

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN BURNETT,

Defendant-Appellant.

UNPUBLISHED

September 13, 2002

No. 233151

Wayne Circuit Court

LC No. 00-008042-01

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's order revoking his probation, which was based on an underlying guilty plea to aggravated stalking. We affirm.

Defendant previously pleaded guilty to aggravated stalking and was sentenced to probation with ninety days to be served in jail. As a condition of probation, defendant was ordered to have no contact with the stalking victim. While in jail, defendant sent letters to various third parties in which he threatened the stalking victim. Based on these letters, a petition for probation violation and bench warrant was issued.

Defendant first asserts the prosecutor failed to establish by a preponderance of the evidence that defendant violated the condition of probation ordering him to have no contact with the stalking victim. Additionally, defendant claims the trial court based its guilty finding on conduct not alleged in the probation violation petition.

Probation violation proceedings involve two steps: (1) a factual determination whether a defendant is guilty of violating probation, and (2) if a defendant is found guilty, a discretionary determination whether the violation warrants revocation. *People v Pillar*, 233 Mich App 267, 269; 590 NW2d 622 (1998). We review the trial court's factual findings for clear error, *People v Thenghkam*, 240 Mich App 29, 43-47; 610 NW2d 571 (2000), and the court's decision to revoke probation for an abuse of discretion. *People v Ritter*, 186 Mich App 701, 706; 464 NW2d 919 (1991).

The prosecution bears the burden of proving a probation violation by a preponderance of the evidence. MCR 6.445(E)(1). On review, we view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the preponderance of

the evidence indicates the defendant violated his probation. *People v Reynolds*, 195 Mich App 182, 184; 489 NW2d 128 (1992). Only evidence relating to the charged probation violation activity may be considered, and only that evidence may provide the basis for a decision to revoke probation. *Pillar, supra* at 270.

At defendant's hearing, the prosecutor introduced letters defendant wrote to third parties. In these letters, defendant made disparaging and threatening remarks directed toward the victim, threatening that the victim better leave defendant alone before she is "hurt real bad." He directed that the victim be contacted, stating in several letters, "tell [victim]" and "tell that whore [victim]. . . ." Further, he acknowledged that the victim had received at least one of his messages, stating "[y]ou gave [victim] the letter I wrote you." Viewed in the light most favorable to the prosecutor, the preponderance of the evidence establishes defendant contacted his victim, albeit through the use of a third party. The trial court did not err in finding defendant guilty of violating his probation conditions.

Moreover, the trial court did not improperly base its finding of guilt on conduct not alleged in the probation violation petition. As the basis for the allegation that defendant violated the no contact condition, the petition listed the letters defendant wrote from jail. The court relied on comments and threats directed toward the victim in these letters, as outlined above, to find defendant guilty of violating his probation.

Next, defendant argues the trial court abused its discretion in admitting defendant's letters because they were irrelevant, lacked a proper foundation, and were more prejudicial than probative. MRE 402, 403, 602, 901. The Michigan Rules of Evidence do not apply to probation revocation proceedings. MCR 6.445(E)(1); MRE 1101(b)(3). Therefore, the trial court did not err in admitting the letters in disharmony with those rules.

Finally, defendant contends the trial court violated his double jeopardy protection and due process rights by admitting as evidence a letter that had previously been used to establish the charge underlying his probation sentence. Specifically, defendant asserts that because the letter, dated April 18, 2000, was previously used against him, the letter could not be used against him concerning the probation violation. Defendant failed to preserve this issue below because he challenged the letter's admission on relevance grounds, not double jeopardy or due process; however, we will nonetheless review the issue because it involves a "significant constitutional question." See *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). A double jeopardy claim presents a question of law that we review de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

The United States and the Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. However, for double jeopardy protections to apply, the defendant must have been put in jeopardy by a criminal prosecution in a court of justice. *People v Marrow*, 210 Mich App 455, 465; 534 NW2d 153 (1995), aff'd 453 Mich 903 (1996), overruled in part on other grounds *People v Pashu*, 466 Mich 378; 645 275 (2002); *People v Johnson*, 191 Mich App 222, 226-227; 477 NW2d 426 (1991). A probation violation hearing is not a criminal prosecution. *Johnson, supra* at 225-227. Moreover, the trial court's determination that defendant violated the terms of his probation order does not burden defendant with a new conviction or expose defendant to punishment other than that to

which he was already exposed as a result of his previous guilty plea on the underlying charge. *Id.* The letter's admission did not violate defendant's double jeopardy protection.

Additionally, the letter's admission did not violate defendant's due process rights. The probation revocation petition gave defendant notice that he would have to answer for attempts to contact the victim. The trial court did not rely on the April 18 letter to determine defendant's guilt of violating probation, but admitted the letter for the limited purpose of demonstrating that defendant had the means to contact the victim.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Richard A. Bandstra

/s/ Hilda R. Gage