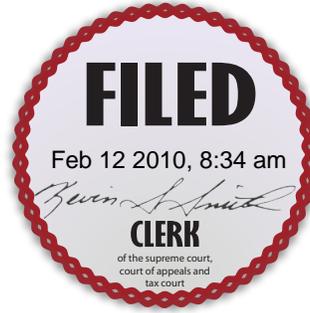


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRIAN L. RIKER,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 14A01-0906-CR-294

APPEAL FROM THE DAVIESS SUPERIOR COURT
The Honorable Dean A. Sobeki, Judge
Cause No. 14D01-0302-FB-95

February 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Brian Riker appeals the trial court's revocation of his probation. We affirm.

Issues

Riker raises two issues, which we restate as:

- I. whether the trial court properly revoked his probation;
and
- II. whether the trial court properly sentenced Riker as a result of his probation revocation.

Facts

On May 5, 2004, Riker pled guilty to class B felony dealing a controlled substance, and the trial court sentenced him to ten years with 198 days executed and the remainder suspended to probation. On July 16, 2008, the State filed a petition to revoke Riker's probation because he had been charged with two counts of sexual misconduct with a minor as Class B felonies, attempted sexual misconduct with a minor as a Class B felony, sexual misconduct with a minor as a Class C felony, six counts of contributing to the delinquency of a minor as Class A misdemeanors, and six counts of furnishing alcohol to a minor as Class C misdemeanors.

At the April 9, 2009 probation revocation hearing, Riker testified that several underage girls spent the night at his house on January 20, 2008, with his daughter. Two of the girls, P.H. and C.M., testified. P.H. testified that she went to a party at Riker's house with Riker's daughter, that she consumed alcohol at the house, and that Riker was aware of the girls drinking and did not object. C.M. testified that she was fifteen years old when she went to the party at Riker's house, that Riker was drinking alcohol with

them, and that Riker had provided them with alcohol. The State moved to admit the depositions of C.M., A.Y., L.S., and T.S. The depositions were taken as part of the criminal case against Riker, and Riker's attorney was present for the depositions and questioned each of the girls. Riker objected to the admission of the depositions because he preferred that the girls actually testify. The trial court overruled Riker's objection. In her deposition, C.M. testified that Riker was giving alcohol shots to L.S. on the night in question. L.S. testified that she was drinking alcohol with Riker and that Riker took her to the bathroom, where he had sexual intercourse with her and attempted to have anal intercourse with her. T.S. testified that Riker provided them with alcohol.

At the end of the probation revocation hearing, the trial court took the matter under advisement so that it could read the depositions. The trial court stated: "Even if, in fact, I find that you violated the terms of your probation, we still have another determination to be made, and I've not heard any evidence, as of yet, as to what that would result in. . . . I would set another hearing and we would have a hearing to determine what the disposition would be at that point in time." Tr. p. 71. Riker did not object to the trial court's proposed procedure.

On May 21, 2009, the trial court issued an order finding that Riker had violated the conditions of his probation and that his probation should be revoked. The trial court relied upon the witnesses' testimony and the depositions, which the trial court found were "reliable sources of evidence." App. p. 19. The trial court found that the State proved, by a preponderance of the evidence, that Riker had committed new criminal offenses of

furnishing alcohol to a minor, contributing to the delinquency of a minor, sexual misconduct with a minor, and attempted sexual misconduct with a minor.

The next day, on May 22, 2009, the trial court scheduled a “scheduling conference” for July 7, 2009. App. p. 11. Riker filed a motion to continue, which the trial court granted and rescheduled the conference for July 28, 2009. On June 19, 2009, the State filed a motion for sentencing. The same day, Riker filed a notice of appeal. After a telephonic hearing with the parties, the trial court scheduled a hearing on the disposition for July 23, 2009. However, on July 14, 2009, Riker filed a motion to vacate the hearing, arguing that this court, not the trial court, had jurisdiction over the case. On July 21, 2009, the trial court clerk filed a notice of completion of clerk’s record with this court. The trial court held the disposition hearing on July 23, 2009, and ordered Riker to serve 2,751 days in the Department of Correction. On August 10, 2009, Riker filed a motion to stay execution of his sentence with this court. On October 14, 2009, this court granted Riker’s motion to stay the execution of his sentence, remanded “to the limited jurisdiction of the trial court for the sole purpose of reissuing any order entered after July 23, 2009,” and held the appeal in abeyance pending the trial court proceedings. Court of Appeals Order dated Oct. 14, 2009. On October 26, 2009, the trial court reissued its order that Riker must serve 2,751 days in the Department of Correction.

Analysis

I. Probation Revocation

Riker argues that the trial court erred in revoking his probation. Riker contends that the depositions were inadmissible and, without the depositions, the evidence is

insufficient to prove that he committed the criminal offense of sexual misconduct with a minor. “The due process right applicable in probation revocation hearings allows for procedures that are more flexible than in a criminal prosecution.” Reyes v. State, 868 N.E.2d 438, 440 (Ind. 2007) (citing Morrissey v. Brewer, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604 (1972)). In Reyes, our supreme court clarified whether substitutes for live testimony were allowed in probation revocation proceedings:

In Gagnon [v. Scarpelli], 411 U.S. 778, 93 S. Ct. 1756 (1973), in which the Supreme Court applied the requirements of Morrissey to probation revocation hearings, the Court clarified the confrontation right of probationers: “While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in Morrissey intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence.” Gagnon, 411 U.S. at 782-83 n.5, 93 S. Ct. 1756. Thus, in both Morrissey and Gagnon, the Supreme Court specifically listed affidavits as a type of material that would be appropriate in a revocation hearing even if not in a criminal trial.

Id. at 440-41 (emphasis added). However, “this does not mean that hearsay evidence may be admitted willy-nilly in a probation revocation hearing.” Id. at 440. Rather, the trial court must determine whether the hearsay evidence “reaches a certain level of reliability, or if it has a substantial guarantee of trustworthiness.” Id. at 441.

In Reyes, our supreme court held that affidavits from a lab director were substantially trustworthy and were admissible in a probation revocation hearing. Here, our review of the depositions reveals that Riker’s counsel questioned each of the girls extensively and exposed weaknesses in the girls’ version of the events. Under such circumstances, the depositions were substantially trustworthy and were admissible.

Consequently, the trial court did not err by relying on the depositions when revoking Riker's probation.

Moreover, even if the depositions were inadmissible, two of the girls testified at the probation revocation hearing. P.H. testified that she went to a party at Riker's house with Riker's daughter, that she consumed alcohol at the house, and that Riker was aware of the girls drinking and did not object. C.M. testified that she was fifteen years old when she went to the party at Riker's house, that Riker was drinking alcohol with them, and that Riker had provided them with alcohol. This evidence alone was sufficient for the trial court to revoke Riker's probation.

II. Sentencing

Riker also argues that the trial court abused its discretion when it sentenced him using a bifurcated revocation and sentencing procedure. According to Riker, Indiana Code Section 35-38-2-3 and Indiana Criminal Rule 11 require a probation revocation and sentencing for the revocation to occur at the same time. Thus, Riker contends that "when the trial court does not pronounce a specific sanction at the time of the revocation, it can be implied that the trial court's sanction is a continuation of the probation without modification or the 'status quo.'" Appellant's Br. p. 7.

The trial court here informed the parties at the probation revocation hearing that: "Even if, in fact, I find that you violated the terms of your probation, we still have another determination to be made, and I've not heard any evidence, as of yet, as to what that would result in. . . . I would set another hearing and we would have a hearing to determine what the disposition would be at that point in time." Tr. p. 71. Riker did not

object to the trial court's proposed procedure. The trial court then issued an order revoking Riker's probation and set a scheduling conference the next day. After a sentencing hearing, the trial court issued a sentencing order regarding the probation revocation.

The trial court here clearly contemplated a bifurcated revocation and sentencing procedure and did not intend that Riker's probation be continued without modification after the revocation order. Riker was aware of the bifurcated procedure the trial court intended to use and did not object. We conclude that Riker has waived any argument regarding the bifurcated procedure by failing to object to the trial court. Helsley v. State, 809 N.E.2d 292, 302 (Ind. 2004) (holding that the defendant may not appeal on grounds not distinctly presented at trial).

Next, Riker argues that the trial court did not have jurisdiction to enter the sentencing order. On June 19, 2009, Riker filed a notice of appeal. On July 21, 2009, the trial court clerk filed a notice of completion of clerk's record with this court. Indiana Appellate Rule 8 provides that "[t]he Court on Appeal acquires jurisdiction on the date the trial court clerk issues its Notice of Completion of Clerk's Record." Thus, the trial court lost jurisdiction on July 21, 2009. However, the trial court held the disposition hearing on July 23, 2009, and ordered Riker to serve 2,751 days in the Department of Correction. On October 14, 2009, this court remanded "to the limited jurisdiction of the trial court for the sole purpose of reissuing any order entered after July 23, 2009," and held the appeal in abeyance pending the trial court proceedings. Court of Appeals Order dated Oct. 14, 2009. On October 26, 2009, the trial court reissued its order that Riker

must serve 2,751 days in the Department of Correction. Thus, the trial court's lack of jurisdiction to enter the July 23, 2009 order was corrected when this court remanded for the trial court to reissue its order.

The long-standing rule in Indiana courts has been that a case is deemed moot when no effective relief can be rendered to the parties before the court. Mosley v. State, 908 N.E.2d 599, 603 (Ind. 2009) (citing Matter of Lawrance, 579 N.E.2d 32, 37 (Ind. 1991)). “When the concrete controversy at issue in a case has been ended or settled, or in some manner disposed of, so as to render it unnecessary to decide the question involved, the case will usually be dismissed.” Id. The trial court's lack of jurisdiction on July 23, 2009, has been corrected, and the issue is moot. Consequently, we need not address this issue further.¹

Conclusion

The trial court did not abuse its discretion by admitting the depositions at the probation revocation hearing or by revoking Riker's probation. Moreover, Riker waived any argument regarding the trial court's bifurcated revocation and sentencing hearing, and any lack of jurisdiction by the trial court to enter the sentencing order was corrected when this court remanded to the trial court. We affirm.

¹ Riker also argues that, because the trial court abused its discretion in admitting the depositions, his only probation violation was providing alcohol to the underage girls. Riker maintains that his sentence was too severe for the minor violation. We determined that the trial court did not abuse its discretion by admitting the depositions. Moreover, we found that, even if the trial court had abused its discretion by admitting the depositions, other evidence demonstrated that Riker provided alcohol to several underage girls at a party in his house. “[U]ltimately it is the trial court's discretion as to what sanction to impose under the statute [Indiana Code Section 35-38-2-3(g)].” Abernathy v. State, 852 N.E.2d 1016, 1022 (Ind. Ct. App. 2006). The trial court's imposition of 2,751 days in the Department of Correction was not an abuse of discretion.

Affirmed.

MATHIAS, J., and BROWN, J., concur.