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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM T. SEXTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-1005-CR-352
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Judge
Cause Nos. 71D08-0807-FD-769 & 71D03-0403-FD-281

February 11, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

In this consolidated appeal, William Sexton appeals his convictions for Class B misdemeanor false informing and Class D felony attempting to acquire a legend drug by fraud, deceit, misrepresentation, or subterfuge. He contends that the evidence is insufficient to support his convictions and that the trial court abused its discretion in refusing to give his tendered instruction on abandonment. Sexton also contends that the trial court erred in revoking his probation in an unrelated cause number. We conclude that the evidence is sufficient to support Sexton's convictions and that the trial court did not abuse its discretion in refusing to give Sexton's tendered instruction on abandonment. We also conclude that the trial court properly revoked Sexton's probation in the unrelated cause number for committing the offenses in this case. We therefore affirm the trial court.

Facts and Procedural History

On July 28, 2008, Kelly Keefe was working as a pharmacy technician at the CVS on Main Street in Mishawaka, Indiana. Between 9:50 and 10:00 p.m., two white males approached the pharmacy counter, and one of them handed Keefe a prescription for Vicodin in the name of "John Colts." *See* State's Ex. 2. Because the store closed at 10:00 p.m., these two males were the "[l]ast [pharmacy] customer[s] of the night." Tr. p. 128. In fact, the front doors of the store were already locked so that no additional customers could enter. *Id.*

Vicodin, a controlled substance, requires a person to present a driver's license or identification card before the prescription can be dispensed. Keefe therefore asked the

male who handed her the Vicodin prescription for his driver's license or identification card, but he did not have one. So, the other male handed his card to Keefe. Keefe then wrote the number from his card on the address line of the prescription. Upon reviewing the prescription, Keefe immediately suspected that the quantity of pills to be dispensed had been altered. That is, the prescription said "25" but the Roman Numeral "XV" (15) was written after the 25. Keefe surmised that the 1 had been changed to a 2, thereby making the prescription for 25 Vicodin pills instead of the originally prescribed 15. Keefe gave the prescription to the pharmacist, Bernard Edet, who also thought that the quantity of pills to be dispensed had been altered. Not only was XV written after 25, but there was a check next to the box indicating the quantity of pills as "1-24" (and not "25-49"). *See* State's Ex. 2. Edet decided to call the emergency room doctor who wrote the prescription. During this delay, Edet informed the males that he had to call "to verify something on the prescription." Tr. p. 143. When Edet found out that the emergency room doctor did not change the prescription, he called the Mishawaka Police Department. Edet described the suspects to the police and told them what was going on. *Id.* at 139, 147. The prescription was never filled.

Officer Chad Smith, who was merely across the street at the police station, arrived at CVS "just past" 10:00 p.m. *Id.* at 114. CVS employees informed Officer Smith that "there were only two people inside the store [who] were not employees and they were the two listed suspects in the attempted passing of the fraudulent prescription." *Id.* at 114-15. Officer Smith and several other officers waited for the two males by the exit door. When the two males approached the exit door, Officer Smith asked one of the employees if they

were the ones who possessed the prescription. *Id.* at 115. The employee said yes. Officer Smith then asked one of the males for his name, and he responded "John Smith." *Id.* Another officer, however, immediately recognized the male from previous dealings as Sexton, not John Smith. *Id.* at 123-24. The officer, who knew that Sexton had a certain tattoo across his chest, asked the male to lift his shirt. The officer immediately recognized the male's tattoo as the one on Sexton. The other man was identified as Larry Sexton ("Larry"). *Id.* at 115. It was later determined that the number Keefe wrote on the prescription was Larry's driver's license number. *Id.* at 158; State's Exs. 2 & 3. This meant that Sexton was the one who presented the prescription while Larry was the one who provided identification.

Thereafter, the State charged Sexton with Class B misdemeanor false informing and Class D felony attempting to acquire a legend drug by fraud, deceit, misrepresentation, or subterfuge under Cause No. 71D08-0907-FD-769. Several months later, the State filed a petition to revoke Sexton's probation in an unrelated case, Cause No. 71D03-0403-FD-281, because of the charges in this case. Appellant's App. p. 137. The two cases were heard at the same time before the trial court.

Following a jury trial, Sexton was found guilty as charged. The trial court also found that he violated his probation in Cause No. 281 for committing the offenses in this case. Tr. p. 182; Apr. 19, 2010, Tr. p. 3. The trial court sentenced Sexton to sixty days for false informing and two years for attempting to acquire a legend drug by fraud, deception, misrepresentation, or subterfuge. The court ordered the sentences in this case to be served concurrent to one another but consecutive to Sexton's three-year sentence

for violating his probation in Cause No. 281. The cause numbers have been consolidated for purposes of Sexton's appeal.

Discussion and Decision

Sexton raises several issues on appeal. First, he contends that the evidence is insufficient to support his convictions. Second, he contends that the trial court abused its discretion in refusing to give his tendered instruction on abandonment. Finally, he contends that the evidence is insufficient to support the revocation of his probation in Cause No. 281.

I. Sufficiency of the Evidence

Sexton contends that the evidence is insufficient to support his convictions for Class B misdemeanor false informing and Class D felony attempting to acquire a legend drug by fraud, deceit, misrepresentation, or subterfuge. When reviewing the sufficiency of the evidence, appellate courts must only consider the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it "most favorably to the trial court's ruling." *Id.* Appellate courts affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* at 146-47 (quotation omitted). It is therefore not necessary that the evidence "overcome every reasonable hypothesis of innocence." *Id.* at

147 (quotation omitted). "[T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Id.* (quotation omitted).

Sexton first argues that the evidence is insufficient to support his convictions because "the persons directly dealing with the alleged offense, Mr. Edet and Ms. Keefe, could not identify William Sexton in court as the person in the pharmacy on July 28, 2008." Appellant's Br. p. 15. It is true that neither Edet nor Keefe identified Sexton in court. *See* Tr. p. 147 ("THE COURT: Do you know if this gentleman was one of the two people in the store on the date we're talking about during this incident? [EDET]: Again I can't be 100 percent. It's . . . been about a year and a half so I can't really say. You know, I can't be 100 percent but he does look familiar."), 127 ("[THE STATE]: Can you describe the customer [who handed you the prescription]? [KEEFE]: Not really. I know it was a male, but besides that from two years ago I don't remember."). Nevertheless, circumstantial evidence supports Sexton's identity as the person who presented the altered prescription and gave a false name on July 28, 2008. *See Malone v. State*, 547 N.E.2d 1101, 1104 (Ind. Ct. App. 1989) ("[A] conviction may be sustained in whole or part upon circumstantial evidence so long as the evidence is of such probative value that a reasonable inference of guilt beyond a reasonable doubt may be drawn therefrom."), *trans. denied*. That is, the two males were the last pharmacy customers of the night. Indeed, the doors to CVS were locked so that no additional customers could enter the store. Edet called the police as soon as he realized that the emergency room doctor did not change the prescription. Officer Smith arrived at CVS "[a] minute and a half at the most" after he received the call. Tr. p. 119. CVS employees informed Officer Smith that

"there were only two people inside the store [who] were not employees and they were the two listed suspects in the attempted passing of the fraudulent prescription." *Id.* at 114-15. Officer Smith and the other officers waited for the two males by the exit door. When the two males approached the exit door, Officer Smith confirmed with an employee that they were the ones who possessed the prescription. Officer Smith then asked one of the males his name, and he gave a false name. Another officer, however, immediately recognized that male from previous dealings as Sexton. The officer, who knew that Sexton had a certain tattoo across his chest, asked the male to lift his shirt. The officer immediately recognized the male's tattoo as the one on Sexton. The other man was identified as Larry. It was later determined that the number written on the Vicodin prescription in the name of "John Colts" was Larry's driver's license number. The evidence is sufficient to establish Sexton's identity as one of the males at CVS on July 28, 2008.

Sexton next argues that the evidence is insufficient to support his false informing conviction because "John Smith is akin to giving no name at all. The police were as likely to believe John Smith as a real name as if Sexton had said Barack Obama, Peyton Manning, Pocahontas or John Doe." Appellant's Br. p. 16. Because the officers were immediately able to determine Sexton's identity, Sexton also argues that he "did not provide information to lead authorities down an erroneous path." *Id.*

In order to convict Sexton of Class B misdemeanor false informing as charged in this case, the State had to prove that he gave false information in the official investigation of the commission of a crime, knowing the information to be false. Ind. Code § 35-44-2-2(d); Appellant's App. p. 118. When Officer Smith asked Sexton for his name, he

responded "John Smith," which Sexton claims is "the proverbial alias" given when a person refuses to answer. Appellant's Br. p. 16. Contrary to Sexton's argument, the statute does not require the officers to *believe* the false information in order for a crime to occur. Rather, the information must be false, and here Sexton knew that "John Smith" was not his name. As for Sexton's argument that he did not lead officers down an erroneous path because his identity was immediately determined, we point out that that is not an element of Class B misdemeanor false informing. Rather, the offense "is a Class A misdemeanor if it substantially hinders any law enforcement process . . . ." I.C. § 35-44-2-2(d). Because Sexton was neither charged with nor convicted of Class A misdemeanor false informing, this argument fails. The evidence is sufficient to support Sexton's convictions.

II. Jury Instruction on Abandonment

Sexton contends that the trial court abused its discretion in refusing to give his tendered instruction on abandonment. Instruction of the jury is generally within the discretion of the trial court and is reviewed only for an abuse of that discretion. *Townsend v. State*, 934 N.E.2d 118, 127 (Ind. Ct. App. 2010), *trans. denied*. In reviewing a trial court's decision to refuse a tendered jury instruction, we consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions which are given. *Id.* Here, the trial court refused to give Sexton's tendered instruction because the evidence did not support it. Tr. p. 156.

The defense of abandonment is set forth in Indiana Code section 35-41-3-10, which states, "With respect to a charge under IC 35-41-2-4 [aiding, inducing, or causing an offense], IC 35-41-5-1 [attempt], or IC 35-41-5-2 [conspiracy], it is a defense that the person who engaged in the prohibited conduct voluntarily abandoned his effort to commit the underlying crime and voluntarily prevented its commission." Where attempt is at issue, a defendant will be relieved of criminal responsibility if, after taking a substantial step toward committing a crime but before its consummation, he voluntarily abandoned his efforts. *Munford v. State*, 923 N.E.2d 11, 18 (Ind. Ct. App. 2010). To be considered voluntary, the decision to abandon must originate with the defendant and not as a result of extrinsic factors that increase the probability of detection. *Id.*; *Patterson v. State*, 729 N.E.2d 1035, 1041 (Ind. Ct. App. 2000); *see also Gravens v. State*, 836 N.E.2d 490, 497 (Ind. Ct. App. 2005) ("[A]bandonment is not voluntary if it is the result of 'unanticipated difficulties in carrying out the criminal plan.'" (quotation omitted)), *trans. denied*.[1]

The trial court did not abuse its discretion in refusing to give Sexton's tendered instruction on abandonment because the evidence in the record did not support such an instruction. The evidence shows that Sexton presented a controlled substance prescription. Accordingly, the pharmacy technician asked for identification from Sexton, but he did not have any. Larry therefore presented his identification. When the technician looked at the prescription, she immediately suspected that it had been altered. She then gave it to the pharmacist, who agreed. When the pharmacist called the

[1] Sexton argues that this case is similar to *Gravens*. In *Gravens*, however, the issue was whether the trial court abused its discretion in giving the State's abandonment instruction instead of the pattern jury instruction. Because the issue in *Gravens* was not whether there was evidence in the record to support the giving of the instruction, 836 N.E.2d at 496, it is not helpful to our analysis in this case.

prescribing doctor to see if he had altered the prescription, this caused a delay in the processing of the prescription. The pharmacist therefore told Sexton and Larry that he had to place a call to verify something on the prescription. At some point after the pharmacist informed them of the delay, Sexton and Larry, without the prescription, exited CVS, at which point they were stopped by police. The reasonable inference is that Sexton and Larry left CVS because they thought the pharmacist would learn from the prescribing doctor that the prescription had been altered. Because Sexton's alleged abandonment was made in response to an extrinsic factor—the probability of detection—and was not the product purely of his own volition, it does not constitute a legal defense and therefore Sexton was not entitled to an instruction on this defense. *See Patterson*, 729 N.E.2d at 1041. Accordingly, the trial court did not abuse its discretion in refusing to give Sexton's tendered instruction on abandonment.

III. Probation Revocation

Finally, Sexton contends that the trial court erred in revoking his probation in Cause No. 281 for committing the offenses in this case.

A person's probation may be revoked if "the person has violated a condition of probation during the probationary period." Ind. Code § 35-38-2-3(a)(1); *Runyon v. State*, 939 N.E.2d 613, 615 (Ind. 2010). To obtain a revocation of probation, "[t]he state must prove the violation by a preponderance of the evidence." I.C. § 35-38-2-3(e); *Runyon*, 939 N.E.2d at 615-16.

Sexton first argues that "insufficient evidence was presented to prove by a preponderance of the evidence that the offense[s] occurred." Appellant's Br. p. 19. The

trial court found that Sexton violated his probation for committing the offenses in this case. Tr. p. 182; Apr. 19, 2010, Tr. p. 3. Because we concluded above that the evidence is sufficient to support Sexton's convictions in this case, the State therefore proved by a preponderance of the evidence that Sexton violated his probation in Cause No. 281 by committing Class B misdemeanor false informing and Class D felony attempting to acquire a legend drug by fraud, deceit, misrepresentation, or subterfuge.

To the extent that Sexton argues he was not informed of the terms of his probation in Cause No. 281 and therefore he could not knowingly violate his probation, the record, although not as complete as it should be, does not bear this out. The record shows that the trial court placed Sexton on three years of probation in Cause No. 281 in June 2004, and his probation was set to expire on June 10, 2007. Appellant's App. p. 140. Sexton's probation terms, which he signed, included that "[v]iolation of any law may be considered a violation of probation." *Id.* at 141. Sexton later admitted violating his probation in Cause No. 281, and the trial court issued an order in March 2006 providing that Sexton's probation "*will continue* when he has completed his Elkhart County sentence." *Id.* at 126, 142, 155 (emphasis added). Sexton was then returned to Westville Correctional Center. *Id.* at 142. According to the State, that sentence was completed on August 14, 2009 (which is after the offenses were committed in this case), and as a result Sexton's probation in Cause No. 281 was scheduled to expire on July 24, 2011. *Id.* at 138 (probation violation report attached to petition to revoke probation). Sexton argues that because he was not provided "written notice of his terms of probation" in March 2006 when the trial court revoked his probation in Cause No. 281 and ordered him to

continue his probation after his Elkhart County sentence was completed, "he could not knowingly violate his probation." Appellant's Br. p. 19.

Although it appears that Sexton's probation in Cause No. 281 had not officially restarted when Sexton committed the 2008 offenses in this case (because his Elkhart County sentence was not completed until 2009), as Sexton concedes on appeal, a defendant's probationary period begins immediately after sentencing and therefore probation can be revoked for an offense committed before the probation officially begins. *Baker v. State*, 894 N.E.2d 594, 596-98 (Ind. Ct. App. 2008). Therefore, Sexton's probationary period in Cause No. 281 began in March 2006.

In addition, it is undisputed that when the trial court originally placed Sexton on probation in Cause No. 281 in 2004, he was informed that violation of any law may be considered a violation of his probation. It is true that the record on appeal does not reflect that Sexton was re-advised of the terms of his probation when the trial court revoked his probation in March 2006 and ordered him to *continue* probation once his Elkhart County sentence was completed. But because his probation was to *continue*, it is reasonable to infer that Sexton's original conditions of probation, including that violation of any law may be considered a violation of probation, still applied to him. But even if the original terms of Sexton's probation did not automatically carry over, generally the requirement that a probationer obey federal, state, and local laws is automatically a condition of probation by operation of law. *Williams v. State*, 695 N.E.2d 1017, 1019 (Ind. Ct. App. 1998); *see also* Ind. Code § 35-38-2-1(b) ("If the person commits an additional crime, the court may revoke the probation."). The trial court properly found

that Sexton violated his probation in Cause No. 281 for committing the offenses in this case.

Affirmed.

BAKER, J., and BARNES, J., concur.