EXHIBIT A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE CITY OF ORCHARD LAKE VILLAGE,

Plaintiff-Appellee,

v.

KIERA LINDSEY EVANS,

Defendant-Appellant.
_____/

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04-DA8124-AR

OAKLAND COUNTY JUDGE MARK A. GOLDSMITH ORCHARD LAKE V EVANS,KIERA.

Case No. 04-DA8124-AR

Hon. Mark A. Goldsmith

OPINION AND ORDER VACATING CONTEMPT ORDER AND SENTENCE AND REMANDING FOR IMPOSITION OF SENTENCE FOR PROBATION VIOLATION

This matter is before the Court on Defendant-Appellant Kiera Lindsey Evans' appeal[1] from the imposition of a sentence of probation in the 48th District Court before the Hon. Diane Dickow D'Agostini. Defendant-Appellant also appeals the district court's finding of contempt for alleged violations of probation and the imposition of a 30-day jail sentence. The Court reviewed the parties' respective briefs on appeal, as well as the record on appeal, and heard oral argument August 11, 2004.

Defendant-Appellant, while under the age of 21, was originally charged with OUIL/UBAL, contrary to MCL 257.625(1)(a), which is a misdemeanor.[2] Thereafter, the prosecution amended the complaint resulting in Defendant-Appellant pleading guilty to

[1] This Court notes that, because Defendant pleaded guilty, Defendant's avenue for review was by way of an application for leave to appeal. MCL 770.3(1)(e); MCR 6.445(H). In the interest of judicial economy, the Court will treat Defendant's claim of appeal as an application for leave to appeal and will address the merits accordingly.

[2] MCL 117.3(k) provides that a city may adopt by reference the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923. Orchard Lake adopted the vehicle code by ordinance, effective May 10, 2002.

driving with a blood alcohol content in violation of the zero tolerance provision of the statute, MCL 257.625(6), which is also a misdemeanor. On May 28, 2003, the district court sentenced Defendant-Appellant to serve 18 months' supervised probation, pay fees, costs and fines, abstain from consuming alcohol, undergo random drug testing and daily preliminary breath tests ("PBTs") for a period of 30 days, attend 2 show cause violation hearings in district court, attend alcohol education classes as well as serve 10 days in the Oakland County Jail in the Weekend Alternatives for Misdemeanants ("WAM") community service program. As a condition of probation, the district court ordered Defendant-Appellant not to violate any criminal law.

At the time of sentencing, the district court ordered a 24-hour drug screen to assure that Defendant-Appellant had no illicit drugs in her system. The court specifically asked Defendant Appellant, "Is that going to come back positive or negative for any type of drug?" Plea and Sentencing Transcript dated May 28, 2003, p. 15. Defendant-Appellant responded, "Um, negative." Id. The court noted that marijuana "stays in your system for 30 days." Id. After no verbal response, the court asked, "Is that a yes?" Defendant-Appellant responded, "Yes." Id. The next day, Defendant-Appellant tested positive for marijuana, after which, the district court ordered Defendant-Appellant to show cause why her probation should not be revoked. Defendant-Appellant pleaded guilty and the lower court sentenced her to two additional days in the WAM program.

On November 18, 2003, Defendant-Appellant was apprehended for drunk driving in the City of Auburn Hills, Michigan. Defendant-Appellant was ordered to appear on February 12, 2004, to show cause why probation should not be revoked. In the

meantime, defense counsel wrote by facsimile to Defendant-Appellant's probation officer seeking consent to Defendant-Appellant's admission into a 28-day inpatient program in the State of Florida to treat her substance abuse, depression and eating disorder. The request was forwarded to the presiding judge. A handwritten notation on the fax coversheet indicates "deny request," but there is no indication in the record that Defendant-Appellant was ever notified that her request was denied. Defendant-Appellant entered the inpatient treatment program and upon failure to appear at the show cause hearing, a bench warrant issued for her arrest. The affiant also asked that Defendant-Appellant be held in contempt of court for failure to appear. An order to appear was issued, but the order identified only the probation violation as the reason for the hearing. An amended motion and order to show cause also addressed only the probation revocation.

On March 31, 2004, Defendant-Appellant filed a motion for entry of an order that she not be sentenced to incarceration for her actions subsequent to her initial guilty plea. On April 15, 2004, the district court heard oral argument, and opined that Defendant-Appellant's motion was based on discussions held off the record and premature. The next day, the court issued an order to show cause why Defendant-Appellant should not be held in criminal contempt "for failure to comply with the order of this court." She was also ordered to show cause why probation should not be revoked for the additional drunk driving charge and for failing to submit to daily PBTs.

On April 29, 2004, the parties appeared for the probation violation hearing. Defendant-Appellant stipulated to the police officers' report concerning her second drunk driving arrest, an unresolved matter pending before another court. The court

found Defendant-Appellant not only guilty of violating probation, but also guilty of contempt of court for violating the probation order. The court also found that Defendant-Appellant's failure to comply with the conditions of bond, by failing to submit to twice daily PBTs, formed contempt. The court noted that Defendant-Appellant had a prior minor in possession violation, that she had used marijuana during her probation, had missed PBTs, and then was charged with drunk driving in Auburn Hills. The court expressed its concern for the public safety and that, regardless of Defendant-Appellant's bipolar disorder, she chose to drink and to miss her PBTs. Defendant-Appellant was sentenced to 30 days in jail, 18 months' probation, outpatient treatment, restitution and costs. The petition and order to discharge from probation noted that Defendant-Appellant was found in contempt and guilty of violating probation. Probation was revoked on April 30, 2004.[3]

Defendant-Appellant raises five issues on appeal: (1) that the trial court erred in sentencing her to probation where the ordinance under which she was convicted did not include probation as a possible sentence; (2) that the trial court erred by making the conditions of probation, and the penalty for violating probation, more severe than the punishment allowed under the ordinance; (3) that the trial court erred by treating the probation violation as contempt of court; (4) that the trial court erred by having the sentencing judge try the contempt matter; and (5) that the trial court abused its discretion by finding that the probation violation rose to the level of contempt.

[3] On May 4, 2004, this Court entered a Stipulated Order staying the district court's sentence pending appeal. See Stipulated Order to Stay Enforcement of April 29, 2004 Order Pending Appeal.

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).

Though the applicable section of the Motor Vehicle Code, MCL 257.1, et seq., does not expressly state that probation is a possible punishment, MCL 771.1 provides that "the court may place the defendant on probation under the charge and supervision of a probation officer" in all misdemeanor prosecutions. MCL 771.1(1). The statute clearly states that the court may place the defendant on probation in lieu of the "penalty imposed by law." It has long been the law in this state that a defendant found guilty of an ordinance violation that amounts to a misdemeanor is subject to probation the same as if he had been found guilty of a misdemeanor under a state statute. See People v Gill, 77 Mich App 248; 258 NW2d 493 (1977). Defendant-Appellant failed to cite any binding precedential authority to the contrary, and the Court finds her argument concerning statutory interpretation unpersuasive.

A violation of probation allows a sentencing court to either 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' 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, not only did the district court have the authority to sentence Defendant-Appellant to 18 months' probation with conditions, it did not abuse its discretion in doing so.

The next question is, whether the court could hold Defendant-Appellant in contempt for violating the terms of her probation.

The record is clear that the trial court treated Defendant-Appellant's OUIL charge and her alleged failure to submit to PBTs not only as violations of the conditions of her probation, but also as acts of contempt. Apparently, 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, and this Court's research revealed none, a clear reading of the probation revocation statute shows that this was an error by the trial court.

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 30 days in jail.[4] 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

[4] The contempt judgment of sentence inexplicably included the original 18-month probation sentence, as well as fees and costs.

might have done if the probation order had never been made." MCL 771.4. The statute is unambiguous and allowed but 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 jail 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").

Consequently, the Court orders that this matter is remanded to the district court for imposition of a lawful sentence for the probation violation. Because Defendant-Appellant has already paid the $250.00 fine allowed by MCL 257.625(11), the lower court may not levy an additional fine. However, this Court perceives no bar to the imposition of additional costs as contemplated by MCL 257.625(13)[5]. Based upon the Court's resolution of this appeal, it is unnecessary to address the remaining issues raised in Defendant-Appellant's appeal concerning contempt.

[5] On the record before the Court, it is unclear whether weekend alternatives for misdemeanants constitutes "community service," within the meaning of MCL 257.625 (12). Because this issue was not briefed, the Court makes no ruling on this point.

For the foregoing reasons, the district court's order finding Defendant-Appellant in contempt of court and sentencing her to 30 days in jail is vacated. This matter is remanded to the district court for imposition of a legal sentence not inconsistent with this Opinion and Order.

This Court does not retain jurisdiction.

IT IS SO ORDERED.

HON. MARK A. GOLDSMITH
CIRCUIT COURT JUDGE

Dated: NOV 16 2004