IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

December 2, 2020

JOSHUA RYAN TIMKE,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D19-1584
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

BY ORDER OF THE COURT:

Appellant's motion for rehearing is denied.

Appellant's motion for written opinion is granted. This court's opinion dated August 28, 2020, is withdrawn, and the attached opinion is issued in its place.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL
CLERK

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JOSHUA RYAN TIMKE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D19-1584

Opinion filed December 2, 2020.

Appeal from the Circuit Court for Hillsborough County; Nick Nazaretian, Judge.

Howard L. Dimmig, II, Public Defender, and Susan M. Shanahan, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and William Stone, Jr., Assistant Attorney General, Tampa, for Appellee.

KHOUZAM, Chief Judge.

Joshua Ryan Timke timely appeals an order revoking his sex offender probation based on a curfew violation and sentencing him to 201 months in prison. After we initially issued a per curiam affirmance, Mr. Timke filed a motion for rehearing or, in the alternative, a written opinion. We deny the motion for rehearing but grant the motion for written opinion in order to explain the basis for our affirmance.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

At the revocation hearing, Mr. Timke's probation officer testified that he received an alert that Mr. Timke's ankle monitor had detected that he was out past his 10:00 p.m. curfew on January 19, 2019. When the probation officer confronted Mr. Timke about it the following day, Mr. Timke admitted that he had been out past his curfew but responded that his prior probation officer "wouldn't make a big deal of that." He stated that the reason he was late was that he had gotten stuck in traffic on his way back from downtown Orlando due to events being held there.

Ankle monitoring records showed that Mr. Timke left his residence in the Orlando area at 8:30 p.m. and arrived in downtown Orlando eighteen minutes later, at 8:48 PM. He began moving again at approximately 9:00 p.m., traveling at various speeds and stopping intermittently. He ultimately arrived home at 10:26 p.m.

Mr. Timke testified that he had previously discussed his curfew with his probation officer and knew that he was required to be home by 10:00 p.m. On the night of the violation, he left his home at about 8:30 p.m. to drive to downtown Orlando. He testified he did not leave the area until 9:15 or 9:20, expecting to arrive home "[a]round 9:50." He testified he then ran into "gridlock traffic" that caused him to take an alternate route home, making him miss his curfew.

Mr. Timke admitted he did not contact his probation officer or the Department of Corrections, even after it became obvious that he was going to miss his curfew. Instead, he only responded to a call from his ankle monitoring system after it notified him that it had detected via GPS that he was out past curfew.

Mr. Timke blamed the traffic on two events taking place in downtown Orlando that night: a monster truck rally and a basketball game. The court observed that both of these events had already started before Mr. Timke left his home and asked Mr. Timke to explain the discrepancy: "I'm just curious, it took 18 minutes to get there through all this monster traffic and then it takes you an hour and a half to get home. Does that make any sense to you?" Mr. Timke responded by simply stating there was "no traffic" on the way there, without addressing the incongruity identified by the court.

The trial court found that Mr. Timke had violated the curfew condition of his probation and that the violation was both willful and substantial. The trial court revoked Mr. Timke's probation and sentenced him at the bottom of the guidelines.

ANALYSIS

On appeal, Mr. Timke admits that he violated his curfew but asserts that the record lacks competent substantial evidence that the violation was willful and substantial. He contends that the violation was due to traffic conditions that arose on his drive home that "were beyond his control."

In reviewing a revocation order, this court first assesses whether the finding of a willful and substantial violation is supported by competent substantial evidence. Savage v. State, 120 So. 3d 619, 621 (Fla. 2d DCA 2013). If so, then the question becomes whether the trial court abused its discretion in deciding to revoke probation. Id. at 623. On this record, we cannot say that the court's finding of a willful and substantial violation is not supported by competent, substantial evidence or that the revocation was an abuse of discretion.

Mr. Timke admitted he knew he had a mandatory curfew of 10:00 PM. Nonetheless, he decided to leave his home to drive to downtown Orlando at about 8:30 p.m.—ninety minutes before his curfew. That would risk a curfew violation any night of the week, but the fact that this was a Saturday night further increased the likelihood of events and traffic in that notoriously crowded metropolitan area. As Mr. Timke's probation officer testified at the hearing, "Anybody that lives in Orlando understands that there are always events in downtown."

When the probation officer discussed the violation with Mr. Timke, he responded that his prior probation officer would not have "ma[d]e a big deal" out of the violation. And Mr. Timke admitted he was planning to arrive home at "[a]round 9:50," leaving only ten minutes of cushion for complications or delays, such as traffic. These statements indicate that Mr. Timke was not particularly concerned about the risk of being out past curfew.

Further, Mr. Timke failed to contact his probation officer—or anyone else at the Department of Corrections—to seek permission to be out past curfew. He also did not notify the officer that he was going to violate his curfew, even after it became obvious during the drive home. Instead, he only returned a call from his ankle monitoring system *after* it had independently detected the curfew violation.

Finally, although no express finding was made as to Mr. Timke's credibility, it is clear on the record before us that the court did not find his story to be credible. Even when the court asked him directly about the clear discrepancy in his explanation of his trip, Mr. Timke declined to reconcile his testimony. And he never

offered any explanation for why he went downtown shortly before curfew in the first place.

This evidence was sufficient to support the court's finding that Mr. Timke's violation was both willful and substantial. "The competent substantial evidence standard defers to the trial court's judgment because the trial court is in the best position to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses." Savage, 120 So. 3d at 622 (citations omitted).

Nonetheless, on appeal Mr. Timke focuses on the fact that he arrived home only twenty-six minutes late, asserting that revocation was inappropriate for such a brief delay. But the cases on which he relies are factually distinguishable.

First, he cites cases where a probationer obtained, or at least sought, permission for the actions leading up to the violation. See Rousey v. State, 226 So. 3d 1015, 1016 (Fla. 2d DCA 2017) (officer gave permission for probationer to go to cell phone store); Hugan v. State, 190 So. 3d 210, 211 (Fla. 2d DCA 2016) (probationer called officer to seek permission to take extra shift); Thomas v. State, 672 So. 2d 587, 588 (Fla. 4th DCA 1996) (job interview was approved). By contrast here, Mr. Timke did not attempt to coordinate with his probation officer in any way—neither before heading downtown nor after it became clear that he would not make curfew.

Second, and crucially here, Mr. Timke relies on cases where the probationer disclosed his or her reason for the violation and the court expressly incorporated that reason into its analysis. In Rousey, for example, the probationer had obtained permission to visit a cell phone store with instructions to be home by 1:00 p.m.

but did not return home until 1:48. 226 So. 3d at 1016. He explained that he was late in returning from the store because he did not have his own transportation and his ride had car trouble after stopping for gas on the way home. Id. Emphasizing that there was no dispute that the probationer (1) had permission both to visit the phone store and to stop for gas and (2) had been stranded at the gas station during the entire period of time he was late, this court reversed the revocation of his probation. Id. at 1017.

Similarly, in Hugan, there was no dispute that the reason the probationer was away from home in violation of the conditions of his community control was that he was working an extra shift at his approved job. 190 So. 3d at 211. The probationer explained that, while at work on an approved shift, he was offered an adjacent overtime shift. Id. He tried to call his community control officer for permission to take the additional shift, but was unable to reach him. Id. This court reversed, as the probationer "was engaged in an approved activity" at the time and there was no suggestion the violation was the result of disregarding the terms of his supervision. Id. at 211-12.

Likewise, in Brown v. State, 86 So. 3d 1225, 1226 (Fla. 2d DCA 2012), the probationer arrived home twenty-five or thirty minutes after curfew. He explained that he was returning from his brother's house where he had gone to pick up job applications pursuant to the condition of his probation that required him to pursue gainful employment. Id. Indeed, he was later hired after submitting one of the applications he obtained that night. Id. at 1227 n.2. This court reversed, holding that the curfew violation to acquire job applications was insubstantial in context. Id. at 1227-28.

In Hern v. State, 747 So. 2d 1039, 1039 (Fla. 4th DCA 1999), the probationer had attended a substance abuse program that ended just fifteen minutes before her curfew. She missed the bus to get home and walked the entire way despite suffering from multiple disabilities that limited her mobility. Id. at 1040. The Fourth District accordingly accepted the State's concession that these facts did not establish a willful or substantial violation. Id.

And finally, in Thomas, it was undisputed that the probationer was required to obtain a job and "was driving to an approved job interview" when one of his tires went flat. 672 So. 2d at 588. His efforts to obtain other transportation were unsuccessful, and the probationer ended up walking most of the way from Boca Raton to Lake Worth to return home. Id. "Several witnesses" corroborated the flat tire story, and the Fourth District reversed the revocation of probation because there was "no evidence to support a conclusion that defendant's failure to return . . . on time was the product of a knowing and willful act." Id. at 588-89.

Here, unlike any of these cases, Mr. Timke has not disclosed any purpose for his evening trip downtown, much less suggested that a valid exigency existed or that he was attempting to satisfy a condition of his probation. Although he was not legally required to explain what he was doing before the curfew violation, in context this omission is consequential. Having declined for whatever reason to disclose what he was doing when he violated his curfew, his reliance on authorities where a curfew violation was excused based on the probationer's stated explanation is misplaced.

In isolation, perhaps some of the arguments Mr. Timke has raised could have required reversal. But on this record, we cannot say that the circuit court abused

its discretion under these particular circumstances. Holding otherwise would suggest that the trial court is precluded from revoking a sex offender's probation for a curfew violation where the probationer drives to a crowded downtown area shortly before his nightly curfew—for an undisclosed reason and without telling his probation officer—so long as he encounters unexpected traffic on the way home. The trial court's discretion is broader than that. Accordingly, we must affirm.

Affirmed.

NORTHCUTT and KELLY, JJ., Concur.