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FILED
Mar 08 2010, 10:38 am
CLERK
of the supreme court, court of appeals and tax court

# IN THE
# COURT OF APPEALS OF INDIANA

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| JEREMY CUNDIFF, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 31A01-0912-CR-572 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE HARRISON SUPERIOR COURT
The Honorable Roger D. Davis, Judge
Cause No. 31D01-0410-CM-844
Cause No. 31D01-0411-CM-960

**March 8, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Jeremy Cundiff appeals from the trial court's order lifting the stay of a previously imposed sentence for probation violations. Cundiff raises the following restated issues for our review:

1. Did the trial court err by lifting the stay of Cundiff's previously imposed executed sentence and issuing a warrant for Cundiff's arrest?

2. Did the trial court err by denying Cundiff's request for findings of fact and conclusions thereon?

We affirm.

Cundiff was charged with one count of misdemeanor criminal recklessness and subsequently charged with one count of misdemeanor possession of marijuana. Cundiff pleaded guilty to the charges and received a one-year suspended sentence on each conviction, to run consecutively. On April 23, 2007, a petition to revoke Cundiff's suspended sentence was filed in both cases alleging that Cundiff missed probation appointments and used marijuana while on probation. Cundiff was arrested on the petition and an agreement was reached on the probation violations. On October 23, 2008, Cundiff agreed to admit to the violations and have his probation revoked for a period of six months consecutively under each cause number. The parties agreed to a stay of that sentence so that Cundiff could regain his employment and begin making weekly payments of $50 in restitution, with a review of the sentence in approximately six months. The trial court admonished Cundiff that he would go to jail if he was not compliant at the time of his review or did not provide a good excuse for non-compliance.

On August 21, 2009, the probation department filed a petition to lift the stay and requested the issuance of a warrant under each cause number. In that petition, the probation department alleged that Cundiff had failed to make any payments on restitution since the stay of his sentence for the probation violations. On September 2, 2009, after a hearing on the petition, the trial court lifted the stay of Cundiff's sentence and ordered him to serve his originally stayed sentence for the probation violations. Cundiff now appeals.

1.

The appropriate standard of review of a trial court's sentencing decision upon a probation revocation is to determine whether the trial court abused its discretion. *Sanders v. State*, 825 N.E.2d 952 (Ind. Ct. App. 2005). An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before it. *Abernathy v. State*, 852 N.E.2d 1016 (Ind. Ct. App. 2006).

"Probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment." *Brabandt v. State*, 797 N.E.2d 855 (Ind. Ct. App. 2003). "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.'" *Id*. at 860 (citing *Cox v. State*, 706 N.E.2d 547, 549 (Ind.1999) and *Davis v. State*, 743 N.E.2d 793, 794 (Ind. Ct. App. 2001)). Ind. Code Ann. § 35-38-2-3(g) provides the trial court with the following options upon finding that a probationer has violated his probation:

> (1) Continue the person on probation, with or without modifying or enlarging the conditions;

(2) Extend the person's probationary period for not more than one (1) year beyond the original probationary period; or
(3) Order execution of all or part of the sentence that was suspended at the time of initial sentencing.

Here, the evidence clearly established that Cundiff admitted that he violated the terms of his probation. In exchange for admitting to the violations, Cundiff received two, six-month, executed sentences to be served consecutively that were stayed so that Cundiff could remain employed and meet his restitution obligations. The grace and favor extended to Cundiff by first imposing suspended sentences for the underlying offenses, was further extended by the trial court staying his executed sentence after the admission of the probation violations. Cundiff was unable to comply with the conditions of the stay. "Once a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed." *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). The trial court was well within its discretion to revoke the stay and order Cundiff to serve the sentences previously imposed for the probation violations upon the determination that the conditions of the stay had not been met.

Cundiff also challenges the propriety of the trial court's decision to issue a warrant for Cundiff's arrest when the petition to lift the stay of sentence was filed. Cundiff cites to I. C. § 35-38-2-3(b)(2) and article 1, § 12 of the Indiana Constitution as support for his position that the trial court's decision to issue the warrant should be reversed.

We again acknowledge the procedural posture of this case before analyzing the arguments here. Cundiff had admitted to probation violations and agreed to two consecutive, six-month, executed sentences for those violations with the sentence stayed in order for him

to regain his employment and make restitution payments. Cundiff thereafter failed to make restitution payments and the stay of his sentence was lifted.

"Because probation revocation deprives a defendant of only a conditional liberty, he is not entitled to the full due process rights afforded during a criminal proceeding." *Cox v. State*, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006). When a probationer admits to the violations, the procedural due process safeguards and an evidentiary hearing are not necessary. *Sanders v. State*, 825 N.E.2d 952. The trial court can proceed to the second step of the inquiry and determine whether the violation warrants revocation. *Id*. Here, Cundiff admitted to the violations, yet was granted the additional grace of a stay of the executed sentence for the probation violations.

We disagree with Cundiff's contention that he was deprived of a protectable interest without a fair hearing when the trial court issued the warrant based upon the allegations contained in the probation department's petition to lift the stay. I. C. § 35-38-2-3(b)(2) provides in the probation revocation context that "when a petition is filed charging a violation of a condition of probation, the court may order a warrant for the person's arrest if there is a risk of the person's fleeing the jurisdiction or causing harm to others." Because the statute provides that the trial court "may" order an arrest warrant, the trial court has the discretion to issue the warrant. *See Clouse v. Noble County Drainage Bd.*, 809 N.E.2d 849 (Ind. Ct. App. 2004) (the term "may" in a statute ordinarily implies a permissive condition and a grant of discretion). The record reveals that Cundiff had a history of failing to appear for hearings and faced an aggregate, one-year, stayed sentence. To the extent Cundiff was

deprived of anything, he was deprived of the additional conditional liberty of the stay of the executed sentence for probation violations. Cundiff's due process rights were not violated by the issuance of the arrest warrant as there was no abuse of discretion.

2.

Cundiff argues that the trial court erred by denying his request for findings of fact and conclusions thereon. Cundiff claims that because probation revocation proceedings are civil in nature, he is entitled to the use of the rules of trial procedure. On August 24, 2009, Cundiff filed a request for findings of fact and conclusions thereon that was denied by the trial court.

It is well settled that a probation revocation hearing is civil in nature, and the alleged violation only needs to be proven by a preponderance of the evidence. *Isaac v. State*, 605 N.E.2d 144 (Ind. 1992). Because of its civil nature, the trial court's inquiry during a probation revocation hearing is narrow and its proceedings are more flexible. *Cox v. State*, 706 N.E.2d 547. Thus, the civil status of a probation revocation proceeding focuses on the level of proof to be established during the hearing, not on the procedure after the hearing is finalized and conviction and sentence are handed down. *Huffman v. State*, 822 N.E.2d 656 (Ind. Ct. App. 2005). A trial court is not required to delineate mitigating and aggravating circumstances when imposing a sentence in a probation revocation. I. C. § 35-38-2-3(g). Given the above, it follows that a trial court is not required to issue findings of fact and

conclusions thereon from a hearing on a petition to lift a stay of sentence. The trial court did not err by denying Cundiff's request.[1]

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.

[1] We decline the State's request to address the propriety of Cundiff's highly questionable act of serving interrogatories and requests for production on the probation department and others.