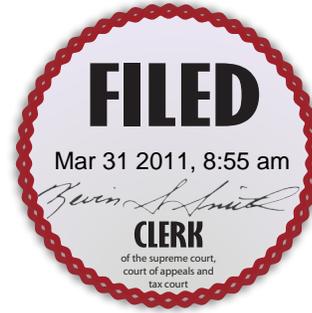


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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EMMETT L. WHITE, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 49A02-1008-CR-867  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Lisa Borges, Judge  
Cause No. 49G04-0705-FC-98205

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**March 31, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Emmett White appeals the trial court's finding that he violated the terms of his probation and the sentence imposed following the revocation of his probation. We affirm.

### **Issues**

White raises two issues, which we restate as:

- I. whether the trial court properly found he violated his probation; and
- II. whether the trial court abused its discretion when it sentenced him.

### **Facts**

In 2007, White pled guilty to one count of Class C felony forgery and was sentenced to eight years, with three years executed and five years suspended. Three years of White's suspended sentence were to be served on probation. White was also required to pay restitution.

On January 25, 2010, the terms of White's probation were modified to include a substance abuse evaluation and treatment if necessary. White was advised that any additional positive urine screens or the failure to make payments toward his court-ordered restitution would result in a notice of probation violation being filed.

On February 26, 2010, the State filed a notice of probation violation alleging White tested positive for marijuana on February 11, 2010, and that he failed to make a good faith effort toward paying his restitution. On March 10, 2010, the trial court issued

an order concluding that White had violated the terms of his probation. His probation was continued, but White was advised that strict compliance was required.

On April 14, 2010, the State filed an amended notice of probation violation, which included the February 26, 2010 allegations and a new allegation that he failed to report for a drug screen on March 18, 2010. The notice indicated that White had his drug assessment on April 1, 2010, and would be attending the next available class.

On June 25, 2010, the State filed another amended notice of probation violation, containing the three previous allegations and three additional allegations. The new allegations were that White failed to participate in court-ordered substance abuse treatment, failed to maintain full-time employment, and failed to communicate truthfully with his probation officer. Apparently White had not enrolled in substance abuse classes because he could not afford classes, White had paid only \$1.00 toward his restitution, and White informed his probation officer that he would be working a security detail for a “justice of the peace,” but his probation officer was unable to confirm such employment.

On July 14, 2010, after a hearing, the trial court found that White violated the terms of his probation and ordered him to serve the remainder of his suspended sentence. White now appeals.

## **Analysis**

### ***I. Violation of Probation***

White argues that the revocation of his probation was improper. Because a probation revocation hearing is civil in nature, an alleged violation of probation only has to be proven by a preponderance of the evidence. Whatley v. State, 847 N.E.2d 1007,

1010 (Ind. Ct. App. 2006). “When we review the determination that a probation violation has occurred, we neither reweigh the evidence nor reassess witness credibility.” Id. Instead, we look at the evidence most favorable to the trial court’s judgment and determine whether there is substantial evidence of probative value supporting revocation. Id.

White argues that his probation should not have been revoked because he could not afford to attend substance abuse classes. He relies on Indiana Code Section 35-38-2-3(f), which provides, “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.” In revoking White’s probation, the trial court stated that White had money to buy marijuana and that the classes cost less than the urine screens. Moreover, even if the failure to attend the substance abuse classes was not a proper basis for revoking White’s probation, the trial court also found that he did not make a good faith effort to obtain employment.

Regarding this allegation, White’s probation officer testified that White presented him with documents indicating White had entered into an employment contract with William Huntington, a “justice of the peace.” According to the documents, White was to perform security services for Huntington. Included in the documents was an “Independent Contractor Agreement,” requiring White to “perform work in a workmanlike manner, according to standard industry practices, unless other standards or requirements are set forth in any attached plans and specifications.” Ex. 1. The contract also required White to obtain any licenses and permits necessary for the work to be

performed, to obtain worker's compensation insurance, to pay any subcontractors, and to obtain lien releases from subcontractors. The documents included an "Assignment of Contract" in which White assigned to himself all of his rights in the contract between Huntington and White. The final document was a "Confidentiality Agreement" prohibiting White from revealing any trade secrets, customer lists, supplier lists, pricing schedules, methods, processes, or marketing plans. When White's probation officer contacted Huntington at the number provided by White, Huntington told the probation officer that he was an over-the-road truck driver, not a judicial officer.

At the probation revocation hearing, White testified that he "run across" "Bill Huntington," who had been elected as a judge in Wisconsin and was "trying to get his office here in Indiana." Tr. p. 15. White stated that he made efforts to renew his private detective license in Georgia and entered into the contract with Huntington.

White also testified that he was interviewing for a job selling life insurance for "Bankers Health and Life." Id. at 18. When asked for the interviewer's contact information, White could not recall the phone number and, when he could not find it in the cell phone he had with him at the hearing, he stated that the phone number must have been on his other cell phone.

White argues that his probation officer's testimony about the phone call with Huntington was inadmissible hearsay. White, however, did not object to this testimony, and the issue is waived. See Wilkerson v. State, 918 N.E.2d 458, 462 n.7 (Ind. Ct. App. 2009).

The trial court clearly rejected White's claim of employment with Huntington and stated it looked like White forged the documents. There is evidence to support the trial court's conclusion that White had not made a good faith effort to find employment. Any conclusion to the contrary would require us to reweigh the evidence and judge witness credibility, which we cannot do. The trial court did not err by revoking White's probation on this basis.

## *II. Sentence*

White also argues that the trial court improperly ordered him to serve the remainder of his suspended sentence. "Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled." Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). "The trial court determines the conditions of probation and may revoke probation if the conditions are violated." Id. (citing Ind. Code § 35-38-2-3). A trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. Id. "An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances." Id. Upon the revocation of probation, the trial court may: (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 year beyond the original probationary period; and (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing. I.C. § 35-38-2-3(g).

White contends it was unreasonable for the trial court to punish him for his financial circumstances. In revoking White's probation, however, the trial court

acknowledged that it had given him two other chances to comply with the terms of his probation, that it had considered his financial circumstances when it ordered him to complete the substance abuse class, and that it did not find his employment relationship with Huntington credible. White has not shown that the trial court abused its discretion in ordering him to serve the remainder of his suspended sentence.

### **Conclusion**

The trial court properly found that White violated the terms of his probation and did not abuse its discretion in ordering to serve the remainder of his suspended sentence.

We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.