STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 1999
v	Nos. 210495; 212548 Livingston Circuit Court
DANIEL CRAIG O'CONNELL, Defendant-Appellant.	LC Nos. 94-008407-FH 96-009294-FH

Before: Hoekstra, P.J., and McDonald and Meter, JJ.

PER CURIAM.

In Docket No. 210495, defendant appeals by right from a determination by the trial court that he violated his probation for the underlying crime of operating under the influence of intoxicating liquor, third offense ("OUIL III"), MCL 257.625(6)(d); MSA 9.2325(6)(d),[1] for which defendant received five years' probation in January 1995. In Docket No. 212548, defendant appeals by leave granted from a determination by the trial court that he violated his probation for a second OUIL III offense, for which defendant again received five years' probation, this time in October 1996. Both probation violation determinations occurred after a single hearing and arose from a single series of events that took place on January 24, 1998. In Docket No. 210495, the trial court sentenced defendant to forty to sixty months' imprisonment. In Docket No. 212548, the trial court, taking into account a second-offense habitual offender enhancement under MCL 769.10; MSA 28.1082, sentenced defendant to 5 to 7 ½ years' imprisonment. We affirm both probation revocations but remand the case for the ministerial task of correcting the judgments of sentence.

Defendant first argues that in finding him guilty of the probation violations, the trial court improperly considered conduct not alleged in the written probation violation petitions. Whether the court acted improperly in this regard is a question of law. We review questions of law de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). Defendant argues that the trial court erred by predicating guilt, in part, on the conclusions – based on defendant's conviction in Florida of OUIL – that defendant had (1) consumed alcohol on January 24, 1998, and (2) operated a motor vehicle under the influence of alcohol on January 24, 1998, when the probation violation petitions alleged only that defendant had *smelled* of alcohol and had *been arrested* for operating under the

influence of alcohol on that date. Defendant contends that the trial court, in essence, found him guilty for behavior not charged in the probation violation petitions, thereby violating the principle espoused in *People v Taylor*, 104 Mich App 514, 517; 305 NW2d 251 (1981), which states that any allegations of misconduct raised during a probation violation hearing "must be included in the notice of violation so as to afford a defendant an opportunity to prepare to defend against them."

We disagree that the trial court acted unlawfully. The conduct charged in the petitions (smelling of intoxicants and being arrested for OUIL) was sufficiently related to the conduct considered by the trial court (consuming alcohol and operating a motor vehicle while under the influence of alcohol) "so as to afford . . . defendant an opportunity to prepare to defend against [the alleged conduct]." *Id*. Moreover, given that defendant's original probation orders did not prohibit *smelling* of intoxicants or *being arrested* for OUIL, the only reasonable conclusion to be drawn from the petitions was that defendant, for purposes of the probation violation hearing, was being charged with *consuming* intoxicants and with *committing* OUIL. Defendant's argument rests upon semantics, not substance, and it accordingly lacks merit.

Next, defendant argues that the trial court should not have based its probation violation findings on defendant's misdemeanor OUIL conviction in Florida, because defendant was not represented by counsel for purposes of the Florida conviction. This argument presents a question of law. Again, we review questions of law de novo. See *Walker, supra* at 302. In support of his position, defendant cites *People v Olah*, 409 Mich 948, 948-949; 298 NW2d 422 (1980), in which the Michigan Supreme Court reversed this Court's decision upholding the use of two misdemeanor convictions as evidence of the defendant's violation of probation where the defendant had not received the assistance of counsel with respect to the convictions. The *Olah* Court, however, relied entirely upon the United States Supreme Court's decision in *Baldasar v Illinois*, 446 US 222; 100 S Ct 1585; 64 L Ed 2d (1980), overruled sub nom *Nichols v United States*, 511 US 738 (1994), a decision that has been overturned. See *People v Reichenbach*, 459 Mich 109, 120, 123; 587 NW2d 1 (1998). In *Baldasar*, the Supreme Court precluded the use of a conviction for sentencing enhancement purposes unless the defendant had been advised of and waived his right to the appointment of counsel at public expense. In *Nichols v United States*, 511 US 738, 742-744; 114 S Ct 1921; 128 L Ed 2d 745 (1994), the Supreme Court rejected *Baldasar* and held that a misdemeanor conviction that did not result in actual imprisonment and regarding which a defendant did not receive the assistance of counsel could be used for enhancement purposes with respect to a subsequent offense. In so holding, the Court stated that "where no sentence of imprisonment [is] imposed, a defendant charged with a misdemeanor ha[s] no [federal] constitutional right to counsel." *Nichols, supra* at 743.

In *People v Richert (After Remand)*, 216 Mich App 186, 192-194; 548 NW2d 924 (1996), this Court adopted the reasoning from *Nichols* and held that a misdemeanor conviction that did not result in imprisonment and with respect to which a defendant did not receive the assistance of counsel could be used to enhance a defendant's sentence under either the United States or Michigan constitutions. See also *Reichenbach, supra* at 123-124, 124 n 15 (recognizing the overruling of *Baldasar* and consequently rejecting *Olah*). Because a defendant has no right to counsel with respect to a misdemeanor conviction that does not result in imprisonment, and because such a conviction may

be used to enhance a defendant's sentence, we conclude that such a conviction may also be used to revoke a defendant's probation and impose a sentence authorized by the underlying conviction for which the defendant was originally placed on probation. In the instant case, defendant does not allege that his Florida conviction resulted in any incarceration, and there is nothing in the record to support a finding of incarceration. In fact, at the probation hearing, the prosecutor stated that the conviction did *not* result in incarceration, and defendant did not object to this statement. Accordingly, the trial court did not act improperly by relying on the Florida conviction in concluding that defendant had violated the terms of his probation.

Finally, defendant argues that the four exhibits – a police report, a criminal record, a written statement, and a substance abuse treatment center report – upon which the trial court relied in revoking his probation should not have been admitted as evidence at the probation violation hearing. Defendant contends that because these exhibits were admitted by way of a witness who had no personal knowledge of their contents but who merely received the documents from Florida, they constituted inadmissible hearsay. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id*.

We disagree that the trial court erred in relying on the exhibits. As stated in *People v Johnson*, 191 Mich App 222, 225; 477 NW2d 426 (1991), "probation violation hearings are summary and informal and *are not subject to rules of evidence* or of pleadings applicable in a criminal trial" (emphasis added). See also MCL 771.4; MSA 28.1134 (rules of evidence applicable during criminal trials are not applicable during probation violation hearings) and MCR 6.445(E) (court presiding over probation violation hearing "need not apply the rules of evidence except those pertaining to privileges"). As stated in *People v Ritter*, 186 Mich App 701, 705-706; 464 NW2d 919 (1991):

> Revocation of probation is not a part of a criminal prosecution. It deprives the defendant of only conditional liberty which is properly dependent on observance of the terms of the probation order, rather than the absolute liberty to which every citizen is entitled. The defendant is a probationer only because he has been convicted of a crime. *He is not entitled to the full range of due process rights associated with a criminal trial*. [Emphasis added.]

Because the trial court was not bound by the general evidentiary rule excluding hearsay, the court did not abuse its discretion by relying on the challenged exhibits in deciding to revoke defendant's probation.[2]

Although we affirm the trial court's finding that defendant violated the terms of his probation, we note that defendant's judgments of sentence both contain errors. Defendant did not raise the errors as an issue in his appellate brief, but we will nevertheless sua sponte address them. In Docket No. 210495, the judgment of sentence indicates that defendant pleaded guilty to violating his probation and that the probation violation was based, in part, on an underlying conviction for possessing marijuana. However, defendant did not *plead* guilty to violating his probation; instead, *the trial court determined*

that a violation had occurred. Moreover, the sentencing transcript for the marijuana possession charge indicates that no probation was imposed for this offense; instead, probation was imposed only for defendant's accompanying OUIL III conviction. The judgment of sentence should be corrected to reflect (1) that defendant was *found by the court* to have violated his probation, and (2) that the violation was based only on the underlying crime of OUIL III.

In Docket No. 212548, the judgment of sentence again indicates that defendant pleaded guilty to violating his probation. It also indicates that the probation violation was based, in part, on an underlying conviction for operating a motor vehicle with a suspended license ("DWLS"). Again, however, defendant did not plead guilty to violating his probation but was instead *found* guilty of the violation. Moreover, the sentencing transcript for the DWLS charge indicates that no probation was imposed for this offense; probation was imposed only for defendant's accompanying OUIL III conviction (although a second-offense habitual offender enhancement was taken into account). The judgment of sentence should be amended to reflect (1) that defendant was *found by the court* to have violated his probation, and (2) that the violation was based only on the underlying crime of OUIL III, with its accompanying second-offense habitual offender enhancement.

Affirmed, but remanded for the ministerial task of correcting defendant's judgments of sentence. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Gary R. McDonald
/s/ Patrick M. Meter

[1] This citation applied at the time defendant committed the underlying OUIL III offense in Docket No. 210495. At the time of the underlying OUIL III offense in Docket No. 212548, the correct citation was MCL 257.625(7)(d); MSA 9.2325(7)(d). The current citation for OUIL III is MCL 257.625(8)(c); MSA 9.2325(8)(c).

[2] Defendant cites *People v Givens*, 82 Mich App 336; 266 NW2d 815 (1978), in support of his argument that an order revoking probation cannot be based on hearsay evidence. While we agree that *Givens* can be read to support defendant's argument, we are bound not by *Givens*, a 1978 decision, but rather by *Johnson, supra* at 225, a 1991 decision indicating that "probation violation hearings are summary and informal and not subject to the rules of evidence . . . applicable in a criminal trial." See MCR 7.215(H)(1) (this Court "must follow the rule of law established by a prior published decision of the Court . . . issued on or after November 1, 1990 . . . ").