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ATTORNEY FOR APPELLANT:

VICTORIA L. BAILEY
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANDREW R. FALK
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

JACK M. ESTES, II,)
)
Appellant-Respondent,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Petitioner.)

No. 49A05-1009-CR-657

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 15
The Honorable James B. Osborn, Judge
The Honorable Patrick Murphy, Commissioner
Cause No. 49F15-0709-FD-199630

May 4, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, Jack M. Estes, II (Estes), appeals his sentence following the trial court's revocation of his probation.

We affirm.

ISSUE

Estes raises one issue for our review, which we restate as the following: Whether the trial court violated his procedural due process rights when it modified his sentence without notice or the opportunity to be present.

FACTS AND PROCEDURAL HISTORY

On September 26, 2007, the State filed an Information charging Estes with Count I, perjury, a Class D felony, Ind. Code § 35-44-2-1; Counts II-VI, failure to appear, Class A misdemeanors, I.C. § 35-44-3-6; and Count VII, impersonation of a public servant, a Class A misdemeanor, I.C. § 35-44-2-3. On May 9, 2008, Estes entered into a plea agreement with the State, whereby he agreed to plead guilty to Count I, perjury, and in exchange, the State dismissed all other charges. During the guilty plea hearing on May 12, 2008, Estes admitted to lying under oath that he was an officer and a pilot with the United States Navy. The trial court sentenced Estes to 720 days executed, 120 of which were to be served in the Indiana Department of Correction (DOC) and 600 days suspended to probation.

On September 15, 2008, the State filed a notice of probation violation, alleging that Estes provided false employment information to the Hendricks County Probation Department.¹ The violation stated the following:

The Hendricks County Probation Department is also supervising [Estes] for a Hendricks County Probation case and were in the process of accepting supervision of a community corrections case from Boone County when this violation occurred. According to Melody Sears with the Hendricks County Probation Department, when [Estes] provided his personal information to the Boone County Community Corrections Department, he provided them with false information regarding his employment...Due to this false employment information, a violation of [c]ommunity [c]orrections was filed in Boone County and [Estes] is current[ly] incarcerated in the Boone County Jail for that case. The Hendricks County Probation Department has also filed a [n]otice of [p]robation [v]iolation with their [c]ourt and have requested a warrant for his arrest. Hendricks County has closed [its] interest in [Estes'] Marion County case due to him being incarcerated in the Boone County Jail.

(Appellant's App. p. 39). On November 18, 2009, Estes appeared before the trial court for a probation hearing. Estes admitted that he had "falsifi[ed] employment verification information to [the] probation department." (Transcript p. 25). Before sentencing Estes, the trial court asked about his current incarceration:

[TRIAL COURT]: Have you been serving another sentence?

[ESTES]: Uh – yes. But it was concurrent with this.

[STATE]: Judge, it looks like he has – he's been held three days, uh, Marion County received him on, uh, the sixteenth of November. Um – as far as the credit on this...

[TRIAL COURT]: Where – ? Um, sir – which court said that this was concurrent, these terms?

¹ Estes' probation had been transferred from Marion to Hendricks County on July 22, 2008.

[ESTES]: Uh, I'm sentenced to D.O.C. right – I'm serving a sentence in D.O.C. from Boone County.

[TRIAL COURT]: Right. Right – and did some court –?

[ESTES]: And these two courts, or these two cases were pending simultaneously. I was not on bond or probation or parole or anything from one to the other.

[TRIAL COURT]: All right. The only thing I can say on the commitment, then, is to make – is silent, no comment at all – regarding concurrent or consecutive. I don't think I have the authority to say either one. If it's another county, um, and it was a probation or paro – um, bond, at that time. So–three hundred days with three credit. And – and the rest is – of your commitment is silent.

(Tr. pp. 26-27). At some point after the hearing, the trial court modified the abstract of the judgment to include the following: “this case is to run consecutive to any other case this [defendant] may currently be serving.” (Appellant's App. p. 15). On August 9, 2010, Estes filed a motion to correct erroneous sentence, which the trial court denied on September 21, 2010.

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

DISCUSSION AND DECISION

Estes argues that his procedural due process rights under the Fourteenth Amendment were violated during the probation revocation proceedings. Specifically, he contends that the trial court modified his sentence without notice or the opportunity to be present.

“It is well settled that although a probationer is not entitled to a full array of rights afforded at trial, certain due process rights inure to a probationer at a revocation hearing.”

Hubbard v. State, 683 N.E.2d 618, 622 (Ind. Ct. App. 1997). Due process that is due to an individual already convicted of an underlying crime requires that a parolee be given:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee 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 such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finder as to the evidence relied on and reasons for revoking parole.

Morrissey v. Brewer, 408 U.S. 471, 489 (1972). Estes is not challenging the probation revocation hearing itself; rather, he disputes the trial court’s entry on the abstract of judgment making his sentence consecutive to his current sentence, which was made after the hearing. Thus, he argues, because the sentence was modified outside of his presence and without notice, his sentence is erroneous and must be modified pursuant to I.C. § 35-38-1-15, which states:

If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.

The purpose of the statute is to provide prompt, direct access to an uncomplicated legal process for correcting the occasional erroneous or illegal sentence. *Davis v. State*, 937 N.E.2d 8, 10 (Ind. Ct. App. 2010), *trans. denied*. However, a motion to correct erroneous sentence may only be filed to address a sentence that is erroneous on its face. *Id.* When

claims of sentencing errors require consideration of matters outside the face of the sentencing judgment, they are best addressed promptly on direct appeal and thereafter via post-conviction relief proceedings where applicable. *Robinson v. State*, 805 N.E.2d 783, 786 (Ind. 2004). A motion to correct an erroneous sentence may only arise out of information contained on the formal judgment of conviction, and not from an abstract of judgment. *Id.* at 793-94. Claims that require consideration of the proceedings before, during, or after trial may not be presented by way of a motion to correct sentence. *Id.* at 787.

As such, we find that I.C. § 35-38-1-15 does not apply in the present case because Estes' sentence is not erroneous on its face. Instead, we apply I.C. § 35-50-1-2(d)(1), which provides that:

If, after being arrested for one (1) crime, a person commits another crime: (1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; ... the terms of imprisonment for the crimes *shall be served consecutively*, regardless of the order in which the crimes are tried and sentences are imposed.

(emphasis added). Therefore, because Estes violated the terms of his Hendricks County probation by providing false employment information to the Boone County Community Corrections, the trial court was *required* to order his sentences to be served consecutively.

As a result, the trial court did not violate his procedural due process rights and any perceived error was harmless.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not violate Estes' procedural due process rights when it ordered him to serve his sentences consecutively.

Affirmed.

DARDEN, J., and BARNES, J., concur.