

**IN THE COURT OF APPEALS OF IOWA**

No. 3-1053 / 13-0133  
Filed January 9, 2014

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JOHN NATHANIEL VAN WIE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Jeffrey L. Harris, District Associate Judge.

A criminal defendant appeals from his convictions and sentence following an unreported probation revocation hearing. **PROBATION REVOCATION REVERSED AND REMANDED; JUDGMENT AND SENTENCE VACATED.**

Julie De Vries of De Vries Law Office, P.L.C., Centerville, for appellant.

Thomas J. Miller, Attorney General, Martha Trout, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

**MULLINS, J.**

John Van Wie appeals from a probation revocation and sentencing order revoking his deferred judgment for criminal mischief in the fourth degree, criminal trespass, and theft in the fifth degree. He contends the trial court erred in failing to find a factual basis for the probation violation and failing to provide reasoning for its sentence. He also contends his trial counsel was ineffective for failing to move the court to correct these errors. The State argues the record Van Wie provided is inadequate for the court to rule on the probation violation and sentencing claims. The State additionally asserts the district court erred in sentencing Van Wie to jail instead of prison. The State asks that the case be remanded to the district court for resentencing to address the illegal placement. Van Wie asks that the case be remanded to allow him to create an adequate record. We reverse the probation revocation and remand for further proceedings. Accordingly, we vacate the judgment and sentence resulting from the probation revocation.

**I. Background Facts and Proceedings.**

On March 16, 2009, Van Wie pled guilty to criminal mischief in the fourth degree, criminal trespass, and theft in the fifth degree. In a reported proceeding, the court accepted the plea, found a factual basis, and granted a deferred judgment and probation. On February 29, 2012, Van Wie's probation officer filed a violation report indicating Van Wie failed to make regular payments on ordered restitution, failed to file proof of community service (ordered in lieu of restitution after he got behind on payments), and failed to appear for a number of required

meetings with the probation officer. The probation officer recommended that Van Wie be brought before the court to show just cause why his deferred judgment should not be revoked. After several continuances, which resulted from Van Wie's failure to appear for court hearings, the court held the probation revocation hearing on January 3, 2013. Van Wie was personally present with counsel. The hearing was not recorded. Following the hearing, the court entered a "Guilty Plea and Sentencing Order," revoking Van Wie's probation, imposing judgment, and announcing his sentence. The court's form order stated:

On December 23, 2009, the defendant filed a Written Plea of Guilty (Alford) to the offenses of Criminal Mischief-4th; Criminal Trespass, Theft 5th in violation of Iowa Code section 716.6/716.8/714.2(5) as more particularly described in the Trial Information. A formal record is made/waived by the parties. Having considered matters which the parties presented,  
IT IS THE SENTENCE OF THIS COURT . . . .

Thus, the record does not reflect whether or not the parties waived a formal record.<sup>1</sup> The court proceeded to impose its sentence. In relevant part, the sentence was a period of incarceration "not to exceed 365 days" for each of the criminal mischief and trespass convictions to run consecutively, plus thirty days for the theft to run concurrently. The court ordered Van Wie to serve the sentence at the county jail. The court also imposed various fines, surcharges, and court costs. Van Wie appeals. He contends the convictions must be overturned because the district court erred by failing to find a factual basis for the probation violation and by failing to give reasons for the sentence it imposed.

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<sup>1</sup> The form order contained this sentence: "A formal record is made/waived by the parties." Presumably, either "made" or "waived" should have been stricken, but neither was.

Van Wie also contends his counsel was ineffective for failing to object that the sentencing order was incomplete. The State asserts the sentence must be vacated and remanded because the court placed Van Wie in the county jail rather than with the department of corrections.

## **II. Analysis.**

We review a court's revocation of probation decision for correction of errors at law. Iowa R. App. P. 6.907. "Probation revocation is a civil proceeding and not a stage of criminal prosecution." *State v. Lillibridge*, 519 N.W.2d 82, 83 (Iowa 1994). "Because revocation is not a stage of criminal prosecution, the rules of criminal procedure do not apply and 'the proceedings can be informal, even summary.'" *Id.* (quoting *Calvert v. State*, 310 N.W.2d 185, 187 (Iowa 1981)). However, because probation revocation involves a serious loss of liberty, the court must afford the defendant due process. *Id.* Due process requires findings by the court showing the factual basis for the revocation. *Id.*; *State v. Hughes*, 200 N.W.2d 559, 562 (Iowa 1972). Probation revocation must be supported by a preponderance of evidence. *State v. Kirby*, 622 N.W.2d 506, 510 (Iowa 2001). The court may make the required findings of fact in writing or orally on the record. *Id.* at 509-10.

The sentencing order contains no written factual findings supporting the court's decision to revoke Van Wie's probation. The court's sentencing order does not document whether the parties waived a record of the hearing, but on appeal the parties agree that no record was made. If no verbatim record is made, the record requirement of the due process obligation may be satisfied by

written findings of fact that support a conclusion that a preponderance of the evidence shows the defendant has violated the terms of probation. We acknowledge it is possible in this case the court recited its factual findings orally in open court. However, if such statements were made, they were not memorialized in any written order. The limited contents of the sentencing order leave us nothing to review to determine what facts were considered by the court and whether facts presented in evidence support the decision to revoke the probation and deferred judgment.

The State argues Van Wie must create the record under rule 6.806 of the Iowa Rule of Appellate Procedure.<sup>2</sup> Van Wie had the right under that rule to try to create a record, and there are occasions in which Iowa courts have required a defendant to do so in order to demonstrate the alleged error. See *State v. Mudra*, 532 N.W.2d 765, 767 (Iowa 1995). We decline, however, to shift to the defendant the burden of creating a record of the probation violation hearing that due process requires the court to make.

Consequently, we reverse the order revoking Van Mie's probation and remand for further proceedings. Imposition of judgment and sentence were based on the court's decision to revoke probation. Having determined that the order revoking probation must be reversed, we necessarily vacate entry of

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<sup>2</sup> Rule 6.806 of the Iowa Rules of Appellate Procedure provides:

A statement of the proceedings may be prepared to create a record of a hearing or trial for which a transcript is unavailable if a party deems it necessary to complete the record on appeal. The statement of the proceedings shall be prepared from the best available means, including the party's recollection.

judgment and sentence and decline to reach the other issues raised by the parties.

**III. Conclusion.**

Because there is no record, verbatim or in writing, of the district court's factual findings to support its decision to revoke Van Wie's probation we reverse the probation revocation and remand for further proceedings. Accordingly, we vacate the judgment and sentence imposed by the court following the revocation of probation.

**PROBATION REVOCATION REVERSED AND REMANDED;  
JUDGMENT AND SENTENCE VACATED.**