

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY PAUL MACK,

Defendant-Appellant.

UNPUBLISHED

June 1, 2001

No. 221828

Midland Circuit Court

LC No. 94-007243-FH

Before: Holbrook, Jr., P.J., and Hood and Griffin, JJ.

PER CURIAM.

Following a contested hearing, defendant was convicted on three counts of probation violation.¹ Defendant was sentenced to continued probation, to make full payment of the outstanding balance of costs, and to serve four months in jail. Defendant appeals as of right. We vacate defendant's conviction for uncharged conduct, and affirm his sentence for probation violation.

Defendant argues the trial court violated his right to a fair hearing and due process by relying on uncharged conduct to find defendant violated his probation. This Court reviews due process violations de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). Probation revocation in Michigan includes the following due process procedures: "(1) a factual determination that a defendant is in fact guilty of violating probation, and (2) a discretionary determination of whether the violation warrants revocation." *People v Laurent*, 171 Mich App 503, 505; 431 NW2d 202 (1988).

Only the conduct charged in the petition may be used to determine if there is a violation of probation. Further, if the court finds that the probationer has violated a condition of probation, only the conduct charged in the petition may be considered in deciding whether probation should be revoked as a result of the charged violation. [*Id.* at 506. Accord *People v Pillar*, 233 Mich App 267, 270; 590 NW2d 622 (1998).]

¹ Defendant's probation followed a plea of no contest to a charge of larceny in a building, MCL 750.360; MSA 28.592.

Defendant did not object to the use of the non-charged conduct at his probation revocation hearing, where he appeared in propria persona, nor at sentencing, when defendant was represented by counsel. Accordingly, we review the alleged error under the plain error rule. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). “To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice” *Id.* at 763. Further, if the three elements of the plain error rule are established, “[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.”” *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

We conclude that the trial court erred in using uncharged conduct to find a probation violation under Count III. Moreover, the error was plain and affected substantial rights. However, because defendant was properly found guilty of probation violations with respect to Counts I and II, we conclude that neither was defendant innocent, nor was the fairness and integrity of the judicial proceedings undermined.

Count III charged a “violation of Rules #3 and #8 in that [defendant] was fired from the Cracker Barrel after failing to show up for work for two weeks, when he failed to report this to the probation officer.” At the probation violation hearing, defendant’s probation officer testified that defendant apparently had not been fired. The officer explained, however, that even though defendant had maintained his full-time employment status, personal reasons had prevented defendant from actually working a full-time schedule. The trial court concluded that defendant’s part-time work schedule constituted a violation of his probation.

If any allegations of misconduct are to be raised at the hearing, they must be included in the notice of violation so as to afford a defendant an opportunity to prepare to defend against them. *People v Taylor*, 104 Mich App 514, 517; 305 NW2d 251 (1981). Here, the trial court erred because the alleged violation of working part-time instead of full-time was raised at the probation violation hearing but was not included in the notice of violation.

Nonetheless, because defendant was also properly found guilty of probation violations on Counts I and II, the court was within its discretion to revoke defendant’s probation and sentence him to jail. Further, at neither the probation violation hearing nor at sentencing did the court remark at length regarding the uncharged conduct so as to impermissibly taint the proceedings or to imply that the sentence was imposed primarily as a result of defendant’s guilt with respect to Count III. See *Laurent, supra*. Additionally, the uncharged conduct did not involve allegations of illegal activity. See *People v Longmier*, 114 Mich App 351; 319 NW2d 579 (1982).

Defendant's conviction for uncharged conduct is vacated. His sentence for probation violation is affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Harold Hood

/s/ Richard Allen Griffin