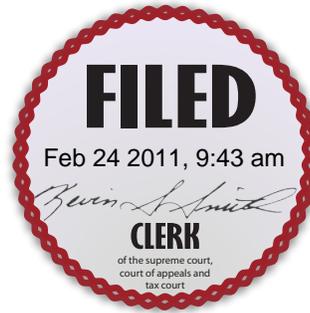


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD OLDFIELD, JR.,)

Appellant-Defendant,)

vs.)

No. 69A01-1007-CR-408

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl H. Taul, Judge
Cause No. 69C01-0504-FB-6

February 24, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Following a hearing on the State's amended notice of probation violation, the trial court revoked Richard Oldfield, Jr.'s probation and ordered him to serve the suspended portion of his sentence. Oldfield presents two issues for review:

1. Whether the court abused its discretion when it found that he had violated the terms of his probation by failing to pay restitution.
2. Whether the court abused its discretion when it ordered him to serve the suspended portion of his sentences upon the revocation of his probation.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 2006, seventeen-year-old Oldfield pleaded guilty to two counts of battery with a deadly weapon, as Class C felonies. The trial court sentenced him to consecutive six-year terms, with four years suspended to probation, and he was ordered to pay more than \$37,000 in restitution to the victims. On appeal, this court reversed his sentence under former Indiana Code Section 35-50-1-2(c) and remanded for resentencing. Oldfield v. State, No. 69A01-0702-CR-74 (Ind. Ct. App. Oct. 2, 2007) at *14. On remand, the trial court ordered Oldfield to serve two consecutive four-year terms, with two years on each count suspended to probation. There was no change to the restitution order.

Oldfield was released from incarceration on January 10, 2008. Shortly after his release, he met with a probation officer, who explained the restitution order and gave Oldfield a suggested payment plan. In the two years that followed, Oldfield attempted to obtain employment and eventually became employed part-time in 2009. Oldfield made

twelve payments for restitution, ranging from \$19 to \$300, for a total of \$2250. When he lived with his mother, she charged \$250 monthly rent, and he also had other bills.

On January 8, 2010, the State filed a petition alleging that Oldfield had violated the terms of his probation by failing to pay restitution. On May 14, the State filed an amended petition for a probation violation hearing (“Amended Petition”). In the Amended Petition the State added two allegations. First, the State alleged that Oldfield had violated the terms of his probation by failing to report for probation supervision as directed and failing to notify his probation officer within twenty-four hours of his change of address. Second, the State alleged that Oldfield had committed four additional offenses in Ohio, namely, three occurrences of driving “under FRA suspension,” as a misdemeanor; and driving while “under [s]uspension/[v]iolation of [l]icense [r]estriction,” as a misdemeanor. Appellant’s App. at 33. The Amended Petition also “made [the court] aware of the following information, which [had been] recently discovered, but [was] not being included as a probation violation[,]” namely, a December 20, 2008, arrest for two counts of robbery, as felonies, and a 2008 conviction for possession of an open flask, as a misdemeanor.

On July 12, the trial court held an evidentiary hearing on the State’s petitions to revoke probation. At the hearing, Oldfield admitted to the driving with a suspended license and open flask offenses. But he argued that the State had not shown that he had recklessly, knowingly, or intentionally refused to pay restitution. At the conclusion of the hearing, the court stated:

While some of the offenses to which [Oldfield] has admitted are not terribly serious there are so many of them and to me that indicates a lack of desire

to follow his conditions of probation. He has failed to notify the probation department of change of address, we have not known where he was for several months. And as I said, I don't see much point in keeping him on probation. I think the best way to enforce the restitution order is for the victims to seek garnishment of his wages upon his release from incarceration. I revoke the balance of his suspended sentence.

Transcript at 36-37. The court then issued an order, that provides in relevant part:

The Court finds, by preponderance of the evidence, that the defendant has violated the conditions of his Probation, in that he has failed to pay restitution as ordered; committed additional offenses; and failed to report a change of address. The Court further finds that the defendant was sentenced to six (6) years on each count to the Indiana Department of Correction, each count to run consecutive to the other, two (2) years suspended on each count, leaving a balance of four (4) years to be revoked and order served. Upon the finding of the probation violation the Court now revokes four (4) years of the suspended sentence, with credit for 46 actual days served, and orders the defendant to serve four (4) years of the balance with credit to be given for each day served at the Indiana Department of Correction.

Appellant's App. at 72. Oldfield now appeals.

DISCUSSION AND DECISION

Issue One: Probation Violation

Oldfield first contends that the trial court abused its discretion when it determined that he had violated his probation by failing to pay restitution. “[A] trial court’s sentencing decisions for probation violations are reviewable using the abuse of discretion standard.” Prewitt v. State, 878 N.E.2d 184, 187 (Ind. 2007). As this court has often stated:

A probation revocation proceeding is in the nature of a civil proceeding, and, therefore, the alleged violation need be proved only by a preponderance of the evidence. J.J.C. v. State, 792 N.E.2d 85, 88 (Ind. Ct. App. 2003). Violation of a single condition of probation is sufficient to revoke probation. Id. As with other sufficiency issues, we do not reweigh the evidence or judge the credibility of witnesses. Id. We look only to the

evidence which supports the judgment and any reasonable inferences flowing therefrom. Id. If there is substantial evidence of probative value to support the trial court's decision that the probationer committed any violation, revocation of probation is appropriate. Id.

Richardson v. State, 890 N.E.2d 766, 768 (Ind. Ct. App. 2008) (quoting T.W. v. State, 864 N.E.2d 361, 364 (Ind. Ct. App. 2007), trans. denied). A defendant is not entitled to serve a sentence in a probation program; rather, such placement is a “matter of grace” and a “conditional liberty that is a favor, not a right.” Jones v. State, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005), trans. denied.

Oldfield argues that the State did not present sufficient evidence to support the finding that he had failed to pay restitution. In support, he cites Indiana Code Section 35-38-2-3(f), which provides that probation “may not be revoked for failure to comply with conditions of a sentence that imposes financial obligations on the person unless the person recklessly, knowingly, or intentionally fails to pay.” Oldfield argues that the State presented no evidence showing that he recklessly, knowingly, or intentionally failed to pay. We must agree.

The trial court found that Oldfield had “failed to pay restitution as ordered.” Appellant's App. at 72. The record shows that the State filed the first petition to revoke probation in January 2010, two years after Oldfield had been released from prison. Up to that point, he had paid \$2250 of the \$37,000 restitution order, and his last payment had been made October 19, 2009. But the State presented no evidence regarding Oldfield's ability to pay. The only evidence in the record on that point was presented by Oldfield. He testified that he had had difficulty finding a job as a felon, that he became employed doing electrical work one year following his release, that that job was only part-time, that

he earned between ten and twelve dollars per hour when he was working, and that he was working only two days per week by the time he was laid off. He also testified that he had other bills, including \$250 monthly rent when he lived with his mother.

The State does not contend on appeal that Oldfield recklessly, knowingly, or intentionally failed to pay restitution. The State's entire argument is that "it was evidence from the facts presented at the hearing that he was failing to make payments in a regular fashion." Appellee's Brief at 4. Neither the evidence nor the argument supports the revocation of probation for failing to pay restitution. Moreover, Oldfield presented evidence that he had difficulty finding employment, was not consistently employed either part- or full-time, and earned twelve dollars per hour or less. On this record, we cannot say that Oldfield recklessly, knowingly, or intentionally failed to pay restitution. To the extent the trial court based the revocation of probation on this violation, the trial court erred. Nonetheless, as explained in detail below, any error by the trial court was harmless.

Issue Two: Revocation of Probation

Oldfield next argues that the trial court abused its discretion when it revoked his probation. Again, we review a trial court's sentencing decisions for probation violations under the abuse of discretion standard. Prewitt, 878 N.E.2d at 187. Violation of a single condition of probation is sufficient to revoke probation. J.J.C., 792 N.E.2d at 88. Oldfield contends that, in light of the circumstances of his violations and the cost to taxpayers of sending him back to prison, the trial court abused its discretion when it ordered him to serve the suspended portion of his sentence. We cannot agree.

Here, Oldfield admitted that he had committed the offenses of driving with a suspended license and possessing an open flask. He attempts to mitigate the driving offenses by explaining that his license was suspended after the employer-owned van he drove for work was found not to be insured. He then continued to drive, despite the suspension, in order to get to and from work. Oldfield also concedes that he waited several months to advise his probation officer of a change in address and did so only after the probation officer had attempted to locate him at the former address.

The trial court noted the number of Oldfield's probation violations as part of the basis for revoking probation. We have already determined that the trial court erred to the extent it relied on the failure to pay restitution as a basis for revoking Oldfield's probation. But that error is harmless in that we find his numerous other violations are sufficient to support the revocation of his probation. Oldfield also argues that the court should only have ordered him to serve two years of the suspended portion of the sentence. But he has not shown that the trial court abused its discretion in ordering him to serve four as opposed to two years. Thus, Oldfield's argument must fail.

Conclusion

In sum, the trial court abused its discretion when it found that Oldfield violated his probation for failing to pay restitution as ordered. Although Oldfield has not consistently paid restitution, the State did not show that his failure to pay was reckless, knowing or intentional. Thus, we reverse the part of the trial court's order finding that the failure to pay restitution was a violation of the terms of probation. However, Oldfield admitted to numerous other violations of probation, namely, four offenses for driving with a

suspended license, possessing an open flask, and failing to notify his probation officer of a change in address. Oldfield has not shown that the trial court abused its discretion in revoking his probation and ordering him to serve the suspended four years of his sentence in the Department of Correction. Thus, we affirm the revocation of his probation.

Affirmed.

DARDEN, J., and BAILEY, J., concur.