

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES A. ASBELL,

Defendant-Appellant.

UNPUBLISHED
December 5, 2000

No. 215979
Oakland Circuit Court
LC No. 91-109461-FH

Before: Zahra, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of probation violation. We affirm.

In 1994, defendant was convicted of possession with intent to deliver a controlled substance in an amount less than fifty grams, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and sentenced to lifetime probation. He was also ordered to pay restitution as part of his sentence.

A bench warrant was sworn out in defendant's name by the Oakland Circuit Court on September 9, 1997. The bench warrant alleged that defendant failed to report as directed, paid only \$38 toward the \$1,943.50 restitution assessed against him, and had a pending warrant for his arrest in 36th District Court for disorderly conduct. A probation violation arraignment was scheduled for October 13, 1997. Defendant did not appear at the arraignment.

In May 1998, defendant was arrested in Wayne County. After his release from Wayne County jail in August 1998, he was brought to Oakland County pursuant to the bench warrant. On September 10, 1998, defendant was brought before the trial court for a hearing on his probation violation.

At the hearing, defendant was charged as set out in the bench warrant with the failure to appear, failure to pay restitution, and the pending warrant in 36th District Court. The trial court found defendant guilty of a violation of the terms of his probation.

Defendant first contends that the approximate one-year delay between the issuance of the bench warrant for his arrest and the actual execution of that warrant constitutes a waiver of the probation violation because the authorities did not exercise due diligence to execute the warrant.

We find no error in the trial court's determination that the probation authorities exercised due diligence.

Once a warrant for a probation violation has been issued, the probation authorities must exercise due diligence in executing the warrant. *People v Diamond*, 59 Mich App 581, 587; 229 NW2d 857 (1975). This Court has indicated that in determining whether the authorities exercised due diligence, the length and reason for the delay as well as the prejudice to defendant due to the delay are appropriately considered. *People v Miller*, 77 Mich App 381, 384; 258 NW2d 235 (1977). Defendant argues that a finding of due diligence in this case is error because no real action was ever taken on this warrant. Defendant contends that it was only after he was arrested and released from jail on an unrelated charge in Wayne County that the probation authorities in Oakland County executed the warrant for his arrest. Moreover, defendant asserts, he made no attempt to evade the probation authorities by changing his name or moving.

The prosecution contends that the trial court's ruling was proper because under all the circumstances, the probation authorities exercised due diligence in executing the warrant for defendant's arrest. Defendant knowingly remained in violation of his probation, disregarded the orders of the court which were sent to the address where he claims to have been residing, and did not respond to any correspondence sent to him. Additionally, the prosecution argues that the probation authorities did not delay in the administration of the probation violation. A report prepared by defendant's probation officer was dated August 27, 1997, less than one month after defendant first failed to report. The bench warrant was issued on September 9, the show cause hearing set for October 13 was scheduled on September 16, and the bench warrant was entered into LEIN, the law enforcement notification system, on October 13. Thus, the prosecution claims that the probation authorities did not delay the proceedings, but, rather, the delay was caused by defendant's failure to report and appear for his probation appointments and court dates.

We agree with the prosecution, although we also believe that the prosecution should not be able to rely on a claim of insufficient resources to excuse the probation authorities' lack of diligence in this case. The prosecution does not argue that there was an attempt to arrest defendant during the nine months between the bench warrant's issuance and defendant's arrest on an unrelated matter. The prosecution likewise does not dispute defendant's claim that the probation authorities were aware of defendant's residence the entire time the bench warrant was pending. Nevertheless, we do not believe that the inefficiencies or inability of the probation department to arrest every offender should cause a waiver of a probation violation when the violator knowingly violated the terms of his probation and the evidence supports the conclusion that the violator was put on notice that a warrant for violation of probation was issued and the violator knowingly ignored the warrant. The facts of this case do not leave us with a firm conviction that the trial court erred when it found that the probation authorities acted with due diligence.

Defendant next argues on appeal that the mention of two unrelated pending felony warrants and the failure of defendant's probation officer to appear and testify on personal knowledge concerning the alleged probation violations violated his right to due process. In addition to showing a denial of due process, a defendant must show that the due process irregularities resulted in prejudice. *In re Madison*, 142 Mich App 216, 224; 369 NW2d 474

(1985); *People v Hooks*, 89 Mich App 124, 128-130; 279 NW2d 598 (1979). Here, defendant fails to demonstrate prejudice from the purported denial of his due process rights.

The testifying probation officer told the trial court that defendant had two pending felony warrants in Recorder's Court. This information was not a part of the charged probation violation and was irrelevant to the probation revocation hearing. However, the mere fact that irrelevant evidence is presented to the trial court at such a hearing does not require the conclusion that the violator was denied a fair hearing. The court, finding by a preponderance of the evidence that defendant violated the terms of his probation, stated that "there's sufficient evidence on the record indicating that you failed to report as required, that you did not pay the costs as required, and those two alone are sufficient to find you guilty as charged." The court did not rely on the two prior felony convictions to find defendant in violation of his probation.

The failure of defendant's probation officer to appear at the revocation hearing denied defendant his right to confrontation. *People v Taylor*, 104 Mich App 514; 517; 305 NW2d 251 (1981). However, only if defendant was prejudiced by the denial of that right will reversal be required. See *In re Madison, supra*; *Hooks, supra*. Here, defendant does not allege any prejudice flowing from the denial of his due process rights. He does not contend that the allegation concerning his failure to report is false or misleading so that the right of confrontation would be vital; nor does he contest the failure to pay violation in the charge. Thus, because we find no prejudice resulting from the mention of the pending felony warrants or from the denial of confrontation, we conclude that no reversible error has been established.

Affirmed.

/s/ Brian K. Zahra

/s/ Harold Hood

/s/ Gary R. McDonald