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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

DANIEL SOWELL,

Defendant-Appellant,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Appellee-Plaintiff.

OPINION AND ORDER

This matter is before the Court on Defendant-Appellant Daniel Sowell's appeal pursuant to MCR 7.101(C)(1) of the District Court's ruling of July 14, 2009, convicting Defendant of contempt of court for violating his probation resulting from his initial charge of minor in possession in violation of MCL 436.1703.

Defendant-Appellant also appeals the District Court's order that he be sentenced to a term of 8 WWAM days for being held in contempt of the District Court's probation order subsequent to a guilty plea to an MIP pursuant to MCL 436.1703.

The Court heard oral argument on October 14, 2009 and took the matter under advisement. The People took no position at the time of the hearing and did not file a brief on appeal. Although provided notice at the hearing, the probation department from the District Court made no appearance.

The Defendant was caught with alcohol at a party at Oakland University when he was under age. After appearing in court without counsel, Defendant pled guilty to MIP 1<sup>st</sup> offense and was sentenced to 18 months probation with no deferral. Pursuant to

OAKLAND  
COUNTY

09-DA9011-AR



JUDGE SHALINA KUMAR  
PEOPLE V SOWELL, DANIEL

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probation, Defendant was required to perform 50 hours of community service, attend a victim impact panel, attend a weekend alcohol education program, and pay probation oversight fees.

On March 25, 2009, the District Court ordered the Defendant to show cause why he should not be held in contempt of court for allegedly violating his probation. Specifically, it was accused that the Defendant had failed to attend two Probation meetings with his probation officer, pay probation fees and attend a weekend alcohol program.

Thereafter, on June 4, 2009, Defendant filed a motion to dismiss and modify the sentence. In the motion, the Defendant contended that contempt of court was not the proper tool in situations where one violates his probation. The motion was denied.

On July 14, 2009, the Defendant appeared at the show cause hearing and at the hearing, the Defendant was advised the he could either serve 8 days in jail or 8 days of the WWAM program. Defendant rejected the recommendation to agree to the jail time and proceeded to trial.

At trial, the sole witness for the prosecution was Elizabeth Arbus who testified that Defendant had not completed his victim impact panel, community service, alcohol weekend and fees were not timely paid. Ms. Arbus testified, however, that Defendant did not willfully violate his probation orders. Defendant testified that he did not attend his February 27<sup>th</sup> 2009 probation meeting because he could not live at Oakland University during spring break and was home in Illinois. Defendant testified that he placed calls to the probation department once he was in Southern Illinois. Defendant testified that nobody called him to instruct him what to do. Defendant said that he

never received notice of the March 17, 2009 probation meeting. No proof of notice was sent to his home in Illinois. Defendant testified that he attempted to contact the probation department approximately 15-20 times by phone. Eventually, Defendant spoke with Ms. Arbus who instructed him how to complete the requirements of probation. Defendant said he attempted to pay the outstanding fines when he appeared with counsel on June 4, 2009, however, the court clerk indicated to the Defendant that at that time they would not accept the money because his probationary period may be altered. Finally, Defendant testified that he always intended to complete his probation.

At the conclusion of the trial, the District Court issued its holding without hearing closing arguments. The District Court found the Defendant in violation of the court's order of probation. The Court proceeded to immediate sentencing, the Defendant objected and sought to clarify that a finding of guilt beyond a reasonable doubt was required for a finding of contempt of court. The Court then stated the following as the basis for its ruling:

In this particular case, the defendant certainly willfully did not appear on February 27<sup>th</sup> and March 17<sup>th</sup>. He indicated on the record in his own testimony that he didn't show up. He never received permission from anybody not to show up. He made the decision on his own not to appear. This wasn't a situation where he slept in or he got into an accident on the way to the court. He made no attempt to come to the court. He made the decision on his own not to appear. Additionally, he made the decision not to pay his probation oversight expenses. (Hearing Transcript pp. 36-37).

The Court then sentenced Defendant to 8 WWAM days. Defendant indicated that because he had moved back to Southern Illinois, that this sentence was a burden and hardship for him. Defendant requested an alternate sentence which the Court denied.

After the sentencing, the Defendant filed an immediate appeal and this Court granted a stay of proceedings.

Defendant-Appellant raises five issues on appeal: (1) District Court erred as a matter of law when it convicted Defendant for contempt because of an alleged probation violation; (2) The district court's finding that Defendant's alleged actions rose to the level of contempt was in opposition to the great weight of the evidence; (3) The district court erred by sentencing the Defendant to WWAM; (4) The district court did not follow proper procedure in prosecuting Defendant's contempt case.

This Court has appellate jurisdiction over all inferior courts and tribunals except as otherwise provided by law. Const 1963, art 6, § 13; MCR 7.101. The imposition of a sentence is reviewed for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002), *lv den* 467 Mich 949 (2003). An abuse of a trial court's discretion will be found only if an unprejudiced person, considering the facts upon which the trial court made its decision, would conclude that no justification existed for the ruling made. *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993), *lv den* 443 Mich 860 (1993).

As to Defendant's first argument, the District Court relied on MCL 600.1701 for its justification in charging Defendant with contempt of court. The Michigan Legislature has given to the Courts contempt powers over those who are convicted of violating the provisions contained within MCL 600.1701. "The power to punish with contempt is awesome and carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown." *People v. Matish*, 384 Mich 568 (1971).

The question presented is whether the District Court properly utilized its contempt powers when addressing a probation order.

A violation of probation allows a sentencing court to continue probation without punishment for the violation, modify or extend the term of probation, or revoke probation and "sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made." MCL 771.4. This Court notes that MCL 771.2 fixes the maximum period of probation for misdemeanor violations at 2 years. Defendant-Appellant was sentenced to serve 18 months of probation. The fine, community service, fees and conditions of probation were also authorized by statute. MCL 257.625(11) and (12) (now MCL 257.625(12) and (13)); MCL 771.2(2); MCL 771.3. Therefore, the District Court had the authority to sentence Defendant-Appellant to 18 months of probation with conditions.

However, Defendant Appellant asserts that the District Court did not have the power to hold him in contempt for violating the terms of his probation. See MCL 771.4. A review of the record shows that the District Court treated Defendant-Appellant's MIP charge and his failure to complete probation requirements including missing scheduled probation meetings as acts of contempt. Essentially, the court treated the probation violation as disobeying a lawful order of the court, pursuant to MCL 600.1701(g). Though neither party cited any binding authority, a clear reading of the probation revocation statute shows that this was an error by the trial court. *Id.*

The trial court held Defendant-Appellant in contempt for failing to fulfill the conditions of probation. The Court then revoked probation and sentenced Defendant-Appellant to 8 days in the WWAM program. This, despite the fact that MCL 771.4 does

not authorize a jail term for violating the terms of probation: "If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made." MCL 771.4. The statute is unambiguous and allowed only three alternatives upon Defendant-Appellant's violation of probation: the trial court could either continue probation without punishment for the violation, modify or extend the term of probation, or revoke probation and sentence Defendant-Appellant to the sentence allowed by MCL 257.625(11) and (12).

By sentencing Defendant-Appellant to the WWAM program for contempt, the trial court violated the principle that a probation violation in and of itself does not amount to a new crime. *People v Kaczmarek*, 464 Mich 478, 482-83; 628 NW2d 484 (2001) ("If a Judge finds that a probationer violated his probation by committing an offense, the probationer is neither burdened with a new conviction nor exposed to punishment other than that to which he has already been exposed..."); *People v Vancil*, 186 Mich App 665, 666; 465 NW2d 49 (1991) ("the sentence imposed upon a probation violation must be in accordance with the permissible sentence for the underlying offense itself").

Moreover, it is important to note that sentencing the Defendant-Appellant to the WWAM program is equivalent to a jail sentence because the Defendant remains under the control and direction of the Oakland County Jail. Therefore, Defendant-Appellant could not be sentenced to WWAM days as that is not a valid sentence for the underlying MIP charge.

Consequently, the Court orders that this matter is remanded to the District Court for a violation of probation hearing. If the District Court finds the Defendant violated the

terms of his probation, then the District Court shall impose a lawful sentence for that probation violation. Based upon the Court's resolution of this appeal, it is unnecessary to address the remaining issues raised in Defendant-Appellant's appeal.

For the foregoing reasons, the District Court's order finding Defendant-Appellant in contempt of court and sentencing him to 8 days the WWAM program is vacated. This matter is remanded to the District Court for a violation of probation hearing and if found in violation then the Court shall impose a legal sentence not inconsistent with this opinion and Order.


**WHEREFORE IT IS HEREBY ORDERED THAT** Defendant Appellant's appeal is hereby **GRANTED**.

**FURTHER, IT IS HEREBY ORDERED THAT** Defendant's conviction for contempt of Court is **VACATED**.

**FURTHER, IT IS HEREBY ORDERED THAT** this case is remanded to the District Court for a violation of probation hearing.

**IT IS SO ORDERED.**

**THIS COURT DOES NOT RETAIN JURISDICTION**

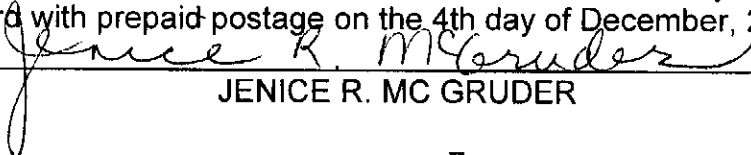
  
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HON. SHALINA D. KUMAR  
CIRCUIT COURT JUDGE

**DEC 04 2009**

Dated: \_\_\_\_\_

**Proof of Service**

I certify that a copy of the above instrument was served upon the attorneys of record or the parties not represented by counsel in the above case by mailing it to their addresses as disclosed by the pleadings of record with prepaid postage on the 4th day of December, 2009.

  
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JENICE R. MC GRUDER