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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES Y. HARRIS,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0908-CR-773
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 1
The Honorable Kurt M. Eisgruber, Judge
The Honorable Steven Rubick, Magistrate
Cause No. 49G01-0812-FC-276874

April 26, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, James Y. Harris (Harris), appeals the trial court's Order revoking his probation.

We affirm.

ISSUE

Harris raises one issue on appeal, which we restate as follows: Whether the trial court abused its discretion when it imposed his suspended sentence after his probation was revoked.

FACTS AND PROCEDURAL HISTORY

On December 5, 2008, the State charged Harris with burglary, a Class C felony, Ind. Code § 35-43-2-1 and theft, a Class D felony, I.C. § 35-43-4-2. On May 2, 2009, Harris entered into a guilty plea, whereby he agreed to plead guilty to burglary in exchange for the dismissal of the theft charge and an executed cap of six years imprisonment. On March 13, 2009, Harris was sentenced to four years with 200 days executed and the remainder suspended. Harris was also placed on probation for 730 days.

On April 7, 2009, the probation department filed a notice of probation violation, alleging that Harris failed to comply with substance abuse treatment. On May 7, 2009, the trial court conducted a hearing on the violation; Harris admitted the violation and was ordered to continue his probation. On July 13, 2009, a second notice of probation violation was filed, which was amended three days later to include three additional allegations, for a total of nine allegations. The amended notice alleged that Harris:

- (1) failed to report to the drug lab as directed on 6/10/09 but did call for testing information.
- (2) failed to report to the drug lab as directed on 6/15/09 and failed to call for testing information.
- (3) failed to report to the drug lab as directed on 6/23/09 but did call for testing information.
- (4) failed to report to the drug lab as directed on 6/30/09 and failed to call for testing information.
- (5) failed to report to Probation as directed.
- (6) failed to pay fees according to payment plan.
- (7) failed to comply with Substance Abuse Treatment.
- (8) failed to report to the drug lab as directed on 7/8/09 but did call for testing information.
- (9) failed to comply with Community Work Service.

(Appellant's App. p. 51). On July 23, 2009, the trial court conducted a probation revocation hearing. During the hearing, Harris testified that he had broken his foot in May. Additionally, Harris stated that because his only mode of transportation was a bike, during the hot summer months, he was unable to ride his bike to his appointments due to his asthma. As a result of his injury to his foot and his asthma, combined with his lack of transportation, Harris stated that he was left without the means to appear for any of the appointments listed among the allegations.

The trial court found that the State had proven violations one through five and seven through nine, but that Harris was not in violation of his probation for failing to pay fees. The trial court stated that, "given eight remaining violations that have been established, and [Harris'] rather cavalier disregard for his obligations to the Probation Department, revocation is appropriate under the circumstances." (Transcript p. 17). The trial court revoked Harris' term of probation and ordered him to serve 1,260 days in the Department of Correction.

Harris now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

We note that “[t]he trial court determines the conditions of probation and may revoke probation if the conditions are violated.” *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007), (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.* The reviewing court will not reweigh the evidence or judge the credibility of the witnesses. *Terrell v. State*, 886 N.E.2d 98, 100 (Ind. Ct. App. 2008).

II. Mitigating Circumstances

Harris argues that the trial court abused its discretion when it revoked his probation and ordered execution of his originally suspended sentence. Specifically, he argues that the trial court violated his right to due process and due course of law under the Fifth and Fourteenth Amendments to the Constitution of the United States, as well as “Indiana Code [section] 35-38-2-3 by failing to consider as a mitigating circumstance evidence of Harris’ medical conditions which impaired his ability to comply with the terms of probation and by ordering execution of the entire suspended sentence.” (Appellants Br. p. 9).

“Probation is a matter of grace left to the trial court discretion, not a right to which a criminal is entitled.” *Prewitt*, 878 N.E.2d at 188. However, once the State grants that favor, it cannot simply revoke the privilege at its discretion. *Parker v. State*, 676 N.E.2d 1083,

1085 (Ind. Ct. App. 1997). Probation revocation implicates the defendant's liberty interests which entitles him to some procedural due process. *Id.* Because probation revocation does not deprive a defendant of his absolute liberty, but only his conditional liberty, he is not entitled to the full due process afforded a defendant in a criminal proceeding. *Id.*

The minimum requirements of due process include:

(a) written notice of the claimed violation of [probation]; (b) disclosure to the [probationer] of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body . . .; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation].

Id.

When determining whether to revoke probation, the trial court engages in a two-step process. *Vernon v. State*, 903 N.E.2d 533, 537 (Ind. Ct. App. 2009), *trans. denied*. The court must first make a factual determination that a violation of a condition of probation actually occurred. *Id.* If a violation is proven, then the trial court must determine if the violation warrants revocation of probation. *Id.* When a probationer admits to the violations, the court can proceed to the second step and determine whether the violation warrants revocation. *Id.* But "even a probationer who admits the allegations against him must still be given an opportunity to offer mitigating evidence suggesting that the violation does not warrant revocation." *Id.*

Harris concedes that he violated the terms of his probation by failing to appear for meetings with the probation department, drug screens, outpatient drug treatment, and failing

to perform community service work. During the July 23, 2009 probation revocation hearing, Harris presented testimony to explain and mitigate his failure to comply with his probation requirements. Harris testified that his asthma made it impossible for him to attend all his drug screens and appointments. He stated that his only means of transportation was his bike, and because “some of them [sic] days [were] hot and humid[,]” he was unable to bike to his appointments, as the humidity made it hard for him to breathe. (Tr. p. 15). Additionally, he testified that he failed to attend his community service work because he was told by the community service center that “I didn’t have to do community service because they didn’t want to take the chance or the responsibility on me fracturing or injuring my foot again. []She told me I [could] leave. She spoke to my probation officer about it.” (Tr. p. 14).

Despite the fact that Harris argues that the trial court should have taken into consideration his physical condition, the trial court choose to regard his claims as insufficient excuses. Given the fact that Harris had eight violations, the trial court noted that Harris exhibited a “rather cavalier disregard for his obligation to the Probation Department, revocation is appropriate under the circumstances.” (Tr. p. 17). We agree. Harris was given multiple chances to comply with the terms of his probation, yet he continued to violate his probation. Even if we were to disregard his violation for failure to comply with the community work service due to his injured foot, that still leaves seven other violations, most of which revolve around his refusal to keep drug testing appointments. It is clear that Harris is unable to comply with the terms and conditions of his probation, which require him to travel, and, thus, he is not a good candidate for probation and should serve his sentence in the

Department of Correction. Consequently, we find that the trial court did not abuse its discretion in revoking Harris' probation, as it was within the trial court's discretion to "order execution of all or part of the sentence that was suspended at the time of the initial hearing." I.C. § 35-38-2-3(g)(3).

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion in revoking Harris' probation and ordering him to serve the remainder of his sentence.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.