IN THE COURT OF APPEALS OF IOWA

No. 6-505 / 06-0137
Filed August 23, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CODY RAY LEVEKE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Defendant appeals from a district court order revoking his deferred judgment and imposing prison sentence. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Dean Stowers of Rosenberg, Stowers & Morse, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and Frank Severino, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Miller, JJ.

MILLER, J.

Cody Leveke appeals from the district court order that found he violated his probation, revoked his deferred judgment, and imposed judgment and sentence. Leveke asserts the record does not contain sufficient evidence of either of the two violations found by the district court. We conclude the record does substantially support the existence of one of the two alleged violations. However, because the district court based its dispositional decision on the existence of both violations, we reverse the revocation of Leveke's deferred judgment, and remand this matter for a new dispositional determination.

I. Background Facts and Proceedings.

In January 2004 Leveke entered a guilty plea to a charge of incest in violation of Iowa Code section 726.2 (2001). In March 2004 he was granted a deferred judgment and placed on probation for a period of two years. On September 13, 2005, David Dreasher, Leveke's probation officer, filed a report of various probation violations alleged to have occurred between October 24, 2004, and September 9, 2005. These included Leveke's failure to complete polygraph examinations, and his termination from classes and treatment.

On October 5 Leveke stipulated to the violations, and the district court entered an order extending his probation by three weeks on the following terms:

> Defendant shall successfully complete the Curt Forbes Residential Center. If Defendant violates any rules of Curt Forbes Residential Center or if he fails to fully cooperate in treatment, a report of violation should be filed immediately and Defendant should be brought back for a revocation hearing.

On November 8, 2005, Dreasher filed in a new report of violation, alleging Leveke had violated the following rule of his probation: "16. I will actively

cooperate with, participate in, and complete any programs or services I am directed to by my Probation Officer and comply with the specific rules of that program." The report alleged that on November 1, 2005, "Leveke once again was not cooperative in taking a polygraph exam, using countermeasures and becoming emotional when confronted."

The court issued a warrant for Leveke's arrest. The warrant was executed on or about November 19,[1] and Leveke remained incarcerated until the January 6, 2006 revocation hearing. During the revocation hearing, the district court considered both the November 8 report as well as a January 3 addendum that alleged Leveke had further violated rule 16 on November 19, 2005, when he "was terminated from SOTP [sex offender treatment program]." The addendum referred to a Treatment Termination/Discharge Summary that detailed Leveke's "minimal progress" in meeting treatment objectives during the preceding four years;[2] noted he apparently had not "taken his treatment opportunity seriously" and "lack[s] motivation to change his behaviors, or to make progress on his treatment objectives"; and stated Leveke was being terminated for failure to make progress on his treatment objectives.[3]

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[1] The return of service states the warrant was served on November 27. However, Leveke asserts, and the State does not dispute, that Leveke was incarcerated beginning November 19.

[2] Leveke was in sex offender treatment for approximately two years prior to being placed on probation.

[3] The summary also remarked on Leveke's history of "periods of apparent progress . . . [and] positive treatment participation" followed by "regress[ion] back to a beginning stage of treatment"; his "continued use of cognitive distortions" that indicate "minimization of his behaviors and lack of empathy for the victim"; the fact he "continues to use justifications, minimizations, and rationalizations regarding both his original offense behaviors and repeated violations of the terms of his treatment contract"; and that the "effort he has put into the group . . . has been unsatisfactory." The summary further concludes Leveke's "prognosis for successful completion of outpatient SOTP is poor," and that he "is no longer appropriate for treatment in a community setting."

After receiving testimony from Dreasher, Leveke's treating psychologist Amanda Milligan, and Leveke himself, the district court determined the State had proved two violations of rule 16 by a preponderance of the evidence. The court accordingly revoked Leveke's deferred judgment and imposed judgment and sentence. Leveke appeals, contending the record does not contain sufficient evidence to support the court's determination that either violation occurred.

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. 6.4. "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 look to see whether the district court's reported findings, written or oral, show a factual basis for the revocation. *State v. Kirby*, 622 N.W.2d 506, 509-10 (Iowa 2001).

III. Discussion.

Leveke first asserts the State failed to prove he violated his probation in the manner alleged in the November 8 report. We must agree.

The alleged violation was based solely upon assertions by Dreasher that the report from Leveke's November 1, 2005 polygraph examination "states that Mr. Leveke used countermeasures during the test and when confronted became too emotional to continue the test." The polygraph examiner did not testify, the polygraph report was not admitted into evidence, and Dreasher admitted he had no first-hand knowledge of what occurred during the examination. Not surprisingly, the district court specifically found that "[t]here is no evidence before

the Court as to Mr. Leveke not being cooperative or using countermeasures [during the November 1 polygraph] other than the fact it's been discussed."

However, the court went on to state that it "does find by a preponderance of the evidence that the rule was violated because of [Leveke's] actions following whatever may have happened in the polygraph examination." When read in context, this is a clear reference to the November 8 report of violation, and not the January 3 addendum. There are two problems with this finding.

First, the November 8 report was limited to Leveke's behavior during the November 1 polygraph examination, an alleged violation that was rejected by the district court. Neither the November 8 report nor January 3 addendum provided Leveke notice of any additional violation that allegedly occurred after the polygraph examination but prior to his discharge from treatment. Thus, it was error for the district court to consider Leveke's post-November 1, pre-November 19 "actions" when determining whether the State had established the first alleged probation violation. *See Calvert v. State*, 310 N.W.2d 185, 188 (Iowa 1981) (noting that, as a matter of due process, a defendant is entitled to a written notice of the claimed probation violation).

Second, the only such "action" appearing in the record is Leveke's "argumentative and tearful" denial, during a group therapy session, of the unproven allegation that he failed to cooperate in or employed countermeasures during the November 1 examination. We agree with Leveke that this behavior is insufficient to establish a violation of rule 16's requirement that he cooperate with, participate in, comply with the rules of, and complete any recommended

programs or services. Accordingly, the district court's determination that Leveke violated his probation, as alleged in the November 8 report, must be reversed.

In contrast, we conclude there is sufficient evidence to support the court's determination that Leveke violated his probation when he was terminated from sex offender treatment on November 19, as reported in the January 3 addendum. In finding this violation had been established by a preponderance of the evidence, the court stated, "There's no dispute that he was terminated from the SOTP and he's failed to comply with the terms of the programs for the reasons that were set forth in" the discharge summary. Leveke does not dispute that failure to cooperate in or complete treatment is a violation of the terms of his probation. Moreover, the discharge summary, which details Leveke's lack of progress in treatment and attributes that lack of progress to Leveke's lack of motivation and participation, substantially supports a determination that Leveke was validly terminated from treatment due to his own lack of cooperation.

Leveke unconvincingly asserts "the claim [he] had not made sufficient progress in the offender's program . . . was mere pretext used to mask the actual reason [he] was discharged," which was the "unsubstantiated allegations of countermeasures on a polygraph examination," compounded by the fact he was unable to comply with the terms of his treatment because of his "subsequent incarceration due to the same." The district court expressly stated it would not consider events occurring after November 19, and nothing in the discharge summary indicates any reliance on Leveke's post-arrest behaviors. Rather, as previously noted, the discharge summary provides a detailed history of Leveke's

minimal progress during four years of treatment, and states it is the overall, long-term lack of progress that is precipitating Leveke's termination.

Leveke criticizes the summary's reliance on any actions or behaviors occurring prior to October 5, 2005, asserting it is "a veiled effort to bootstrap the pre-October 5, 2005 violations . . . despite the district court's determination that the previous violations were not relevant on their own in forming a basis for action by the court . . . ." Like the district court, we agree violations alleged and resolved prior to October 5, 2005, cannot serve as an independent basis for a new violation. However, contrary to Leveke's suggestion, and consistent with the district court's ruling, we believe all his pre-termination behavior is relevant in assessing whether he was, in fact, legitimately discharged from treatment. We accordingly reject Leveke's contention that his termination was arbitrary because Dreasher and Milligan testified there was no appreciable difference between his pre-October 5 and post-October 5 behavior, and because, at the time of his termination, "he was participating in . . . and expressing a desire to complete the program." An informed decision to terminate a defendant from treatment for lack of progress necessarily turns on a review of the defendant's entire history, rather than just his most recent behavior.

IV. Conclusion.

We have considered all of Leveke's contentions, whether or not specifically discussed. Although the State failed to prove a probation violation occurred on November 1, substantial evidence supports the district court's determination that Leveke violated his probation on November 19 when he was discharged from treatment for failure to comply with program terms. Because the

court's dispositional decision was based on a determination two violations occurred, we reverse the court's revocation of Leveke's deferred judgment, and its imposition of judgment and sentence, and remand this matter for a new determination of these questions in light of our present decision.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.