

Case Summary

Appellant-Defendant Noor Adnan Sobuh (“Sobuh”) appeals the trial court’s order that he serve his previously suspended ten-year sentence for Dealing in Cocaine, as a Class B felony.¹ We reverse.

Issue

Sobuh articulates four issues for review, which we consolidate and restate as a single issue: whether the trial court’s order requiring that Sobuh serve his previously suspended sentence was entered without procedural due process and the establishment of a probation violation.

Facts and Procedural History

On December 6, 2007, Sobuh pled guilty to Dealing in Cocaine. On March 20, 2008, Sobuh was sentenced to ten years imprisonment, all suspended to probation. At the conclusion of the sentencing hearing, the trial court ordered Sobuh to submit to a drug screen.

On April 14, 2008, the State filed a petition to revoke Sobuh’s probation, alleging that he tested positive for marijuana and cocaine on the March 20, 2008 drug screen, failed to meet financial obligations, failed to obtain a GED, and failed to enroll into and complete a substance abuse program.

On April 17, 2008, Sobuh appeared for a brief hearing at which the trial court

¹ Ind. Code § 35-48-4-1(a).

dismissed the probation violation allegations, with the exception of the allegation of a positive drug screen. The State did not object.

The trial court invited the parties to present argument or evidence, and defense counsel argued that the conduct alleged would have occurred before the probationary period.

The trial court then inquired, “Anything from the state,” and the prosecutor responded, “No, Your Honor.” (Tr. 5.) At that juncture, the trial court indicated that Sobuh was to serve his previously-suspended sentence, stating: “Okay. Based on the original sentence then that was imposed, the defendant is now sentenced to the department of correction for a period of ten years.” (Tr. 5.)

The trial court subsequently entered a written order providing in relevant part:

The petition to revoke probation is dismissed for the reason that the conduct complained of did occur prior to the imposition of probation. On March 20, 2008, the defendant was sentenced to ten (10) years in the Indiana Department of Correction, said sentence being suspended, and defendant placed on probation for a term of ten (10) years, based upon the defendant’s assertion that he had remained drug free while on pre-trial release. The court ordered the defendant tested that day, and indicated that a positive reading would result in the sentence being served in the Indiana Department of Correction. On March 20, 2008, the defendant tested positive for marijuana and cocaine use. The defendant is now re-sentenced to a term of ten (10) years in the Indiana Department of Correction.

(App. 16.) (emphasis added.)

On April 22, 2008, the Lake County Probation Department filed a motion for discharge, requesting that the trial court “unsatisfactorily discharge [Sobuh] from supervision for the reason the defendant’s probation was revoked on April 17, 2008.” (App. 17.) That same day, the trial court granted the motion.

Sobuh appeals, contending that the trial court, while purportedly re-sentencing Sobuh, effectively revoked his probation and did so absent procedural due process and the establishment of the claimed violation.

Discussion and Decision

The grant of probation is a favor and not a right to which a criminal defendant is entitled. Sanders v. State, 825 N.E.2d 952, 955 (Ind. Ct. App. 2005), trans. denied. However, because probation revocation implicates the defendant's liberty interests, he is entitled to some procedural due process before the State can revoke that favor. Id. In probation revocation proceedings, the minimum requirements of due process include: (a) written notice of the claimed violations of probation; (b) disclosure to the probationer of the evidence against him; (c) an opportunity to be heard and present evidence; (d) the right to confront and cross-examine adverse witnesses; and (e) a neutral and detached hearing body. Woods v. State, 892 N.E.2d 637, 640 (Ind. 2008). The State must prove the violation by a preponderance of the evidence. Ind. Code § 35-38-2-3(e).

Here, the trial court conducted an April 2008 hearing at which defense argument was heard, but no testimony was received and no evidentiary exhibits were submitted. Our review of the four-page transcript indicates that the trial court likely reviewed a document purportedly disclosing drug screen results. However, there is no indication in the record that the State either formally submitted this document into evidence or requested judicial notice of it. We do not know if the document was certified or uncertified. Sobuh was unable to exercise his right of cross-examination. Furthermore, after hearing Sobuh's argument that

the conduct alleged was outside the probationary period, the trial court entered conflicting orders alternately indicating that Sobuh had been “re-sentenced” and that his probation had been revoked.

Sobuh was entitled to a probation revocation hearing comporting with the requirements of due process. Moreover, to the extent that his failure to oppose the State’s allegation could be considered an admission, Sobuh at best admitted to conduct outside the probationary period.

The State alleged that Sobuh failed a drug screen administered on March 20, 2008, which screen was given at the conclusion of his sentencing hearing. Assuming test accuracy, it appears that Sobuh ingested drugs some time prior to appearing at his sentencing hearing and the contemporaneous drug screen. Indiana Code Section 35-38-2-3(a)(1) provides that “the court may revoke a person’s probation if the person has violated a condition of probation during the probationary period.” (emphasis added.) The term “probationary period” as used in Indiana Code Section 35-38-2-3 “means that period of time beginning immediately after sentencing and ending at the conclusion of the ‘probationary phases’ of the defendant’s sentence.” Ashley v. State, 717 N.E.2d 927, 928 (Ind. Ct. App. 1999).

Because the sole pending allegation against Sobuh was that he committed conduct that occurred before the commencement of his probationary period, the trial court could not properly revoke his probation on this basis. See C.S. v. State, 817 N.E.2d 1279, 1281 (Ind. Ct. App. 2004) (observing “it is axiomatic that to violate one’s probation, one must perform some prohibited act, or fail to perform some required action, during the period of probation”

and concluding that a urine test taken five days after placement on probation, without evidence of the duration of cocaine metabolites, did not establish use of cocaine after placement on probation).

Reversed.

DARDEN, J., and ROBB, J., concur.