

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT TODD SMIT,

Defendant-Appellant.

UNPUBLISHED

October 28, 2008

No. 279528

Kent Circuit Court

LC No. 02-012422-FH

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted of violation of probation from his underlying plea-based conviction of two counts of breaking and entering a building with intent to commit larceny, MCL 750.110, and was sentenced to a term of 23 to 120 months in prison. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to two counts of breaking and entering a building with intent to commit larceny, and was sentenced to four years' probation, with one year to be served in jail. Upon violating his probation for the first time, and admitting guilt, defendant's probation term was extended by one year, and he was ordered to enter the Pine Rest Men's Residential program, and abide by all rules and regulations of that program. He was prohibited from leaving the program without permission from his probation officer.

Defendant entered the program, and after breaking a rule against taking contraband from Pine Rest by taking a box cutter, defendant was put on "adjustment," a form of punishment under which residents lost most of their privileges. Upon being told that he was being placed on adjustment, defendant left Pine Rest without permission.

At the probation violation hearing, defendant testified as follows:

I guess I was wrong for leaving the program, and I admit that I'm wrong for leaving. I just was upset and distraught because I didn't understand being written up for manipulating staff. It just didn't make any sense to me. . . . I wouldn't have left the program, your Honor, with only seventeen or eighteen days to go to complete it, if knowing I would be facing prison.

In his closing argument, defense counsel said:

I think we can speed along a little bit here. Mr. Smit committed the violation. We're not arguing that he didn't do it. He was supposed to stay at Jellema House, he left. It's done. That's not the issue. Nor is the issue why he did it. He didn't have permission.

Defense counsel went on to say, "I think the guilt is obvious, we're not contesting that. I would simply ask the court to roll the dice again on this man. Give him a chance to do the right thing."

On appeal, defendant contends that the above statements by defense counsel during closing argument constituted an admission of guilt and as such, was a violation of his constitutional right to effective assistance of counsel, as guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's representation was below an objective standard of reasonableness, that there is a reasonable probability that but for counsel's errors there would have been a different result, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002), and the result that occurred was fundamentally unreliable or unfair. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Review of a claim of ineffective assistance of counsel must be highly deferential and without the benefit of hindsight. *Bell, supra* at 698. There is a strong presumption that counsel's assistance was effective, and the defendant bears the burden of overcoming that presumption. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Trial counsel does not render ineffective assistance by failing to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

A probation violation hearing is not a criminal trial, and a defendant in such a proceeding does not have all the rights guaranteed to a defendant in a criminal trial. *People v Belanger*, 227 Mich App 637, 643; 576 NW2d 703 (1998). A probation violation hearing is "summary and informal", and is not subject to the rules of evidence or to the rules of pleadings applicable in criminal trials. MCL 771.4. In order to revoke a defendant's probation, "[t]here must be verified facts in the record from which the court can find by a preponderance of the evidence that a violation was committed." *People v Pillar*, 233 Mich App 267, 270; 590 NW2d 622 (1998).

Defendant relies on *People v Schultz*, 85 Mich App 527, 531-532; 271 NW2d 305 (1978), to assert that defense counsel's statements during closing argument were tantamount to an admission of guilt. While defense counsel's statements during closing argument in *Schultz* were construed as a complete admission of guilt, and ineffective assistance of counsel, that case was a criminal trial, whereas the instant case concerns a probation violation hearing. Here, defendant was already convicted of the offense for which he was on probation. In *People v Belanger*, 227 Mich App 637, 644; 576 NW2d 703 (1998), this Court said, "[d]efendants' analogy to a trial and a guilty plea is unsound. Probation revocation is not a stage of a criminal prosecution. In these proceedings we deal not with the procedural rights of an accused in a criminal prosecution, but with the more limited due process rights of one who is a probationer because he has been convicted of a crime. . . ." The *Belanger* Court went on to say, "due process requires only that the proceedings be fundamentally fair." *Id.* at 647.

Also unlike in *Schultz*, defendant took the witness stand and admitted that he left Pine Rest without being given authorization to do so. Considering that the burden of proof in a probation violation hearing is guilt by preponderance of the evidence, *Pillar, supra* at 270, rather than guilt beyond a reasonable doubt, defendant's admission that he left Pine Rest without permission gave defense counsel little choice but to appeal to the sympathy of the court. Counsel's statements during closing argument did not constitute ineffective assistance of counsel. *Mack, supra* at 130.

Defendant essentially argues that his testimony that he left Pine Rest without permission is distinguishable from defense counsel's statement that, "Mr. Smit committed the violation[,]" because defendant admitted to leaving without permission, but not to violating his probation because his leaving was excusable under the circumstances. This argument is tenuous at best. Defendant was not allowed to leave Pine Rest without permission; having admitted to leaving without permission, defendant effectively admitted to "violating" that term of his probation.

Assuming *arguendo* that defense counsel's representation fell below an objectively reasonable standard, it is important to note that this hearing was before a judge, rather than a jury. "A judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Because this hearing was before a judge rather than a jury, and defendant testified that he left Pine Rest without permission, it cannot be said that it is reasonably probable that, but for defense counsel's statements, a different result would have occurred.

Affirmed.

/s/ Deborah A. Servitto
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood