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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
DANIEL PAUL HARGER,)
Defendant-Appellant.)

Filed January 30, 1981

0-367
64759

Appeal from Polk District Court - Norman Elliott, Judge.

Defendant appeals revocation of probation and imposition of sentence upon his conviction for OMVUI, contending that there was insufficient evidence to show he had violated the trial court's order and that the trial court abused its discretion in revoking his probation. AFFIRMED.

Roger J. Kuhle of Myers, Knox & Hart, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendant Daniel Harger appeals from the revocation of his probation and subsequent imposition of a sentence upon his conviction for OMVUI following a guilty plea. He contends that there was insufficient evidence to show he had violated the trial court's order and that the trial court abused its discretion in revoking his probation. We affirm the revocation.

Our review of this appeal is limited to correction of errors at law. Iowa R. App. P. 4.

I.

On December 18, 1979, defendant pleaded guilty to OMVUI, first offense, in violation of section 321.281, The Code 1977. He was granted a deferred sentence and placed on one year probation under the supervision of the Alcohol Safety Action Program (ASAP). In its order, the court provided that the defendant was to "present himself" at the ASAP office for the purpose of entering into a probation agreement and that he was to attend and successfully complete a course for drinking drivers.

On February 14, 1980, the ASAP supervisor informed the trial court that the defendant had not yet reported to ASAP to enter into a probation agreement. A revocation hearing was then held, with the supervisor recommending that the defendant be fined and that ASAP be relieved of the obligation of supervising the defendant during his probation. Defendant testified that on December 18, the day the deferred sentence was entered, he telephoned ASAP and made arrangements to enroll in the drinking drivers' course which he later took and completed. He did not mention to the person who took his call that the court had ordered him to contact ASAP for the additional purpose of entering into a probation agreement. He testified that he then thought he had done everything required of him by the court order and that he was waiting for someone to contact him about probation.

Following defendant's testimony and various statements by the judge to the effect that he had serious misgivings about continuing defendant's probation, the court again asked the ASAP supervisor for his recommendation and stated that it would "go entirely" on that recommendation. The supervisor replied that he would not change his original recommendation and the court, remarking that it was "inclined" to agree, revoked defendant's probation, ordered him to pay a $300 fine, and imposed a sentence of two days in the county jail. Defendant then filed his appeal.

II.

Defendant first contends that revocation of his probation and imposition of a sentence was unwarranted because there is insufficient evidence for the trial court's conclusion that the defendant "refused to contact ASAP" as required by court order. We disagree.

Trial courts possess the statutory authority to revoke probation and impose a sentence if it is shown that the defendant is not cooperating with the probation program or is not responding to it. § 907.3(1), Supplement to the Code 1977. See also § 908.11, Supplement to the Code 1977. Facts justifying revocation of probation must be established by a preponderance of the evidence. State v. McGinnis, 243 N.W.2d 583, 587 (Iowa 1976); Rheuport v. State, 238 N.W.2d 770, 772 (Iowa 1976); State v. Hughes, 200 N.W.2d 559, 563 (Iowa 1972). We are not convinced by the explanation defendant has offered for his failure to contact ASAP about a probation agreement and conclude that his refusal to comply with that part of the trial court's order is established by a preponderance of the evidence. In his attempt to justify his failure to enter into a probation agreement with ASAP, the defendant points out that he telephoned ASAP on the day his sentence was deferred and made arrangements to enroll in the drinking drivers' course. He left his name, address, and social security number and hung up, thinking that someone from ASAP would then contact him about probation and that he had done all that was required of him under the court order. We find this explanation very difficult to accept for several reasons. First, since at no time during the telephone conversation did the defendant mention that he was to arrange for a probation agreement with ASAP, we fail to see how he could reasonably have thought that his phone call would have alerted ASAP to the fact that he had been placed on probation under the organization's supervision. Second, the court order clearly states that in addition to contacting ASAP about the drinking drivers' course, the defendant was to "present himself" to the ASAP office for the purpose of entering into a probation agreement. These requirements were also explained verbally to the defendant by the trial court. We therefore do not understand why the defendant contacted ASAP for one of the specified purposes without mentioning the other. Finally, defendant admits he understood at the time he received the deferred sentence that it was his obligation to do whatever was necessary to comply with the court order; we are therefore somewhat unsympathetic to defendant's position that it was ASAP's responsibility to contact him

about entering into a probation agreement. For all of these reasons, we affirm the trial court's revocation of defendant's probation and its subsequent imposition of a sentence.

III.

Defendant also contends that the trial court abused its discretion in revoking his probation and imposing a sentence upon him. We find no merit in this argument.

Defendant first alleges that the trial court totally surrendered its authority to determine the revocation question by basing the outcome of the issue entirely on the recommendation of the ASAP supervisor and thereby abusing its discretion. We think it is clear from the record that this is not what happened. The supervisor's recommendation on revocation was only one factor considered by the trial court and, in fact, the court remarked several times before asking the supervisor for his final recommendation that it simply could not accept defendant's excuse for his failure to enter into a probation agreement. We find no abuse of discretion on the basis of this contention.

Furthermore, we do not think that the court abused its discretion in revoking defendant's probation. Trial courts have broad discretion in dealing with probation matters; only upon a finding of abuse will we interfere with that discretion. State v. Killpack, 276 N.W.2d 368, 373 (Iowa 1979); State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979); State v. Rogers, 251 N.W.2d 239, 243 (Iowa 1977). Normally, an abuse of discretion exists only where there is no support for the decision in the record, or, in other words, where "the result [is] so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will . . . ." State v. Warner, 229 N.W.2d 776, 783 (Iowa 1975). That is certainly not the situation in this case. Defendant was required by court order to contact ASAP for the purpose of entering into a probation agreement. Although defendant knew of this requirement, he never contacted ASAP for that purpose and never entered into a probation agreement. The trial court revoked his probation on the grounds that he had refused to fully comply with its order, and we affirm.

AFFIRMED.