

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

Decided and Entered: June 20, 2019

108808

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

PAMELA L. JOHNSON,

Appellant.

Calendar Date: June 6, 2019

Before: Garry, P.J., Egan Jr., Clark, Devine and Pritzker, JJ.

Rural Law Center of New York, Castleton (Keith F. Schockmel of counsel), for appellant.

Patrick A. Perfetti, District Attorney, Cortland (Elizabeth McGrath of counsel), for respondent.

Devine, J.

Appeal from a judgment of the County Court of Cortland County (Campbell, J.), rendered July 28, 2016, which revoked defendant's probation and imposed a sentence of imprisonment.

In June 2015, defendant pleaded guilty to grand larceny in the second degree and was sentenced to 90 days in jail, to be followed by 90 days of electronic monitoring and five years of probation. In October 2015, while defendant was subject to electronic monitoring, the Probation Department filed a uniform court report alleging that defendant had violated a condition of her probation by vandalizing her estranged husband's motor

vehicle, for which she was arrested and charged with criminal mischief in the second degree. In April 2016, the Probation Department filed a second uniform court report alleging, among other things, that defendant violated the condition of her probation requiring her to obey all state and federal laws as a result of her prior arrest for criminal mischief in the second degree and for her subsequent March 2016 arrest for aggravated unlicensed operation of a motor vehicle in the third degree and two additional violations of the Vehicle and Traffic Law. As a result, a declaration of delinquency was issued.

Following an evidentiary hearing, County Court found that defendant violated several terms of her probation; specifically, that defendant failed to obey all state and federal laws (hereinafter condition 2), failed to obtain a mental health assessment and participate in recommended treatment (hereinafter condition 8), entered a gambling establishment (hereinafter condition 12) and failed to abide by an order of protection (hereinafter condition 16). At sentencing, County Court revoked her probation and imposed a prison sentence of 2 to 6 years. This appeal ensued.

As an initial matter, defendant contends that County Court's finding that she violated probation was improper to the extent that it was based upon certain violations that were not enumerated or alleged in the April 2016 uniform court report (hereinafter the uniform court report).¹ We agree. Where a violation of probation is alleged to have occurred, a written statement must be filed with the court and provided to defendant "setting forth the condition or conditions of the sentence violated and a reasonable description of the time, place and manner in which the violation occurred" (CPL 410.70 [2] [emphasis added]; see People v Turner, 136 AD3d 1111, 1113 [2016], lv denied 27 NY3d 1140 [2016]). Here, the details of the alleged violations in the uniform court report only included the allegation that defendant violated condition 2, which

¹ Contrary to the People's contention, defendant's counsel adequately preserved this issue at the hearing when he argued that the uniform court report failed to include any allegations that defendant violated conditions 8, 12 and 16 of the terms of her probation (see CPL 470.05 [2]).

required her to obey all state and federal laws, by engaging in conduct that led to her September 2015 and March 2016 arrests. Although a different section of the uniform court report summarizing defendant's probation supervision referenced other incidents that County Court made findings with respect thereto, the uniform court report only alleged that defendant violated condition 2 of the terms of her probation (see CPL 410.70 [2]). Moreover, defendant's probation officer acknowledged in her testimony that defendant was not charged in the uniform court report with violating conditions 8, 12 and 16. Notwithstanding the testimony that was allowed at the hearing with regard to conditions 8, 12 and 16, defendant was not provided with a written statement informing her that she was also being charged with violating these conditions of her probation. Accordingly, County Court's finding that defendant violated these terms of her probation was improper (see CPL 410.70 [2]; People v Avellanet, 272 AD2d 406, 407 [2000]; People v Minard, 161 AD2d 607, 607 [1990], lv denied 76 NY2d 861 [1990]; cf. People v Turner, 136 AD3d at 1112-1113).

Turning to County Court's finding that defendant violated condition 2 of the terms of her probation, "[a] violation of probation proceeding is summary in nature and a sentence of probation may be revoked if the defendant has been afforded an opportunity to be heard and the court determines by a preponderance of the evidence that a condition of the probation has been violated" (People v Ferry, 171 AD3d 1398, 1398 [2019] [internal quotation marks and citations omitted]; see CPL 410.70 [3]; People v Hakes, 168 AD3d 1214, 1214-1215 [2019]; People v Turner, 136 AD3d at 1112; People v Songa, 132 AD3d 1071, 1072 [2015]). The commission of an additional criminal offense constitutes a ground for revocation of probation irrespective of whether such fact is specified as a condition of probation (see CPL 410.10 [2]; People v Finch, 160 AD3d 1212, 1213 [2018]), and a defendant need not be convicted of the additional criminal offense for it to serve as the basis for revocation of probation (see People v Brooks, 171 AD3d 778, 779 [2019]; People v Hill, 148 AD3d 1469, 1471 n 2 [2017], lv denied 29 NY3d 1080 [2017]). Nevertheless, evidence that a defendant has been arrested for an additional criminal offense, without more, is insufficient to support a finding of a violation of probation (see People v

Schneider, 188 AD2d 754, 756 [1992], lv denied 81 NY2d 892 [1993]; People v Brink, 124 AD2d 966, 966 [1986]).

Condition 2 of the terms of defendant's probation required her to obey all federal, state and local laws and notify her probation officer immediately if questioned or arrested by a law enforcement agency or if convicted of a new offense. In support of its allegation that defendant violated this condition, the People adduced the testimony of defendant's probation officer who testified, in relevant part, that defendant notified her of both the September 2015 and March 2016 arrests and charges. Beyond the probation officer's testimony that defendant had been arrested on two occasions, no additional evidence or proof was offered as to the underlying acts. Accordingly, County Court's finding that defendant violated condition 2 of her probation was not supported by a preponderance of the evidence (see People v Schneider, 188 AD2d at 756; People v Brink, 124 AD2d at 966).

Garry, P.J., Egan Jr., Clark and Pritzker, JJ., concur.

ORDERED that the judgment is reversed, on the law, and matter remitted to the County Court of Cortland County for further proceedings not inconsistent with this Court's decision.

ENTER:



Robert D. Mayberger
Clerk of the Court