

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

JOHN ALLAN LOUGHNER,

Defendant-Appellant

UNPUBLISHED

May 20, 1997

No. 190286

Bay Circuit

LC No. 93-001431-FH

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

PER CURIAM.

Defendant, who had been sentenced to probation for possession of marijuana with the intent to deliver, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), appeals as of right from a finding that he violated the terms of his probation by violating a criminal law and by consuming alcohol. He was sentenced to 330 days' imprisonment and continued probation with four additional months of electronic monitoring and no association with his girlfriend, Jodie Gray. We affirm.

On July 17, 1995, two Bay City police officers were dispatched to a residence on a domestic disturbance call. When they arrived, they found several people, including defendant, arguing loudly in the front yard, but saw no signs of physical abuse. The officers attempted to quiet defendant but had difficulty separating him from two women, Jennifer Jamieson and Jodie Gray. The officers asked defendant to sit in the back seat of the patrol car, and he cooperated. However, while in the car, defendant yelled to the officers and the two women whenever they came near. According to one of the officers, defendant yelled so loudly that he could be heard outside the car, even though the car's windows were closed.

Defendant was originally charged with violating probation by assaulting Gray and Jamieson, but this charge was dismissed before the probation hearing, and defendant was instead charged with exciting a disturbance. Officer Jankowski testified at the hearing that during questioning defendant first told the officers that he had not assaulted anyone and later said that he had been attacked by the two women and another man. Jankowski also testified to his belief that defendant had been drinking

alcoholic beverages because defendant's speech was slurred, he emitted an odor of alcohol, and defendant admitted that he had consumed alcohol earlier in the day.

Defendant now argues that defense counsel was ineffective because Jodie Gray was not asked to testify or provide a statement. To sustain a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). If counsel makes a serious mistake in a matter of trial strategy, such as the failure to present witnesses, a conviction will be reversed only if this failure deprived the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.*

Although defendant now claims that Gray would have testified that defendant did not assault her, there is no indication on the record of what Gray's testimony would have been. While her testimony may have provided a defense to one of the original charged counts of assault, it could not have provided an absolute defense to the charge of exciting a disturbance or to the allegation that defendant was intoxicated. See MCL 750.167(e); MSA 28.364(e). Therefore, defendant was not deprived of a substantial defense, and defense counsel was not constitutionally ineffective. *Id.* at 711.

Defendant also argues that the evidence was insufficient to establish that he had violated the terms of his probation. The terms of defendant's probation prohibited him from violating a criminal law and from consuming alcoholic beverages. Defendant did not challenge Officer Jankowski's testimony. Viewing this testimony in a light most favorable to the prosecution, a rational trier of fact could conclude that defendant violated his probation by exciting a disturbance in violation of MCL 750.167(e); MSA 28.364(e), and by consuming alcohol. Thus, the trial court did not abuse its discretion in finding that the essential elements of a probation violation were established by a preponderance of the evidence. *People v Ison*, 132 Mich App 61, 66; 346 NW2d 894 (1984).

Defendant next contends that the presentence information report (PSIR) contained inaccurate information and did not include exculpatory statements made by Gray. Because defendant did not challenge the accuracy of the PSIR at or prior to sentencing and does not claim that he raised this issue as soon as any inaccuracy in the PSIR could reasonably have been discovered, this issue was not preserved for our review, and we decline to address it. MCR 6.429(C); *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996).

Defendant also asserts that his sentence was excessive and disproportionate, that the trial court erred in failing to provide accurate reasons for the sentence imposed, and that one of the conditions of his continuing probation was not reasonably related to his rehabilitation nor pertinent to his offense. In particular, he complains of the provision forbidding contact with Jodie Gray, arguing that this term was excessive and not rationally related to his rehabilitation because the trial court made the inaccurate finding that defendant had assaulted Gray.

We find defendant's arguments to be without merit. Defendant's position ignores the fact that probation is a matter of grace, not of right, and that the trial court enjoys broad discretion in determining the conditions to be imposed as part of probation. MCL 771.4; MSA 28.1134; *People v Whiteside*, 437 Mich 188, 192; 468 NW2d 504 (1991). Indeed, had defendant found the conditions of probation imposed after his violation to be overly onerous, he could have declined the continuance of his probation, notified the court that he would not abide by the terms of probation, and submitted himself for sentencing directly for his original offense of possession of marijuana with the intent to deliver. See *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995).

Affirmed.

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