3 STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2012
v	No. 305220 Oakland Circuit Court
DOMINICK ALLEN DIGHERA, Defendant-Appellant.	LC No. 2006-211291-FH

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted an order revoking his probation and sentencing him to prison. We affirm.

I. BACKGROUND

Defendant pleaded guilty of using a computer to commit a crime, MCL 752.796, furnishing obscenity to a child, MCL 750.142, and five counts of accosting a child for immoral purposes, MCL 750.145a. In January 2007, defendant was placed on probation. One of the conditions of defendant's probation was to "[m]ake a truthful report to the probation officer monthly, or as often as the probation officer may require, either in person or in writing, as required by the probation officer." Subsequently, on January 10, 2011, during defendant's monthly in-person report, defendant's probation agent, Sarah Ostroski, arranged for a home call at defendant's house. A home call is a residence check where Ostroski would walk through defendant's house to ensure that defendant was in compliance with all of his probationary terms. Defendant requested that Ostroski arrive at his house before 8:00 a.m. for the home call to allow him to get to work on time.

On January 14, 2011, Ostroski arrived at defendant's house around 8:00 a.m. for the home call. She knocked on the side door and defendant answered the door. Before entering the house, Ostroski asked defendant standard safety questions regarding who else was in the house. Specifically, Ostroski asked defendant who else lived at the residence, and defendant stated that he had a roommate. When Ostroski asked defendant if anyone was presently inside the house, defendant replied "no" and that his roommate was not there. Ostroski then entered defendant's house and they walked through defendant's house together. Upon entering the backroom of the

house, Ostroski observed an unidentified male. Defendant told Ostroski that he was going to breakfast with the person. Ostroski concluded her home call and left the premises.

Subsequently, in May 2011, a probation violation hearing was held to determine if defendant violated his probation order by failing to make a truthful report. After reviewing the evidence and listening to the parties' oral arguments, the trial court concluded that defendant failed to make a truthful report to Ostroski when he told her that the home call needed to be done before 8:00 a.m. so that defendant could get to work on time and when he failed to inform Ostroski that someone else was inside the house. The trial court revoked defendant's probation and sentenced him to prison. From this order, defendant appeals by delayed leave granted.

II. ANALYSIS

A. CHALLENGES TO THE PROBATION VIOLATION

Defendant argues that his probation condition required truthful reporting to the probation officer only during his monthly report and that his conversation with his probation officer at the side of his house did not constitute a monthly report. Defendant did not raise this argument before the trial court, so we review it for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The probation condition at issue provides that defendant must "*[m]ake a truthful report to the probation officer* monthly, or *as often as the probation officer may require*, either in person or in writing, as required by the probation officer." (Emphasis added.) We turn to the dictionary definition of "report" in determining the meaning of this probation condition because the term is undefined. Report is defined as "a detailed account of an event, situation, etc., usu[ally] based on observation or inquiry[]" or "a statement or announcement." *Random House Webster's College Dictionary* (2001). According to Ostroski's testimony, upon arriving at defendant's house, she asked defendant several standard safety questions outside the house. Consequently, this was not – as characterized by defendant – a "comment on the side porch" of defendant's house. Rather, during the exchange outside the house, defendant was providing a detailed account to Ostroski regarding the situation inside his home before she entered. Thus, defendant's statements to Ostroksi were a report and, per his probationary terms, he was required to be truthful. The trial court correctly concluded that the conversation between defendant and his probation officer at the side of his house constituted a report and bring truthful at that time was a part of defendant's probation terms.

Moreover, contrary to defendant's assertion on appeal, the probation condition provides that defendant must make a truthful report whenever the probation officer requires him. Thus, he was not limited to being truthful only during his monthly report. Rather, the probation condition requires that defendant be truthful during each report – meaning during any detailed account or statement – given to the probation officer. The trial court's construction of the order did not constitute plain error.

As a corollary argument, defendant also asserts that he did not have prior notice that he must be truthful to his probation officer outside of the monthly reports. Defendant did not raise this due process argument before the trial court, so we review it for plain error. *Carines*, 460

Mich at 763-764. Generally, due process requires that a probationer have prior notice of a probationary term before his probation may be revoke for violating that probationary term. *People v Stanley*, 207 Mich App 300, 307; 523 NW2d 892 (1994). The record shows that defendant acknowledged his probation order and defendant does not provide any evidence to the contrary. Thus, we conclude that defendant failed to show plain error because he properly received prior notice of all probation conditions. The mere fact that defendant failed to understand a probation condition does not result in a constitutional violation.[1]

Alternatively, defendant contends that the evidence was insufficient to prove that he made an untruthful report to Ostroski during their conservation outside his house. The finding of a probation violation is a two-step process: "(1) a factual determination that the probationer is in fact guilty of violating probation, and (2) a discretionary determination of whether the violation warrants revocation." *People v Pillar*, 233 Mich App 267, 269; 590 NW2d 622 (1998). Following the hearing, the trial court must make findings of fact and conclusions of law. MCR 6.445(E)(2). We review findings of fact for clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). We review the trial court's decision to revoke probation for an abuse of discretion. *People v Ritter*, 186 Mich App 701, 706; 464 NW2d 919 (1991).

When reviewing a claim that the evidence was insufficient to establish a probation violation, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the preponderance of the evidence establishes that the defendant violated his probation. *People v Reynolds*, 195 Mich App 182, 184; 489 NW2d 128 (1992). The prosecution bears the burden of proving the probation violation by a preponderance of the evidence. MCR 6.445(E)(1). "[O]nly evidence relating to the charged probation violation activity may be considered at a violation hearing and only such evidence may provide the basis for a decision to revoke one's probation." *Pillar*, 233 Mich App at 270. We give deference to the trial court's determination regarding the weight and credibility of evidence. *People v Breeding*, 284 Mich App 471, 487; 772 NW2d 810 (2009).

The evidence was sufficient to establish a probation violation. On January 14, 2011, Ostroski arrived at defendant's house around 8:00 a.m. Ostroski knocked on the side door and defendant answered the door. While still outside the house, Ostroski began the home call by asking defendant standard safety questions regarding who else lived at the residence. According to Ostroski, defendant "indicated [that] he had a roommate name Kristen." Ostroski then "asked

[1] Defendant also makes the assertion, without citation to legal authority and with cursory legal analysis, that this probation condition violates his First Amendment right to freedom of speech. We consider this argument abandoned and decline to address it. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). However, even if we were to address it, we note that this probation condition does not violate the First Amendment. A probation condition "'may affect fundamental rights such as freedom of speech and freedom of association if the conditions are primarily designed to meet the ends of rehabilitation and protect the public.'" *United States v Hughes*, 964 F 2d 536, 542 (CA 6, 1992) (citation omitted); see also *People v Branson*, 138 Mich App 455, 460; 360 NW2d 614 (1984).

him [defendant] if anyone else was presently in the home and he indicated no, and that Kristen was not there either." Ostroski and defendant then walked through the house. Ostroski did not encounter anyone in the basement, kitchen, or bedrooms. However, upon entering the backroom of the house, Ostroski observed an unidentified male inside the house.

Defendant characterizes this evidence as highlighting a mere miscommunication between the parties, as evidenced by the fact that he passed a polygraph test regarding whether he lied to Ostroski. However, it was for the trial court to determine the weight and credibility of the evidence presented before it. The evidence was sufficient to establish that defendant failed to make a truthful report to Ostroski by a preponderance of the evidence when he told Ostroski that no one was inside his house.[2]

B. JUDICIAL BIAS

Defendant contends that he was denied a fair trial because the trial court was biased. Defendant failed to raise this issue below, thus, it is unpreserved and we review it for plain error. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011), citing *Carines*, 460 Mich at 763-764.

"A criminal defendant is entitled to a neutral and detached magistrate." *Jackson*, 292 Mich App at 597 (quotations and citation omitted). The defendant must overcome a heavy presumption of judiciary impartiality. *Id*. at 598. "The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judiciary impartiality is whether the trial court's conduct or comments were of such a nature as to . . . deprive the appellant of his right to a fair and impartial trial." *Id*. (quotations and citations omitted). "Comments that are critical of or hostile to counsel and the parties are generally not sufficient to pierce the veil of impartiality." *Id*., citing *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

Defendant cites to the trial court's commentary from a February 2011 violation of probation hearing as evidence of judicial bias. At that hearing, the trial court indicated that defendant had "a problem with the truth still." The trial court also stated:

> You want to go to prison, you're writing your own check right now. You are absolutely writing your own check into the prison system. Nothing I can do about it. Because you've decided that that's your attitude and that apparently we all work at your pleasure. So nothing I can do about it. But I think I made myself clear.

[2] We note that even if defendant's untruthful statement outside of his house to Ostroski was not a report, it is clear from the evidence that defendant's untruthful statement to Ostroski *during his monthly report* that he needed her arrive before 8:00 a.m. for him to get to work on time was a report. Consequently, even if we had accepted defendant's argument, we would have still concluded that the trial court correctly found that defendant violated his probation condition by a preponderance of the evidence.

These comments do not overcome the presumption of judicial impartiality. The trial court made these comments three months before the May 2011 probation violation hearing, and there is nothing in the record to suggest that the trial court harbored a bias towards defendant. Moreover, defendant does not point to any commentary or action by the trial court during his May 2011 probation violation hearing to establish judicial bias.

Defendant, relying upon *Cain v Mich Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996), also asserts that the trial court should have recused itself *sua sponte*, and that the failure of the trial court to do so infringed on his due process right to an unbiased and impartial decisionmaker. We review this unpreserved constitutional claim for plain error. *Carines*, 460 Mich at 763-764.

The *Cain* Court concluded that a judge may be disqualified "without a showing of actual bias in situations where experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Cain*, 451 Mich at 498 (quotations, citation, and emphasis omitted). "[J]udicial disqualification pursuant to the Due Process Clause . . . for bias or prejudice is only constitutionally required in the most extreme cases." *Id*. The *Cain* Court listed four situations requiring judicial disqualification without a showing of actual bias:

> [where the trial court] (1) has a pecuniary interest in the outcome; (2) "has been the target of personal abuse or criticism from the party before him"; (3) is "enmeshed in [other] matters involving petitioner . . . "; or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker. [*Id*. (citation omitted).]

Defendant asserts that the fourth situation is present in this case, but, he has failed to establish that the trial court may have prejudged his case. Indeed, a review of the record reveals that the trial court did not prejudge defendant's case before the conclusion of the probation violation hearing. The record establishes that the trial court held a hearing, admitted evidence, heard arguments by both parties, and made a decision based on the evidence presented during the hearing.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray