

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

MICHAEL BRYAN NIEMI,

Appellant,

v.

Case No. 5D19-325

STATE OF FLORIDA,

Appellee.

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Opinion filed November 15, 2019

Appeal from the Circuit Court
for Citrus County,
Richard A. Howard, Judge.

James S. Purdy, Public Defender, and
Thomas J. Lukashow, Assistant Public
Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Allison L. Morris,
Assistant Attorney General, Daytona
Beach, for Appellee.

PER CURIAM.

Michael Niemi pled no contest to lewd or lascivious conduct, and the trial court placed him on sex offender probation. Upon his release from jail, he went to the residence approved by the probation officer—the home where he resided prior to his arrest—only to learn that his Wife had sold it.

Consequently, Niemi's probation officer placed him with a sponsor at a residence on Pompeo Avenue in Citrus County. Niemi disliked that living arrangement and

requested to move to a residence on Rock Crusher Road in Citrus County. The probation officer approved the move but instructed Niemi that he could not move into the new residence until the residence was visually inspected and approved. Despite that instruction, Niemi moved.

Niemi was subsequently charged with and found guilty of violating four conditions of his probation: changing his residence without consent (condition 3); violating Florida law by failing to register his change of address within 48 hours (condition 5); failing to comply with instructions and truthfully answer his probation officer's questions (condition 9); and failing to abide by a mandatory curfew (condition 14). On appeal, Niemi argues that there was insufficient evidence to support the lower court's findings that he violated conditions 5 and 9. We agree.

Related to the violation of condition 5, the affidavit of violation of probation alleged:

On 12/2/2018 [Niemi] was arrested by the Citrus County Sheriff's Office for the criminal offense of Sex Offender Failure to Report Name /Address Change within 48 Hours. [Niemi] was arrested after a Registration Check and a review of the Florida Department of Law Enforcement Sexual Offenders revealed that [he] did not report an address or address change within the mandated 48-hour time period required by Florida Statute.

The evidence at the violation of probation hearing does not demonstrate that Niemi violated the reporting requirements of section 943.0435, Florida Statutes (2018). Section 943.0435 allowed Niemi 48 hours to notify the Sheriff's Office of his relocation. The probation officer and Niemi testified that Niemi moved into the Rock Crusher Road residence on December 1.¹ Citrus County law enforcement officers arrested Niemi the

¹ The probation officer testified that the electronic monitoring system initiated a "home zone alert" on December 1, meaning the monitor was not at the Pompeo Avenue residence when Niemi's curfew began.

following day for failing to comply with section 943.0435. Because Niemi had 48 hours to report his change of residence, his arrest for violating section 943.0435 on December 2 was premature and could not form the basis for finding that he willfully and substantially violated his probation.

As to Niemi's alleged violation of condition 9, the affidavit of violation of probation stated:

[B]y failing to comply with all instructions given to [Niemi], and to promptly and truthfully answer all inquiries directed by the probation officer, and as grounds for belief that [he] violated his probation, Officer Scrivens states that on 12/2/2018, [Niemi] did answer untruthfully an inquiry by the probation officer as to the residence [he] provided to the Department, of which [he] was instructed to provide, and [he] did fail to carry out this instruction by Officer Scrivens.

At the violation of probation hearing, the probation officer articulated:

It was approved for [Niemi] to go [to Rock Crusher Road], but it was not authorized for him to be there Mr. Niemi was also instructed to contact me of his move because I have to witness and verify him in that residence, and he would have so many days to go back to law enforcement in the process to get it registered with them as well.

The lower court found that Niemi "didn't truthfully answer [the] probation officer as to where [he was] supposed to be living or anything approaching that, just—just general directions between Pompeo and Rock Crusher is not a valid address. So that's—Condition Number 9 has been shown by the greater weight of preponderance."

The record does not support the lower court's finding that Niemi willfully and substantially violated condition 9 by failing to comply with instructions and truthfully answer his probation officer's questions. The probation officer knew the Rock Crusher Road address and provided it to law enforcement. There is no evidence that Niemi lied to

the probation officer about where he was moving or provided “just general directions between Pompeo and Rock Crusher.”

Accordingly, we reverse the lower court’s findings that Niemi violated conditions 5 and 9 of his probation. We affirm the lower court’s findings that Niemi violated conditions 3 and 14, as Niemi does not contest these findings on appeal.

It is unclear from the record whether the lower court would have revoked Niemi’s probation and imposed the same sentence based on his violations of conditions 3 and 14 only. Therefore, we reverse and remand for the lower court to determine whether the violations of conditions 3 and 14 justify revocation of Niemi’s probation and/or the imposition of a prison sentence. See Hostetter v. State, 82 So. 3d 1217, 1221 (Fla. 1st DCA 2012) (remanding based on reversal of some violations of probation but not others, noting that record was unclear whether trial court would have revoked probation and imposed same sentence based on remaining violations only); see also Grannemann v. State, 85 So. 3d 1186, 1187 (Fla. 5th DCA 2012).

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

COHEN, WALLIS and HARRIS, JJ., concur.