

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON O'NEILL,

Defendant-Appellant.

UNPUBLISHED

November 29, 2005

No. 256016

Oakland Circuit Court

LC No. 2001-176697-FH

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

MEMORANDUM.

Defendant appeals as on leave granted¹ from a prison term imposed on a plea-based conviction of criminal sexual conduct in the third degree, MCL 750.520d(1)(a), following a determination that he violated probation. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

First, defendant contends that even though he pleaded guilty to the underlying offense, he should be entitled to an appeal as of right from revocation of probation following a contested hearing. Because the same argument was considered and rejected in *People v Perks (On Remand)*, 259 Mich App 100; 672 NW2d 902 (2003), we find no merit to defendant's contention.

Next, defendant contends that the trial court erred in finding him guilty of violation of probation. Probation is a matter of grace, not of right, and is thus subject to revocation. MCL 771.4. "A revocation proceeding has two steps: (1) a factual determination that the violations charged in the notice have occurred; and (2) a discretionary determination that the proven charges warrant revoking probation." *People v Taylor*, 104 Mich App 514, 516; 305 NW2d 251 (1981). The prosecutor bears the burden of proving that the defendant violated the terms of his probation by a preponderance of the evidence. *People v Ison*, 132 Mich App 61, 66; 346 NW2d 894 (1984). Following the hearing, the trial court must make findings of fact and conclusions of law. MCR 6.445(E)(2). The trial court's factual findings are reviewed for clear error. A finding of fact is considered "clearly erroneous if, after review of the entire record, the appellate court is

¹ *People v O'Neill*, 470 Mich 872; 687 NW2d 294 (2004).

left with a definite and firm conviction that a mistake has been made.” *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

While the trial court clearly erred in finding that defendant had prohibited contact with the victim, there being no evidence of such contact, the trial court did not clearly err in finding that defendant had prohibited contact with the victim’s school. Defendant admitted that he went somewhere near the school to pick up another student. While he maintained that he parked by the adjacent public library, the student told her mother that defendant drove past the library and “came into the high school” parking lot. Other witnesses testified that defendant parked in a lot designated for school use. Thus, the trial court properly found that defendant had violated his probation with the school by appearing on school grounds.

Affirmed.

/s/ Michael R. Smolenski

/s/ Bill Schuette

/s/ Stephen L. Borrello