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ATTORNEY FOR APPELLANT:

PAULA M. SAUER
Danville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

J.T. WHITEHEAD
Deputy Attorney General
Indianapolis, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

JACK M. ESTES, II,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A04-1010-CR-693
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS CIRCUIT COURT
The Honorable Jeffrey V. Boles, Judge
Cause No. 32C01-0710-FD-129

May 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jack M. Estes II appeals the Hendricks Circuit Court's sentencing order which orders his probation revocation sentence in Hendricks County to be served consecutive to his probation revocation sentence in Boone County. Because the underlying sentences were not ordered to be served consecutively and there is no evidence that Estes was on probation in Boone County when he committed the underlying offense in Hendricks County, we conclude that the trial court abused its discretion in ordering consecutive sentences and therefore reverse.

Facts and Procedural History

In January 2006, Estes, who used to be a physician's assistant with prescription-writing privileges, underwent outpatient surgery. When Estes depleted his hydrocodone prescription and his doctor was out of town, he called the Plainfield CVS and phoned in a new prescription instead of waiting for his doctor to return. On February 28, 2008, Estes, under Cause Number 32C01-0710-FD-129 (Cause No. 129) in Hendricks Circuit Court, pled guilty to Class D felony knowingly or intentionally acquiring possession of a controlled substance by misrepresentation, which is known as an offense relating to registration. Ind. Code § 35-48-4-14(c). The trial court sentenced him to 1095 days, with 180 days served in the DOC and 915 days suspended. The plea agreement provided, "Upon any probation violation of any type, Mr. Estes must serve the entire suspended sentence of 915 days at the [DOC]." Appellant's App. p. 37 (bolding and capitalization omitted).

In August 2007, Estes deposited a check for more than $500 from his own company, requesting $500 cash in return, using a bank account that had been closed. Also on February 28, 2008, Estes, under Cause Number 32C01-0710-FC-33 (Cause No. 33) in Hendricks Circuit Court, pled guilty to Class D felony theft. State's Ex. 3. The trial court sentenced him to 1095 days, with 180 days in the DOC and 915 days suspended. Tr. p. 60. According to the plea agreement, the sentences in both cause numbers were to be served consecutively. *Id.* at 58. The court warned Estes that upon "any probation violation of any type . . . you must serve the entire suspended sentence of [915] days at the [DOC], this sentence . . . must run consecutive[] to the sentence under case number FD 129. Mr. Estes must serve the total sentence of [1830] days executed upon any probation violation." *Id.* at 61.

Approximately six months later on August 27, 2008, Estes was convicted of Class C felony forgery and Class D felony perjury in Cause No. 06C01-0709-FC-181 (Cause No. 181) in Boone Circuit Court. The trial court sentenced him to an aggregate term of five and one-half years, with some of the time to be served on community corrections home detention and the rest to be served on probation.[1] The sentence in Boone County Cause No. 181 was not ordered to be served consecutive to either of the Hendricks County cause numbers. It is not clear from the record when the underlying offenses in Cause No. 181 occurred. However, at Estes's initial hearing for multiple cause numbers in Hendricks County on November 29, 2007, he had been in the Boone County Jail for

[1] Estes was also convicted of a Class A misdemeanor in Boone Superior Court II under Cause No. 06D02-0407-CM-637. *See* State's Ex. 9. It appears that this sentence was ordered to be served consecutive to Boone County Cause No. 181. *Id.* We are provided with no other information about this cause number.

eighty-five days. *Id.* at 16. The record does not reveal why Estes was in the Boone County Jail. When asked if his Boone County case was done, Estes responded, "[A]s far as I know it's a probation violation for this charge." *Id.* at 17.

In any event, on September 10, 2008, Boone County filed a petition to change Estes's community corrections placement and a petition to modify and/or revoke his probation. The following day, Hendricks County filed a petition to revoke Estes's probation in Cause No. 33 because of problems in Boone County. *Id.* at 114. Hendricks County did not file a petition to revoke Estes's probation in Cause No. 129 until February 24, 2009, because that cause number had slipped through the cracks. *Id.* at 115, 126-27; Appellant's App. p. 77. Hendricks County filed both petitions for the very same reason, though:

> Mr. Estes had been placed on uh community corrections through Boone County on August 27th and uh he provided information to their, to their department regarding employment that uh turned out to be false uh which was a violation of his probation and . . . community corrections over there and that constituted a violation over here in [Hendricks] [C]ounty for violating a court order.

Tr. p. 115.

Boone County was the first county to address Estes's violations. Accordingly, on October 31, 2008, the Boone Circuit Court modified Estes's community corrections placement and ordered him to serve that sentence in the DOC. The Boone Circuit Court also ordered Estes to serve the previously-suspended portion of his sentence in the DOC. Thus, Estes was ordered to serve five and one-half years in the DOC. State's Exs. 4, 7.

Nearly one year later on September 9, 2009, Estes's probation revocation hearing was held for Cause Nos. 129 and 33 in Hendricks Circuit Court. The trial court found

that Estes violated his probation by violating a court order, revoked his probation, and committed him to the DOC for 915 days in Cause No. 129 and 931 days in Cause No. 33. The court ordered the sentences to run consecutive to each other and consecutive to "any sentence out of Boone County." Appellant's App. p. 94, 96. Estes now appeals his sentence in Cause No. 129 only.[2]

Discussion and Decision

Estes contends that the trial court erred in ordering his sentence in Cause No. 129 to be served consecutive to his sentences in Boone County. He "does not allege that the trial court improperly found him to be in violation of his probation" in Hendricks County Cause No. 129 or "contest the court's order requiring him to serve the entire suspended sentence, consecutive to the sentence under FC-33, the other Hendricks County case." Appellant's Br. p. 7. Instead, Estes argues that the court erred in ordering his sentence in Hendricks County Cause No. 129 to be served consecutive to his Boone County sentences "because the original Hendricks and Boone County sentences were not ordered to be served consecutively." *Id.*

The crux of the State's argument is that "after conviction for his Boone County offenses, and before completing his Boone County probation, Estes committed his Hendricks County offenses." Appellee's Br. p. 3. The State therefore argues that "the sentences for these causes, out of two separate counties, *must* be served consecutively, according to statute." *Id.* That statute provides:

> (d) If, after being arrested for one (1) crime, a person commits another crime:

[2] Estes appeals his sentence in Cause No. 33 in another appeal, Cause No. 32A01-1010-CR-576.

> (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.

Ind. Code § 35-50-1-2.

The entire foundation of the State's argument is erroneous. That is, based on the cause numbers before us, there is no way that Estes could have committed the registration offense in Hendricks County Cause No. 129, which occurred in January 2006, while he was on probation for the forgery and perjury offenses in Boone County Cause No. 181. This is because Estes was not placed on probation in Boone County Cause No. 181 until August 2008—over two years after he committed the registration offense in Hendricks County Cause No. 129. Therefore, it simply cannot be, as the State argues on appeal, that Estes "was serving probation [in Boone County] *at the time* he committed the offenses in Hendricks County." Appellee's Br. p. 4 (emphasis added); *see also id.* at 5 ("Estes was arrested for his Boone County offenses, then committed his offenses in Hendricks County, and did so before he completed his probation for his earlier offenses, previously committe[d] in Boone County"). Because Estes did not commit the registration offense in Hendricks County Cause No. 129 when he was on probation in Boone County Cause No. 181, consecutive sentences were not mandatory pursuant to Indiana Code section 35-50-1-2(d). Because the State provides no other proper basis to support consecutive sentences,[3] *see Weaver v. State*, 664 N.E.2d 1169, 1170 (Ind. 1996) ("A trial court cannot

[3] The State argues that the fact that there were multiple victims justifies consecutive sentences. But the State makes no argument why this justifies consecutive sentences for probation revocation

order consecutive sentences absent express statutory authority."), we conclude that the trial court abused its discretion in ordering Hendricks County Cause No. 129 to be served consecutive to Estes's probation revocation sentence in Boone County Cause No. 181.

We note that to the extent Estes may have been on probation in Boone County in a different cause number when he committed the 2006 registration offense in Hendricks County Cause No. 129, the trial court should specifically identify this cause number when ordering consecutive sentences. But given the cause numbers identified before us, there is simply no evidence that Estes was actually on probation in Boone County when he committed the registration offense in Hendricks County Cause No. 129, thus mandating consecutive sentences. We therefore reverse the trial court and remand for the imposition of concurrent sentences on Boone County Cause No. 181 with Hendricks County Cause No. 129. On remand, the trial court is also ordered to correct the statutory citation in Estes's Abstract of Judgment for Cause No. 129. It lists his registration conviction but provides the wrong statutory citation. *See* Appellant's App. p. 96. It should issue an amended Abstract of Judgment listing Indiana Code section 35-38-4-14(c) as the correct statutory citation.

Reversed and remanded.

KIRSCH, J., and MATHIAS, J., concur.

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sentences in separate (unrelated) cause numbers when the original sentences were not ordered to be consecutive.