

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 19, 2012

102897

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

MARK BEVILACQUA,

Appellant.

Calendar Date: November 22, 2011

Before: Spain, J.P., Malone Jr., Stein, McCarthy and
Egan Jr., JJ.

Edward J. Carroll, Kingston, for appellant.

D. Holley Carnright, District Attorney, Kingston (Joan
Gudesblatt Lamb of counsel), for respondent.

Stein, J.

Appeal from a judgment of the County Court of Ulster County
(Schneer, J.), rendered October 8, 2009, which revoked
defendant's probation and imposed a sentence of imprisonment.

In December 2008, defendant pleaded guilty to possessing an
obscene sexual performance by a child in connection with his
possession of certain materials on his personal computer. On
February 10, 2009, defendant was sentenced to a 10-year period of
probation for his conviction of that crime. The conditions of
his probation included, among other things, a prohibition against
possessing any materials depicting nudity or sexual conduct. In
April 2009, defendant made statements to Brent Warberg, a
polygraph examiner, indicating that he knowingly possessed such

materials. Warberg communicated this admission to defendant's probation officer, Cynthia King, who obtained an order to search defendant's residence for contraband. The probation officers and law enforcement personnel who conducted the search found dozens of videos depicting sexual conduct, as well as several SD cards which contained one or more images of young girls naked or engaged in sexual acts. Supreme Court (Sise, J.) issued a declaration of delinquency (see CPL 410.30). After a hearing, County Court (Schneer, J.) found that defendant had violated a condition of his probation. Defendant's probation was thereafter revoked and he was sentenced to a 60-day term of incarceration, to be followed by the continuation of his probation. Defendant now appeals.

We affirm. The People have the burden of proving by a preponderance of the evidence that defendant violated a term of his probation (see CPL 410.70 [3]; People v Rockefeller, 79 AD3d 1527, 1527 [2010], lv denied 16 NY3d 862 [2011]). Probation violation hearings are summary in nature and evidence presented thereat may include hearsay, although that may not be the sole basis for the finding of a violation (see People v DeMoney, 55 AD3d 953, 954 [2008]; People v Trathen, 2 AD3d 1065 [2003], lv denied 1 NY3d 635 [2004]).

Here, the People met their initial burden of demonstrating that defendant violated a condition of probation by introducing into evidence the terms of his probation, the report prepared by Warberg, the physical evidence confiscated from defendant's home¹ and the testimony of King. Although Warberg's report contained hearsay, the physical evidence, alone, was sufficient to demonstrate a violation. In addition, defendant admitted at the hearing that he was aware of the conditions of his probation and that he possessed prohibited materials at his house. Thus, the burden shifted to defendant to establish a justifiable excuse for

¹ Defendant's argument that such evidence was illegally obtained and should have been suppressed is not preserved for our review in view of his failure to seek suppression of the items on the ground that they were the result of an illegal search (see People v Soprano, 27 AD3d 964, 965 [2006]).

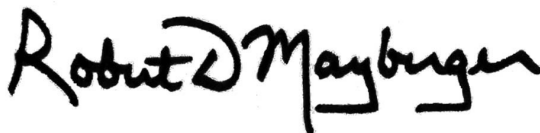
his violation (see People v Osborne, 38 AD3d 1132, 1132 [2007], lv denied 9 NY3d 849 [2007]). To that end, defendant attempted to attribute his possession of the prohibited materials to King's failure to provide him with a time frame within which he had to rid his home of the materials, the quantity of items in his home that he had to sort through and his difficulty in disposing of the contraband. County Court explicitly found defendant's testimony in that regard to be incredible and, on our review of the record, we perceive no abuse of discretion and, therefore, decline to disturb County Court's determination that defendant failed to meet his burden of establishing a justifiable excuse for his violation of the terms of his probation (see People v Oehler, 52 AD3d 955, 956 [2008], lv denied 11 NY3d 792 [2008]; People v Osborne, 38 AD3d at 1132).

Defendant's remaining contentions have been considered and are without merit.

Spain, J.P., Malone Jr., McCarthy and Egan Jr., JJ.,
concur.

ORDERED that the judgment is affirmed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court