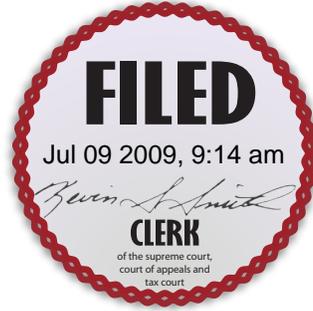


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ADRIAN D. KIRTZ,)
)
Appellant-Defendant,)
)
vs.) No. 18A02-0902-CR-109
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
Cause No. 18C02-0301-FA-1

July 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Adrian D. Kirtz appeals the revocation of his probation and imposition of his previously-suspended six-year sentence. He raises the following restated issue: whether the trial court erred in denying Kirtz's motion for a change of judge where he claimed that he was denied due process because the trial court failed to act as a neutral and detached hearing body.

We affirm.

FACTS AND PROCEDURAL HISTORY

On January 30, 2003, the State charged Kirtz with dealing in cocaine as a Class A felony and, subsequently, amended the charge by adding Count II, possession of cocaine as a Class C felony. On August 22, 2003, Kirtz pleaded guilty to Class C felony possession of cocaine pursuant to a plea agreement, and the State agreed to dismiss the dealing in cocaine charge and four other felony charges under a different cause number. Sentencing was left to the discretion of the trial court, and it sentenced Kirtz to a six-year suspended sentence and ordered him to serve four years on supervised probation.

On January 26, 2007, a petition for the revocation of probation was filed against Kirtz alleging that, on January 3, 2007, he was charged with two counts of dealing in cocaine, each as a Class A felony, and one count of possession of cocaine as a Class C felony. The petition was subsequently amended to add the allegation that Kirtz had been indicted by the United States District Court with two counts of conspiracy to use fire to commit mail fraud. An initial hearing on the petition was held on August 7, 2008, at which Kirtz appeared, but his counsel was not present. A preliminary plea of denial was entered on behalf of Kirtz. At

the end of the hearing, the trial court inquired as to whether Kirtz would answer some questions regarding a confidential settlement agreement that was before the court under a different cause number. Kirtz refused to answer any questions without his attorney present, and the trial court immediately dropped the matter.

On October 8, 2008, Kirtz filed a “Motion for Change of Venue from the Judge” with an accompanying memorandum of law and affidavit. In his affidavit, he alleged the following:

- a. That Judge Dailey has had conversations with Judge Feik of the Delaware Circuit Court No. 4 concerning a confidential settlement agreement signed by [Kirtz] and his attorney and related payments of monies to the parties to the agreement under the original miscellaneous cause number for forfeiture.
- b. That Judge Dailey is the Judge of the Delaware Circuit Court No. 2 and had on its own initiative opened a miscellaneous cause number titled *State et al. v. Adrian Kirtz et al.*, under cause number 18C02-0807-MI-0052 wherein the Affiant and his attorney have been ordered to appear to answer questions concerning the payment of monies to the parties and facts and circumstances surrounding the filing of criminal charges against the affiant.
- c. That during an initial hearing in this cause, on revocation of probation conducted on August 7th, 2008, Judge Richard Dailey conducted a hearing with [Kirtz] present without his attorney, Jake Dunnuck. During said hearing the court inquired of [Kirtz] if the Court could ask him questions concerning the confidential settlement agreement.
- d. Kirtz believes that Judge Dailey had already indicated that he is bias[ed] towards the defendant in this cause and that he would not receive a fair hearing should the change of judge not be granted.

Appellant's App. at 230-31.

On October 9, 2008, a hearing was held on Kirtz's motion, and the trial court, after noting that Kirtz was not the target of the investigation conducted by the trial court, found no reasonable basis for questioning the trial court's impartiality and denied Kirtz's motion. The trial court then continued to conduct the fact-finding hearing on the petition to revoke probation. At the conclusion of the evidence, the trial court found by a preponderance of the evidence that Kirtz had violated his probation. A dispositional hearing was held on November 6, 2008, and the trial court ordered Kirtz to serve his six-year suspended sentence in the Department of Correction. Kirtz now appeals.

DISCUSSION AND DECISION

The standard of review of a trial court's decision to grant or deny a motion for a change of judge under Indiana Criminal Rule 12 is whether the decision was clearly erroneous. *McKinney v. State*, 873 N.E.2d 630, 638 (Ind. Ct. App. 2007) (citing *Sturgeon v. State*, 719 N.E.2d 1173, 1182 (Ind. 1999)), *trans. denied*. A decision is clearly erroneous when we are left with a definite and firm conviction that a mistake has been made. *Id.*

Kirtz argues that the trial court erred when it denied his motion for a change of judge. He contends that the trial court's statements during the proceedings for his petition to revoke probation constituted bias and prejudice against him. He asserts that the comments by the trial court created a reasonable basis for questioning the impartiality of the trial court, and his motion should have been granted.

“The ability to serve a sentence on probation has been variously described as a ‘matter of grace’ and a ‘conditional liberty that is a favor, not a right.’” *Marsh v. State*, 818 N.E.2d

143, 146 (Ind. Ct. App. 2004) (quoting *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999)). A probationer faced with a petition to revoke his probation is not entitled to the full panoply of rights he enjoyed prior to the conviction. *Id.* The rules of evidence do not apply, and the State need only prove an alleged violation of probation by a preponderance of the evidence. *Id.* However, a probationer must be given certain due process rights during the probation revocation proceedings, which include:

- (a) written notice of the claimed violations 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 fact finders as to the evidence relied on and reasons for revoking [probation].

Tillberry v. State, 895 N.E.2d 411, 416 (Ind. Ct. App. 2008).

The law presumes that a judge is unbiased and unprejudiced. *McKinney*, 873 N.E.2d at 640. To overcome this presumption, the moving party must establish that the judge has personal prejudice for or against a party. *Carter v. Knox County Office of Family & Children*, 761 N.E.2d 431, 435 (Ind. Ct. App. 2001). Such bias or prejudice exists only where there is an undisputed claim or the judge has expressed an opinion on the merits of the

controversy before him. *Id.* Prejudice must be shown by the judge's trial conduct; it cannot be inferred from his subjective views. *Id.*

Here, at the initial hearing on the petition to revoke probation, the trial court asked Kirtz if he had any objection to being asked questions concerning the confidential settlement agreement, to which Kirtz responded, "[n]ot without my attorney here." *Tr.* at 17. The trial court promptly dropped the subject. This question by the trial court did not demonstrate any bias or prejudice, and it did not make any comment on the present controversy before the court.

At the hearing on Kirtz's motion for change of judge, the trial court explained that Kirtz was not the object of its independent investigation and that, during the course of this investigation into confidential agreements regarding civil forfeitures, the trial court discovered that Kirtz was involved in a case concerning such an agreement. *Id.* at 29. The mere fact that the trial court was conducting an independent inquiry into the type of agreements that Kirtz had entered into does not, by itself, establish bias or prejudice. *See Sturgeon*, 719 N.E.2d at 1181 ("[A] trial judge's exposure to evidence through judicial sources is, alone, insufficient to establish bias."); *Carter*, 761 N.E.2d at 435 ("[T]he mere fact that a party has appeared before a certain judge in a prior action or the judge had gained knowledge of the party by participating in other actions does not establish the existence of bias or prejudice."). Based on the trial court's statements during Kirtz's probation revocation proceedings, we do not believe that an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the trial court's impartiality. *See*

James v. State, 716 N.E.2d 935, 940 (Ind. 1999) (stating that this is test for whether judge should recuse himself under Indiana Judicial Conduct Canon 3(E)(1)). We conclude that the trial court did not err in denying Kirtz's motion for change of judge and that Kirtz received the benefit of a neutral and detached hearing body in his probation revocation proceedings.

Affirmed.

RILEY, J., and MATHIAS, J., concur.