IN THE COURT OF APPEALS OF IOWA

No. 7-130 / 06-0151
Filed June 13, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALVIN LORENZO WORKMAN, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Artis Reis (extension of probation) and Peter A. Keller (probation revocation), Judges.

Alvin Lorenzo Workman, Jr. appeals from the district court's decision revoking his deferred judgment and sentencing him to prison for the crime of sexual abuse in the third degree. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Patricia Reynolds, Acting State Appellate Defender, Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and Susan Cox, Assistant County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

MILLER, J.

Alvin Lorenzo Workman, Jr. appeals from the district court's decision revoking his deferred judgment and sentencing him to prison for the crime of sexual abuse in the third degree. He contends his probation should not have been extended based solely on fees owed to the department of corrections, the district court erred in finding he violated the terms of his probation, and the court abused its discretion in revoking his deferred judgement and sentencing him to prison. We affirm in part, reverse in part, and remand.

I. BACKGROUND FACTS AND PROCEEDINGS.

On May 15, 2003, the State charged Workman with sexual abuse in the third degree, in violation of Iowa Code section 709.4(2)(c)(4) (2003). On July 11, 2003, Workman pled guilty to the charge. The court granted Workman a deferred judgement and placed him on probation for two years. Some of the conditions of Workman's probation ordered by the court included having no contact with the victim, obtaining a substance abuse evaluation, registering as a sex offender, and completing sex offender treatment.

In August 2004, Workman's probation officer, Jennifer Kimbrough, filed a report of probation violation stating Workman had been charged with three counts of first-degree harassment for threatening to kill three people. In September 2004, Workman was ordered to appear at a hearing to show cause why he should not be held in contempt for failing to pay restitution. An arrest warrant was issued for Workman in October 2004, when he failed to appear for the contempt hearing. On November 3, 2004, Workman stipulated to the

probation violations. The court did not revoke his probation at that time but instead ordered him to reside at a residential facility. Workman was allowed to remain out of custody until bed space became available at the facility.

On January 4, 2005, Kimbrough filed another report of violation when Workman failed to report to the residential facility as ordered. On January 20, 2005, Workman stipulated to this second violation. The district court again did not revoke his probation and again ordered him to reside at a residential facility. However, this time the court ordered Workman to remain in jail until space became available at the residential facility and ordered he remain at the residential facility until discharging his probation. On July 6, 2005, Workman waived his right to appear in court and agreed to an extension of his probation until his costs were paid in full, or July 11, 2006, whichever occurred first.

On December 22, 2005, Kimbrough filed a report alleging Workman had again violated his probation. The report indicated that during a home check of Workman's apartment, a corrections officer, Officer Kness, found several empty alcoholic beverage containers, a pornographic DVD, hand-drawn pictures of naked women, and a small hunting knife, all allegedly in violation of his probation agreement. The report also indicated Workman failed to call in to a voice verification system at his designated curfew time as required. A probation revocation hearing was held on the alleged violations. The district court found Workman had violated his probation by possessing a weapon, possessing

pornography, and violating the terms of his curfew.[1] The court revoked Workman's deferred judgement and sentenced him to a term of incarceration of no more than ten years.

Workman appeals, contending his probation should not have been extended based solely on fees owed to the department of corrections, the district court erred in finding he violated the terms of his probation, and the court abused its discretion in revoking his deferred judgement and sentencing him to prison.

II. MERITS.

A. Extension of Probation.

Workman first contends the July 6, 2005 extension of his probation due to fees he owed to the department of corrections was constitutionally prohibited. We review constitutional issues de novo. *State v. Izzolena*, 609 N.W.2d 541, 545 (Iowa 2000).

As set forth above, Workman waived his right to appear in court and requested the extension of his probation until such time as all his costs were paid in full or July 11, 2006, whichever occurred first. It appears from the record before us that he voluntarily chose to seek this extension rather than face a probation revocation hearing. In the application for extension Workman also acknowledged that he understood and agreed he would continue to abide by all the terms of his probation until it was discharged under the extension. Thus, in complaining about the constitutionality of the court's grant of his request for an extension of his probation, Workman is in effect complaining of a "self-inflicted

[1] We note the court did not make any finding that Workman had possessed the alcoholic beverage containers, and thus did not rely on this alleged violation in revoking his deferred judgement.

wound." *See State v. Mandicino,* 509 N.W.2d 481, 481 (Iowa 1993) (stating that when probationer applied for extension of probation and then complains when probation is later revoked during the extended period he or she is complaining of a self-inflicted wound). Thus, because Workman requested the probation extension he has waived any challenge to it on appeal.

In addition, during the January 20, 2006 probation revocation hearing Workman noted that his probation was extended because he did not pay his financial obligations. However, neither at that time, nor at any other time prior to this appeal, did he ever claim the extension was involuntary, unconstitutional, or in any other way improper.

Our error preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal. *Metz v. Amoco Oil Co*. 581 N.W.2d 597, 600 (Iowa 1998); *Benevides v. J.C. Penney Life Ins. Co.,* 539 N.W.2d 352, 356 (Iowa 1995). This court will not consider an error raised for the first time on appeal, "even if it is of constitutional dimension." *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994). Here not only did Workman himself request the extension of his probation, but when he had an opportunity while represented by counsel to raise any challenges to the extension he did not do so. Thus, this issue was never raised before the district court and the court did not have a chance to rule on the issue. Accordingly, we conclude there is nothing on this issue for use to review. Workman has failed to properly preserve this issue for our review.

B. Probation Violations.

Workman next asserts the district court erred in finding he violated his probation agreement by possessing a weapon, possessing pornography, and violating the terms of his curfew. We review the district court's revocation decision for the correction of errors at law. Iowa R. App. P. 6.4. "Grounds for probation revocation must be proved by a preponderance of the evidence; thus, on review there must be sufficient evidence to support the district court's revocation of probation." *State v. Allen*, 402 N.W.2d 438, 443 (Iowa 1987). "It is sufficient if the violation is established by evidence which is competent." *Rheuport v. State,* 238 N.W.2d 770, 772 (Iowa 1976). We look to see whether the district court's reported findings, written or oral, show a factual basis for the revocation. *State v. Kirby*, 622 N.W.2d 506, 509-10 (Iowa 2001). "Probation revocation involves a two-step inquiry by the court. First, the court must determine if a probation violation has occurred. Next, the court must determine what should be done as a result of the violation." *Allen,* 402 N.W.2d at 443. We will address separately the alleged violations relied on by the district court.

1. Possession of a weapon.

Paragraph 4 of Workman's probation agreement states "I will not own, possess, or use a firearm or weapon of any kind." The term "weapon" is not defined anywhere in the agreement. Kimbrough testified that the department of correctional services does not allow a probationer "to possess anything that might be a weapon."

Workman argues that a great number of common items can be used as a weapon and thus considered to be a weapon under the "anything that might be a weapon" reasoning of the department of correctional services. We agree. Many recreational and vocational items commonly found and used in urban residences and on farms would qualify. A few that immediately come to mind are baseball and softball bats; garden and yard tools such as scythes, axes, hatchets, and hammers; and many carpenters' tools and lumbermans' tools.

Workman argues that the term in question, "weapon," should not and cannot reasonably be read as broadly as read by the department, and that to be enforceable in the absence of a definition in the probation agreement the term should be read to prohibit possession or use of a "dangerous weapon," a statutorily defined term.[2] We agree, as we do not believe it is realistic, or could have been the intent of the department, to prohibit probationers' possession of all items such as those of which we have above mentioned a few.

Officer Kness described the "weapon" in question as "approximately a six inch knife like a buck knife." Workman acknowledged possession of the knife, and testified it is a collector's item and he has had it since he was thirteen years

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[2] Section 702.7 (2005) provides:

> A "*dangerous weapon*" is any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed. Additionally, any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being, is a dangerous weapon. Dangerous weapons include, but are not limited to, any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switchblade, knife, or knife having a blade exceeding five inches in length."

of age. He testified that "with the blade and handle it was a total [of] six, six and a half inches." No substantial evidence in the record indicates the knife in question is an "instrument or device *designed primarily for* use in inflicting death or injury upon a human being or animal," was "actually used in such a manner as to indicate that [Workman] intend[ed] to inflict death or serious injury upon [another]," or had "a blade exceeding five inches in length."[3] (Emphasis added.) We conclude the record does not support a finding that Workman possessed a dangerous weapon, and thus does not support the district court's determination that he violated paragraph 4 of his probation agreement by possessing the hunting knife in question. The court's determination that Workman violated paragraph 4 of his probation agreement must be reversed.

2. Possession of "Pornography."

Paragraph 411 of the probation agreement provided, "I shall not be in possession of any sexually explicit materials, videos, books, magazines, pictures, posters, letters, etc., without express written approval from my supervising officer and a sex offender treatment team." Officer Kness testified that he found both a pornographic DVD and several hand-drawn pictures of naked female forms, some with a woman on her hands and knees with genitalia exposed, in Workman's apartment. He further stated that when asked by the officers during the home check what was on the DVD, Workman admitted it was pornography. Workman acknowledged in testimony that he had drawn the naked females. The

[3] Nothing in the record indicates whether the knife was a straight knife or was a folding knife. Whichever it was, given the descriptions of its overall length and assuming a normal handle sufficient for a person to hold onto, it would appear highly likely the knife's blade was at most some three to four inches in length.

district court found that Workman had violated probation by possessing the drawings and by possessing the DVD.

Workman asserts that because the district court did not independently assess whether the items possessed by him would qualify as "sexually explicit" the State failed to prove by a preponderance of the evidence that the material in question was in violation of paragraph 411 of his probation agreement. He points out that the probation agreement did not define "sexually explicit" and whether a picture or movie is sexually explicit is very subjective. He further contends the hand-drawn pictures that were found were his art and had artistic value, and thus were not sexually explicit.

At the revocation hearing Workman testified that when the officers found the DVD he "informed them it was porn." He further testified there was no dispute he was in possession of pornography while on probation and that possession of such was a violation of his probation. An admission of guilt is sufficient to satisfy the preponderance of evidence requirement in a probation revocation proceeding. *State v. Dolan,* 496 N.W.2d 278, 280 (Iowa Ct. App. 1992). We conclude there was sufficient, competent evidence for the district court to find Workman violated paragraph 411 of his probation agreement by possessing a pornographic movie.

We also conclude that by any reasonable definition Workman's drawing of naked females with genitalia exposed were "sexually explicit." We conclude Workman therefore also violated paragraph 411 by possession of those drawings.

3. Curfew call.

Paragraph 9 of Workman's probation agreement provides "I understand that at the discretion of my supervising officer, I may be placed on an electronic monitoring system device." Kimbrough testified that Workman's electronic monitoring system was a voice verification system which required him to call in to a security system at various specified times. Although the exact times he was to call in are not clear from the record, they apparently included 6:45 a.m. and 10:18 p.m. Kimbrough testified that Workman failed to call in at his 6:45 a.m. curfew time on December 13, 2005. The computer system then received a call at 10:18 p.m. that was purportedly from Workman but it was "verified false," meaning the voice was not recognized by the computer. Kimbrough stated the false verification could indicate someone else called in place of Workman, or that the person who called was sick or had a sore throat and thus the computer could not recognize the voice.

Workman testified he made both of the calls. He appears to now claim on appeal that he made the first call from work and the phone there must have "interfered" with the call. He asserted in the district court, and continues to assert on appeal that he made the second call while he was sick and that is why there was a false verification. The district court apparently relied only on Workman's failure to call in at his 6:45 a.m. curfew time as the violation of rule 9, the third rule it found he had violated. The court made no finding regarding the allegedly false verification from his 10:18 p.m. call in.

All of the testimony on this issue was before the district court and it was for the court, as factfinder, to determine witness credibility and the weight of the evidence as a whole. *See State v. Laffey,* 600 N.W.2d 57, 59 (Iowa 1999). Trial court findings on credibility of witnesses are entitled to considerable deference by this court. *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994). It is clear the court here found Kimbrough's testimony to be more credible than Workman's on the issue of whether Workman actually called in at 6:45 a.m. on the day in question. We defer to this credibility determination. Accordingly, we conclude there was sufficient, competent evidence for the district court to find Workman violated paragraph 9 of his probation agreement by failing to call in at his designated curfew time.

IV. CONCLUSION.

We conclude Workman failed to properly preserve the issue of whether his requested extension of probation was constitutionally infirm. There was a sufficient, competent, factual basis for the district court's findings that Workman violated paragraphs 411 and 9 of his probation agreement by possessing a pornographic movie and sexually explicit drawings, and by failing to call in at his designated curfew time, respectively. However, the record does not support a finding that he violated paragraph 4 by possessing a hunting knife. Because the court's dispositional decision was based on a determination that three violations occurred and we have found only two violations sufficiently supported, we reverse the court's revocation of Workman's deferred judgment, and its imposition of judgment and sentence, and remand this matter for a new

determination of these questions in light of our present decision. Based on our determination and disposition of these issues on appeal we need not address Workman's third claim of error, that the court abused its discretion by revoking his deferred judgment and sentencing him to prison.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.