



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES L. PLACHES,)
)
Defendant Below-)
Appellant,) No. 126, 2020
) ON APPEAL FROM
) THE SUPERIOR COURT OF THE
v.) STATE OF DELAWARE
) ID Nos. 0912004522, 1402007837
STATE OF DELAWARE,)
)
Plaintiff Below-)
Appellee.)

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
DELAWARE IN AND FOR KENT COUNTY

OPENING BRIEF

COLLINS & ASSOCIATES

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Dated: October 4, 2021

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NATURE OF THE PROCEEDINGS

On July 7, 2010, James Plaches pled guilty to Rape Third Degree, Breach of Conditions, and Tampering with a Witness.¹ On June 12, 2014, Mr. Plaches pled guilty to Exploiting Resources of an Infirm Adult.² As a result of these convictions, Mr. Plaches was a Level III probationer.

On January 8, 2020, PO Jessica Vorous filed an administrative warrant alleging that Mr. Plaches violated the terms of his probation.³ A violation report followed on January 15, 2020.⁴ At a violation hearing on January 24, 2020, the judge learned that Mr. Plaches contested the violations, and accordingly scheduled the matter for a contested hearing.⁵

Between hearings, police retroactively arrested Mr. Plaches, charging him with falsely reporting an incident; the allegation relates back to the facts in the violation report.⁶ On March 16, 2020, the State would enter a *nolle prosequi* as to that case.⁷ But while the case was pending and prior to the VOP hearing, the

¹ A1; A4, D.I. 31.

² A16; A17, D.I. 20.

³ A26.

⁴ A27-34.

⁵ A43.

⁶ A54-55.

⁷ A88.

probation officer filed a supplemental violation report. This report added a violation based on the arrest.⁸

On February 24, 2020, the Superior Court held a VOP hearing. Mr. Plaches admitted only to police contact; he denied the violations.⁹ The judge nevertheless found him in violation¹⁰ and imposed a sentence of 7 years unsuspended prison time, followed by community supervision with conditions.¹¹ On May 14, 2020, the Court also denied Mr. Plaches' motion for a sentence reduction.¹²

On March 27, 2020, Mr. Plaches filed a timely *pro se* Notice of Appeal to this Court.¹³ On May 7, 2021, he filed an Opening Brief.¹⁴ On May 13, 2021, the State filed a Motion to Affirm.¹⁵ This Court, on July 26, 2021, issued an Order finding it was not manifest on the face of Mr. Plaches' Opening Brief that his appeal is without merit. This Court also determined, in the interest of justice, that counsel be appointed.¹⁶ The undersigned attorney entered an appearance in this Court. This is Mr. Plaches' Opening Brief.

⁸ A58-63.

⁹ A72, A76.

¹⁰ A82.

¹¹ Exhibit A.

¹² A89.

¹³ No. 126, 2020; D.I. 1.

¹⁴ A90-127.

¹⁵ A128-132.

¹⁶ A133-134.

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING THAT MR. PLACHES VIOLATED THE CONDITIONS OF HIS PROBATION.

The Superior Court found Mr. Plaches in violation of his probation solely because he admitted to police contact. But reporting police contact is a required condition of his probation, not a violation of it. Mr. Plaches was not arrested in connection with the police contact. The Superior Court's finding was an abuse of discretion, necessitating reversal by this Court.

There was no competent evidence that Mr. Plaches violated his probation at all. The probation officer relayed only inadmissible hearsay to the judge. There were no witnesses and no physical evidence. The statements used by the probation officer to support her allegations that Mr. Plaches had lied to her were largely contradicted by police reports.

Because the Superior Court abused its discretion in finding Mr. Plaches had violated his probation by reporting police contact, this Court should reverse and vacate the finding along with the seven-year prison sentence imposed.

STATEMENT OF FACTS

The alleged violations of probation

The supervision history portion of the violation report indicates that Mr. Plaches had drug and mental health issues while on probation. These problems resulted in TASC (Treatment Access Center) supervision and a stay at Dover Behavioral Health.¹⁷ However, by October 2019, he was doing well with TASC and outpatient mental health treatment. He had also found employment with Easter Seals taking care of his elderly mother.¹⁸

Probation Officer Vorous alleged that Mr. Plaches violated three conditions. Two of these, reporting a change in residence and abiding by curfew, arise out of the same allegation. PO Vorous alleged that Mr. Plaches called the probation office on January 3, 2020, and stated he needed to leave his residence due to children being present. Mr. Plaches has a no contact order with minor children.¹⁹ He called again on January 5, 2020, to state that he still needed to stay away from home and that he was moving to another hotel. PO Vorous alleged that Mr. Plaches was lying and that children were not at the house.²⁰

¹⁷ A31. Notes, highlights, and underlining found on the Appendix documents were present when received.

¹⁸ *Id.*

¹⁹ A26.

²⁰ *Id.*

The third violated condition was failure to report police contact. According to PO Vorous, Mr. Plaches reported to his probation officer on January 6, 2020 that there was police contact regarding a family dispute, but the police contact never happened.²¹ PO Vorous would later modify this allegation – she alleged that Mr. Plaches *did* have police contact but lied about the nature of the contact.

The violation summary provides some additional details. PO Vorous learned that children were not in the house from his fiancée’s family members who called from New Hampshire.²² Then probation officers contacted the fiancée, Christina Hays, who confirmed that no children were present over the weekend. She also stated there were domestic incidents over the weekend involving both Felton and Camden police departments.²³ PO Vorous officer noted, “unfortunately, no arrest was made.” In summary, PO Vorous described the narrative as “a prime example of Mr. Plaches [sic] violence, deceit, and manipulation.”²⁴ She sought a 9-year prison sentence.

The police reports

PO Vorous attached exhibits to the violation report in the form of three police reports. In the first, Felton Police went to the Plaches/Hays residence for a

²¹ *Id.*

²² A31.

²³ A32.

²⁴ *Id.*

welfare check on January 3, 2020. The welfare check was initiated by a call from Samantha Clendaniel, Hays' sister. Clendaniel stated that Hays had been "drinking and acting weird," and she wanted the police to check on her. The report notes that Hays has a history of mental health issues and alcohol abuse. Hays told police that she had been drinking and wanted to be taken to a local hotel, because she did not want to be around her roommate, Mr. Plaches. The police drove her to a hotel.²⁵

The second report, also from Felton Police, was submitted on January 7, 2020. Hays, who was at a nearby residence, reported that she and Mr. Plaches had gotten into an argument in Rodney Village. But then she said it had occurred in Camden. Hays stated Mr. Plaches punched her; an ambulance took her to BayHealth,²⁶ although the Camden Police report clarified it was for an unrelated injury.²⁷ Later in the shift, Chief Brown of the Felton Police drove her home. No charges were filed.²⁸

The third report is from Camden Police and again describes an incident on January 7, 2020. According to the officer, Hays now says the incident occurred in a car. She claimed she smacked Mr. Plaches in the arm and he responded by striking her in the face. The officer saw no evidence of injury to Hays' face. Two

²⁵ A48.

²⁶ A49.

²⁷ A51.

²⁸ A49.

Delaware State Police officers also spoke to Hays and did not see any evidence of injury. The report notes that Hays gave “conflicting accounts” of when and where the incident occurred. Hays was taken to the hospital for an unrelated injury. Hays stated she did not want to move forward with prosecution and instead was going to contact Mr. Plaches’ probation officer to obtain a PFA.²⁹

The first VOP hearing: January 24, 2020

Mr. Plaches’ attorney advised the judge that the violation was “unusual” because the allegation was not that Mr. Plaches was not allowed to stay at the hotel, but because he lied about why he had to stay at the hotel.³⁰ Mr. Plaches explained to the judge that Hays’ family was planning to visit and that children would be present. He duly received permission to stay at the hotel. He went on to say that he had been fully compliant with all mental health and drug treatment requirements.³¹ In Mr. Plaches’ view, he was “trying to do everything by the book” and got violated for it.³²

PO Vorous stated that Probation had given Mr. Plaches permission to stay at a hotel.³³ This permission was extended for a few days, then Mr. Plaches reported

²⁹ A51.

³⁰ A36.

³¹ A37.

³² A38.

³³ *Id.*

that there were no longer children in the house and he was going back home.³⁴ But then, on January 8, 2020, Hays' family from New Hampshire called PO Vorous and stated that there were not in fact children in the house. They claimed that Hays wanted to leave Mr. Plaches and that he was following her from hotel to hotel.³⁵ PO Vorous then visited Hays on January 8, 2020. PO Vorous told the Court that Hays had "visible bruises,"³⁶ even though three police officers saw no evidence of injury the day before.³⁷ PO Vorous claimed that Hays was very frightened of Mr. Plaches, and because of the "reluctancy of the victim," no charges were brought against Mr. Plaches.³⁸

The judge confirmed that Mr. Plaches did report his hotel stay daily.³⁹ PO Vorous stated that Mr. Plaches reported police contact the night of Friday, January 3, 2020. According to PO Vorous, Mr. Plaches stated the contact was regarding a domestic dispute between Hays and her sister, not with Hays and Mr. Plaches.⁴⁰ Instead, PO Vorous continued, "the police contact that occurred was the girlfriend

³⁴ A39.

³⁵ A39.

³⁶ *Id.*

³⁷ *See*, A51.

³⁸ A40.

³⁹ A41.

⁴⁰ *Id.*

was calling Felton police, come get me out of this house because I don't want to have to defend myself.”⁴¹

The police report from the incident establishes the PO Vorous' claim is not true. It was Hays' sister Clendaniel calling the police asking them to go check on her because she had been “drinking and acting weird.”⁴²

After further attempts by Mr. Plaches to explain the situation, the Court found that since Mr. Plaches disputed the allegations, a contested hearing would be necessary.⁴³ Mr. Plaches said he was not arrested; had he done something wrong, he would have been. To that, the judge replied, “it would be clearer for the Court if he was arrested. He was not arrested apparently.”⁴⁴ The judge set the bail at \$5,000 cash and scheduled a contested hearing for February 3, 2020.⁴⁵ The TASC representative sought to close out services to Mr. Plaches; the judge granted that request.⁴⁶

Mr. Plaches is arrested between hearings; a supplemental VOP report is filed

Predictably, given the Court's comments at the hearing, within the week police swore out a warrant against Mr. Plaches for Falsely Reporting an Alleged

⁴¹ *Id.*

⁴² A48.

⁴³ A42-43.

⁴⁴ A43.

⁴⁵ A45-46.

⁴⁶ A46.

Incident to Law Officer, Which Did Not Occur.⁴⁷ The warrant was the result of PO Vorous reporting what she believed to be Mr. Plaches' false statements to Capitol Police. The officer contacted the Attorney General's Office and was advised by that office to file a warrant.⁴⁸ The Attorney General would later file a *nolle prosequi* of this case on March 16, 2020. The reason given is "Nolle Pros AG" without further explanation.⁴⁹

This new arrest obviously enabled PO Vorous to file a supplemental VOP report alleging a violation of Condition 1: committing a new criminal offense.⁵⁰

The Second VOP hearing: February 24, 2020

A different public defender represented Mr. Plaches at the second hearing. Defense counsel stated that Mr. Plaches was "in agreement to admit police contact," and that counsel wished to be heard on sentencing.⁵¹ The prosecutor then argued for a 9-year sentence, due to Mr. Plaches' six prior violations, his "history of violence," and his dishonesty to the police officer.⁵²

The defense attorney argued that, unlike many probationers, Mr. Plaches was complying with probation requirements by reporting police contact. The

⁴⁷ A54-55.

⁴⁸ A55.

⁴⁹ A88.

⁵⁰ A58-59.

⁵¹ A65.

⁵² A66-67.

allegation is based on the probation officer not believing him.⁵³ Counsel also noted she had never before seen a criminal charge be added based solely on information in a violation report.⁵⁴

Counsel then handed up a notarized letter from Mr. Plaches' sister, which explains that she did plan to visit from Pittsburgh that weekend with her children.⁵⁵ The letter goes on to state that due to an unexpected death in the family, the planned visit had to be cancelled at the last minute.⁵⁶

Mr. Plaches spoke next. He explained that he did have police contact, but it was "positive" contact in the sense that he reported it timely and it did not result in new charges. He and Hays were arguing about her drinking and the fact that his family members were coming to visit.⁵⁷ Mr. Plaches explained that he duly reported the police contact. As to the move to the hotel, Mr. Plaches explained that he was given permission from Probation due to the impending visit of his family members.⁵⁸ Mr. Plaches then stated that he did have six prior violations, but they were all for "dirty urines."⁵⁹ He had done the Key and Crest programs, and

⁵³ A68.

⁵⁴ A69.

⁵⁵ A70.

⁵⁶ A86.

⁵⁷ A71.

⁵⁸ A73-74.

⁵⁹ A75.

intensive outpatient treatment since then.⁶⁰ Mr. Plaches concluded by saying he was sorry if his probation officer thought he was lying, but he was telling the truth.⁶¹

In response, PO Vorous repeated the same allegations for the first hearing: that Mr. Plaches lied about the nature of the police contact he reported, and he lied to Probation about there being children at his house so that he could go stay in a hotel.⁶² Again, as support for the assertion that there were no children in the house, PO Vorous relied upon statements from Hays' family.⁶³

Having heard from all parties, the Court noted the "admission of police contact by the defendant."⁶⁴ The judge continued, "obviously, the Court must find Mr. Plaches in violation of the terms and conditions of his probation."⁶⁵ Then the judge sentenced Mr. Plaches to seven years of unsuspended prison time with other conditions upon release.⁶⁶

⁶⁰ A75-76.

⁶¹ A77.

⁶² A78-79.

⁶³ A79.

⁶⁴ A81.

⁶⁵ A82.

⁶⁶ A82-83.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING THAT MR. PLACHES VIOLATED THE CONDITIONS OF HIS PROBATION.

A. Question Presented

Whether the judge erred by finding Mr. Plaches in violation of his probation for “police contact,” which Mr. Plaches reported to Probation as required. Mr. Plaches preserved this issue at the VOP hearing in his arguments to the judge.⁶⁷ However, Mr. Plaches’ attorney appears to have admitted police contact and, notwithstanding the fact that police contact is not a violation, asked to be heard regarding sentencing.⁶⁸ As such, the record could be read to indicate that this claim was not preserved, due to the defense attorney’s comments.

To the extent this claim was not preserved, Mr. Plaches seeks review pursuant to Rule 8. That rule states, “only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.”⁶⁹ The interests of justice militate in favor of review. This Court, in denying the State’s motion to affirm, noted that Mr. Plaches admitted only to police contact, and that no charges arose from the contact.⁷⁰ Moreover, this Court

⁶⁷ A71-75.

⁶⁸ A65.

⁶⁹ Supr. Ct. R. 8.

⁷⁰ A133.

caused counsel to be appointed, *sua sponte* and in the interests of justice.⁷¹ Given those findings, Mr. Plaches respectfully seeks appellate review of this claim under Rule 8, to the extent Rule 8 is implicated.

B. Standard of Review

This Court reviews the revocation of probation for abuse of discretion.⁷²

C. Merits of Argument

Applicable legal precepts

The procedural requirements for alleged violations of probation are codified by statute:

Upon such arrest and detention, the Department shall immediately notify the court and shall submit in writing a report showing in what manner the probationer has violated the conditions of probation or suspension of sentence. Thereupon, or upon arrest by warrant as provided in subsection (b) of this section, the court shall cause the probationer to be brought before it without unnecessary delay, for a hearing on the violation charge. The hearing may be informal or summary. If the violation is established, the court may continue or revoke the probation or suspension of sentence, and may require the probation violator to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.⁷³

The judge has broad discretion to determine whether the probationer has violated one or more conditions of probation.⁷⁴

⁷¹ A133-134.

⁷² *Brown v. State*, 249 A.2d 269, 271-272 (Del. 1968).

⁷³ 11 *Del. C.* § 4334(c).

⁷⁴ *Brown* at 271.

The State bears the burden of proof by a preponderance of the evidence that the defendant violated probation.⁷⁵ The State must present “some competent evidence to prove that the violation occurred.”⁷⁶ Competent evidence has been described by this court as evidence that would be admissible in a criminal trial and is proof that the defendant violated the terms of his probation.⁷⁷ Hearsay evidence is admissible.⁷⁸ But “inadmissible hearsay, without some corroborating admissible evidence, is ‘a basis too untrustworthy [to terminate a person’s freedom].’”⁷⁹

In *Collins*, this Court reversed the Superior Court’s finding of a violation because the only evidence provided to link the probationer to a new crime was hearsay. The officer testified that Collins’ ex-girlfriend told him that Collins had gone to her house, kicked in the door, threatened her, and smashed a figurine.⁸⁰ Indeed, there was evidence of such damage. But at the hearing, Collins denied the offense, and the State did not produce the ex-girlfriend or any other witness or physical evidence linking Collins to the crime.⁸¹ This Court reversed, finding that the competent evidence of violation standard was not met.⁸²

⁷⁵ *Rossi v. State*, 140 A.3d 1115, 1119 (Del. 2016).

⁷⁶ *Rossi* at 1119, *citing Brown v. State*, 249 A.2d 269, 272 (Del. 1968).

⁷⁷ *Rossi* at 1119.

⁷⁸ *Collins v. State*, 897 A.2d 159, 160 (Del. 2006).

⁷⁹ *Rossi* at 1120, *citing Brown* at 272.

⁸⁰ *Collins* at 160.

⁸¹ *Id.*

⁸² *Id.* at 162.

More recently, this Court reversed a violation of probation in *Rossi*. This Court reiterated that “some competent evidence” means “(i) an act constituting a violation occurred, and (ii) the defendant is linked to that act.”⁸³ The State had recently entered a *nolle prosequi* with conditions on Rossi’s charges, which involved a shoplifting scheme at JC Penney. Just days after Rossi’s release from prison, his probation officer filed a VOP report, alleging he had once again shoplifted at JC Penney.⁸⁴ At the hearing, the police officer relayed information from the loss prevention manager, who had also shown him still photos taken from security camera videos that purportedly depicted Rossi and his girlfriend. Upon questioning, Rossi admitted to being at the store but nothing more. The girlfriend’s hearsay statement implicated Rossi.⁸⁵ The State also argued that Rossi’s agreement to pay restitution to JC Penney in his prior, dismissed case was evidence of the current violation.⁸⁶

This Court parsed the evidence presented and determined that the only competent evidence that met admissibility requirements was Rossi’s own statement that he was present at the store.⁸⁷ This Court held that the non-hearsay requirement

⁸³ *Rossi*, 140 A.3d at 1117.

⁸⁴ *Id.* at 1118.

⁸⁵ *Id.* at 1119-1120.

⁸⁶ *Id.* at 1121.

⁸⁷ *Id.* at 1122.

applies to both analytical prongs: that the crime occurred and that the probationer committed it. As such, this Court reversed.⁸⁸

Mr. Plaches was found in violation for complying with the terms of his probation.

The Superior Court specifically found one fact: Mr. Plaches admitted police contact. Based on this finding, the Court held that “obviously” the Court must find that he violated the terms and conditions of his probation.⁸⁹ But Mr. Plaches was *required* to report police contact, and he did so promptly. The police contact did not result in an arrest, nor did anyone claim that it did. The one charge, hastily filed at the request of PO Vorous, pertained to Mr. Plaches purportedly lying about there being children visiting. In any event, the State entered a *nolle prosequi* on that charge once it had served its purpose.

Quite simply, one cannot be found in violation of a condition of probation when the probationer has specifically complied with that condition. The Superior Court’s finding otherwise was an abuse of discretion.

No competent evidence established any violations by Mr. Plaches.

The record below does not establish any probation violation. If anything, it establishes that a probation officer aggressively pursued a violation and a 9-year prison sentence because the officer believed that Mr. Plaches was lying to her. But

⁸⁸ *Id.* at 1124.

⁸⁹ A81-82.

there was no competent evidence to support an actual violation. To the extent there was a hearing at all, the Court only heard from PO Vorous. All evidence related by PO Vorous except her own personal observations were inadmissible hearsay. And most of that hearsay was inaccurate.

PO Vorous' statement that Christina Hays called the police to say "come get me out of this house because I don't want to have to defend myself"⁹⁰ was untrue. The police report clearly states that it was Hays' sister, Samantha Clendaniel, who called the police to ask them to check on Hays, because she was "drinking and acting weird."⁹¹ PO Vorous claimed to see evidence of bruising on Hays, but all the police officers who filed reports that same day saw no evidence of injury on January 7, 2020. Moreover, PO Vorous elided the fact that the officers noted that Hays had mental health and alcohol issues and gave conflicting accounts of the alleged abuse by Mr. Plaches.

As to the claim that Mr. Plaches lied about there being children at his house, PO Vorous relied solely on a phone call from Hays' family, rather than asking Mr. Plaches' family who were the ones planning to visit. It appears that neither PO Vorous nor the Court considered the notarized letter from Mr. Plaches' sister describing how arrangements were made for Mr. Plaches to be out of the house

⁹⁰ A41.

⁹¹ A48.

when children were visiting – and that the visit was cancelled abruptly due to a death in the family.

Because Mr. Plaches could not possibly have violated his probation by complying with the condition to report police contact, the Superior Court’s finding of a violation should be reversed. Since there was no other competent evidence of any violation by Mr. Plaches, the order revoking probation and the prison sentence should be vacated.

CONCLUSION

For the foregoing reasons, Appellant James Plaches respectfully requests that this Court reverse the judgment of the Superior Court.

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