

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN JERRONE FRAZIER,

Defendant-Appellant.

UNPUBLISHED
February 11, 2021

No. 352114
Oakland Circuit Court
LC No. 2018-267178-FH

Before: FORT HOOD, P.J., and GADOLA and LETICA, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the order of the trial court revoking his probation, and sentencing him to 23 months to three years in prison. We affirm.

I. FACTS

Defendant pleaded no contest to one count of aggravated indecent exposure, MCL 750.335a(2)(b), and was sentenced as a second-offense habitual offender, MCL 769.10, to five years' probation and 210 days in jail. As a condition of his probation, defendant was required to participate in an electronic monitoring GPS program for one year after his release from jail.

According to Oakland County Probation Officer Amanda Schmidt, she met with defendant on September 21, 2018, while he was incarcerated and reviewed with him the conditions of the order of probation. She discussed with defendant that the order of probation required him to wear an electronic tether for one year upon his release from jail, and that he was required to obtain the GPS tether through a private provider. When defendant asked Schmidt about the possibility of instead obtaining a curfew tether, Schmidt explained to defendant that a curfew tether could be obtained through the Michigan Department of Corrections; the curfew tether is more limited because it permits the wearer to leave home only at certain times to accommodate specific activities, such as work. The private tether is more costly, however, and requires the wearer to make an immediate payment, while the MDOC curfew tether permits the wearer to delay payment. Schmidt testified that defendant told her that the MDOC curfew tether would not work for him because it would not accommodate his employment schedule.

On January 25, 2019, defendant was released from jail. That same day, Schmidt met with defendant and again reviewed with him the conditions of the order of probation. According to Schmidt, she instructed defendant to report to the GPS tether company Home Confinement that same day immediately upon leaving the probation office to have his GPS tether installed. Schmidt later contacted Home Confinement and learned that defendant did not contact them that day.

Defendant testified that he did not contact Home Confinement that day, but contacted them the next day, on January 26, 2019. According to defendant, Officer Schmidt had told him to contact Home Confinement within a “24-hour period.” Defendant testified that the Home Confinement representative informed him that their field agents could not install the tether that day because it was a Saturday, but advised him to call again on Monday. Defendant testified that when he contacted Home Confinement the following Monday, he learned that the initial price of the tether was \$465 with a monthly fee of \$390, which defendant determined he could not afford. Defendant testified that Schmidt never told him about the option of a MDOC tether, which is less costly.

Officer Schmidt testified that on January 29, 2019, defendant informed her that he did not have an electronic tether. He told her that he had not contacted Home Confinement on January 25, 2019, and that when he contacted Home Confinement on January 28, 2019, he learned the cost involved and determined that he could not afford the tether. Schmidt testified that she again discussed with defendant the option of the MDOC curfew tether, which permits the wearer to delay payment. Schmidt testified that defendant told her that he could not afford even the lower fees associated with the MDOC curfew tether, and that he could not comply with the curfew tether which was more restrictive than a private GPS tether. She testified that she informed defendant that she planned to file a report advising the trial court of his probation violation in connection with the tether. By contrast, defendant testified that Schmidt told him she would advise the trial court that he could not afford a tether and request a change to the GPS tether requirement.

Officer Schmidt thereafter filed a motion with the trial court reporting that defendant had violated the terms of his probation by failing to participate in the GPS tether program as ordered.¹ The trial court held an evidentiary hearing on the motion over the course of two days. At the conclusion of the first day of the hearing, the trial court permitted defendant to remain out of jail on a surety bond with the provision that he obtain a GPS tether. When the hearing resumed several days later, defendant testified that he had a private GPS tether affixed to his leg and was paying the fees to maintain the GPS tether.

At the conclusion of the evidentiary hearing, the trial court found that defendant had violated the terms of his probation by failing to participate in the GPS tether program as ordered. The trial court observed that the GPS tether was a requirement of defendant’s probation imposed at the time of sentencing in August 2018, and that defendant had never advised the trial court that he could not afford to comply with the tether requirement of his probation. Accordingly, the trial

¹ The motion, as amended, also alleged that defendant had violated his probation by failing to timely register with the sex offender registry and by making a false report regarding his residence. The trial court concluded that these violations had not been demonstrated.

court revoked defendant's probation, and sentenced him to 23 months to 3 years in prison for his conviction of aggravated indecent exposure.

Defendant thereafter moved to correct or vacate his sentence, arguing that he had been sentenced to prison essentially for being unable to pay the cost of his GPS tether in violation of the Equal Protection Clause, US Const, Am XIV. After a hearing and additional briefing by the parties, the trial court denied defendant's motion reasoning that defendant violated his GPS tether condition by failing to contact the private tether provider as required on the day of his release from jail. The trial court observed that because defendant had violated his probation by failing to meet this requirement even before the issue of his ability to pay had arisen, defendant's alleged inability to pay was irrelevant. Defendant now appeals.

II. ANALYSIS

Defendant contends that the trial court abused its discretion by revoking his probation and sentencing him to prison for failure to obtain the GPS tether because he could not afford it. Defendant argues that the trial court was required to hold a hearing on his ability to pay before revoking his probation, and that failure to do so violated the Equal Protection Clauses of the federal and state constitutions, US Const, Am XIV; Const 1963, art 1, § 2. We disagree.

A. STANDARD OF REVIEW

We review for an abuse of discretion a sentencing court's decision to revoke probation. *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009). A trial court abuses its discretion when it chooses an outcome outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). We review questions of constitutional law de novo and review the trial court's factual findings for clear error. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012).

B. REVOCATION OF PROBATION

Probation is a matter of grace, not of right, *People v Harper*, 479 Mich 599, 626; 739 NW2d 523 (2007), and a sentencing court has broad discretion in determining the conditions to impose as part of probation. *Breeding*, 284 Mich App at 479-480. When a sentencing court imposes probation, it is "revocable on the basis of a judge's findings of fact at an informal hearing, and largely at the judge's discretion." *Harper*, 479 Mich at 626 (quotation marks and citation omitted).

Probation revocation is a two-step process in which the sentencing court makes a factual determination concerning whether a defendant violated probation, then determines whether the violation warrants revoking probation. MCR 6.455(E), (G); *People v Pillar*, 233 Mich App 267, 269; 590 NW2d 622 (1998). The prosecution bears the burden of proving a probation violation by a preponderance of the evidence. MCR 6.445(E)(1). We review the evidence in the light most favorable to the prosecution, deferring to the trial court's ability to weigh the evidence and determine the credibility of the witnesses. *Breeding*, 284 Mich App at 487. The scope of a probation violation hearing is limited, and a probationer's rights at a probation violation hearing are not as broad as the rights afforded to a defendant in a criminal trial. *Id.* at 480.

Although a sentencing court has broad discretion to revoke probation, the sentencing court may not revoke probation in violation of the Equal Protection Clauses of the federal and state constitutions, US Const, Am XIV; Const 1963, art 1, § 2. This Court has held that although payment of costs may legitimately be imposed as a condition of probation, *People v Terminelli*, 68 Mich App 635, 637; 243 NW2d 703 (1976), citing *Fuller v Oregon*, 417 US 40; 94 S Ct 2116; 40 L Ed 2d 642 (1974), when a probationer is prevented by indigency from fulfilling such a condition, imprisonment of the probationer on that ground constitutes discrimination on the basis of economic status. Without justification of a significant state interest served by such discrimination, revoking an indigent probationer's probation for failure to pay costs is an impermissible denial of equal protection. *Terminelli*, 68 Mich App at 637. In keeping with this prohibition, MCL 771.3 provides that a sentencing court must consider the probationer's ability to pay costs before revoking probation because of a probationer's failure to pay. See MCL 771.3(8).

Here, defendant argues that the cost of the GPS tether was essentially a cost or "other financial obligation imposed by the court" under MCR 6.445(G), and that the sentencing court was required to hold a hearing to determine his ability to pay before revoking his probation on that basis, and that the court's failure to do so violated his right to equal protection. The record does not support defendant's claim. Officer Schmidt testified that, on the day of defendant's release she met with him and reviewed the terms of his probation, including the requirement that he obtain a GPS tether by reporting to Home Confinement immediately upon leaving the probation office that day. At the probation violation hearing, defendant admitted that he did not contact Home Confinement that day, nor did he contact any other private GPS tether provider that day. The sentencing court found that defendant thereby violated his probation. Although defendant testified that Officer Schmidt told him to contact Home Confinement within a 24-hour period, the trial court found more credible the testimony of Officer Schmidt. See *Breeding*, 284 Mich App at 488-489.

Contrary to defendant's assertion that his probation was revoked because he could not afford a GPS tether, the record indicates that the sentencing court revoked defendant's probation because he failed to contact Home Confinement on January 25, 2019, as instructed by his probation officer, which occurred before he learned of the cost of the tether on January 28, 2019. In addition, after learning of the cost of the GPS tether, defendant thereafter made no effort to obtain a GPS and still was without an electronic tether on April 11, 2019, when the hearing on his probation violation began. On that day, the trial court required defendant to obtain a GPS tether as a condition of his bond to be released from jail, and when the hearing resumed on May 2, 2019, defendant had obtained a GPS tether.

The sentencing court did not revoke defendant's probation because he could not afford to pay for a GPS tether, but rather because he failed to take the necessary steps to comply with the GPS tether requirement even before he learned of the cost of the tether. The sentencing court's decision to revoke probation therefore did not violate defendant's right to equal protection, and the court did not abuse its discretion by revoking defendant's probation for failure to comply with the GPS tether requirement of his probation.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also contends that his trial counsel was ineffective for conceding that defendant violated the GPS tether requirement of his probation. Whether a defendant has been deprived of

the effective assistance of counsel presents a mixed question of fact and constitutional law. *Trakhtenberg*, 493 Mich at 47. We review the trial court’s factual findings for clear error and review questions of constitutional law de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must demonstrate that (1) defense counsel’s performance was objectively deficient, and that (2) the deficiencies prejudiced the defendant. *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018). A defendant has been prejudiced if there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, quoting *Strickland v Washington*, 466 US 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In this case, defendant contends that defense counsel at the probation hearing was ineffective because he conceded during closing argument that the prosecution had demonstrated that defendant had violated his probation by failing to comply with the GPS tether requirement. We disagree with this characterization of the record. At the conclusion of the probation violation hearing, defense counsel summarized the evidence concerning the three probation violations alleged in the motion. With regard to the allegation that defendant did not timely obtain a GPS, defense counsel stated: “It’s clear my client didn’t get the GPS tether as was instructed.” This statement is in accord with defendant’s own testimony at the hearing that he did not contact Home Confinement on January 25, 2019, and that he did not obtain the GPS tether until the sentencing court made it a condition of his bond after the first day of the probation violation hearing on April 11, 2019.

There was no dispute that defendant was ordered to obtain a GPS tether and did not obtain the GPS tether as ordered by the sentencing court; the only dispute was whether the sentencing court was justified in revoking defendant’s probation for that failure. Defense counsel therefore did not fail to be effective by acknowledging that defendant did not obtain the GPS tether as instructed, which was consistent with defendant’s own testimony. Because defendant failed to establish that defense counsel’s performance was objectively deficient, defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael F. Gadola
/s/ Anica Letica