 622 N.W.2d 506, 509-10 (Iowa 2001).

We review sentencing challenges for errors at law. *State v. Liddell*, 672 N.W.2d 805, 815 (Iowa 2003).

III. Merits

A. Revocation. McLachlan argues there is insufficient evidence to support the district court's revocation of his probation. He contends the evidence did not show he had either actual or constructive possession of the marijuana Officer Hedlund found in the yard. McLachlan points out the drugs were not found in a remote area, but instead were located in an area known to have high drug activity and "across the street from other individuals that were near other baggies of marijuana, one of whom admitted ownership of the marijuana."

Probation revocation is a civil proceeding and "not a stage of criminal prosecution." *State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999). Therefore, the strict rules of evidence utilized in criminal trials do not apply in revocation proceedings. *Rheuport v. State*, 238 N.W.2d 770, 772 (Iowa 1976). Rather, it "is sufficient if the violation is established by evidence which is competent." *Id*. While "proximity to contraband, standing alone," has been found "insufficient to establish constructive possession for the purposes of conviction," proof "beyond a reasonable doubt is not required" to prove a probation violation. *Kirby*, 622 N.W.2d at 511 (ruling a defendant's proximity to drugs coupled with his suspicious activities is substantial evidence of a probation violation).

McLachlan does not, and indeed cannot, dispute the facts showing he violated the probation terms requiring him to observe a 10:00 p.m. curfew and to avoid "hanging around the wrong people." These violations would provide independent grounds for probation revocation.

As to whether there is sufficient evidence McLachlan violated his probation by possessing marijuana, Officer Hedlund did not observe any of the other people in McLachlan's group *running* as the officer arrived in his marked patrol car. At the revocation hearing, McLachlan provided no explanation why he ran behind the house for twenty seconds. Officer Hedlund found the large quantity of marijuana when he *retraced* McLachlan's path behind the house. There is no evidence anyone else was in the area, and McLachlan's speculative assertion an unknown person placed the drugs in the yard is unpersuasive in light of the testimony the baggies appeared new, and large quantities of drugs are typically not left out in open areas. Additionally, only after McLachlan (1) pleaded with his companions to "take the charge," and (2) stated he was facing "ten years," did someone in the group change their story and claim the marijuana. At the hearing, Officer Steinkemp explained a person's friends will "quite often" falsely admit to possession to save their friend harsh punishment. We conclude McLachlan's suspicious activity, as observed and explained by the officers, his curfew violation, and in being in a high crime area constitute substantial evidence of a probation violation for possession of marijuana. *See id*.

B. Sentencing. McLachlan argues the district court erred in not granting him the right of allocution before imposing sentence. The State agrees the

district court did not give McLachlan a chance to speak in mitigation of punishment. Therefore, we affirm McLachlan's convictions and vacate his sentences. We remand for the limited purpose of resentencing. *See Duckworth*, 597 N.W.2d at 801 (ruling a defendant is entitled to allocution following the court's revocation of a deferred judgment and prior to the court's imposition of a sentence).

CONVICTIONS AFFIRMED; SENTENCES VACATED AND REMANDED FOR RESENTENCING.