



## Case Summary

Maurice Tatum appeals the trial court's order revoking his probation. We affirm.

### Issue

We address the following issue raised in the parties' briefs: whether the trial court denied Tatum his due process rights during the probation revocation hearing.

### Facts and Procedural History

On June 14, 2006, the State charged Tatum with one count of class C felony battery. After Tatum entered a preliminary plea of not guilty, the State filed an amended information on August 3, 2006, adding one count of class B felony aggravated battery. Tatum withdrew his original plea of not guilty and pled guilty to battery resulting in serious bodily injury, a class C felony. Judge Steven Rubick accepted Tatum's plea of guilty and granted the State's motion to dismiss all other charges. On June 5, 2007, Judge Rubick sentenced Tatum to four years, with 1408 days suspended and 1095 days of probation. The conditions of Tatum's probation included that he would maintain full-time employment and would communicate truthfully with his probation officer at all times.

The probation department filed notices of probation violation on November 15, 2007, May 1, 2008, October 23, 2008, and December 1, 2008.<sup>1</sup> A compliance hearing took place

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<sup>1</sup> The November 15, 2007, notice alleged failure to report to the drug lab on two occasions, to comply with GED assessment, and to submit to a urine sample; however, the court found Tatum in compliance. Appellants's App. at 20, 92. The May 1, 2008, notice alleged failure to comply with GED assessment and to communicate truthfully with the probation department; the court held compliance hearings and allowed Tatum to continue on probation and continued the matter. *Id.* at 21-22, 94. The October 23, 2008, amended notice alleged failure to report to the drug lab and previous pending allegations. *Id.* at 95. The December 1, 2008, amended notice alleged failure to report to the drug lab and previous pending allegations. *Id.* at 96.

on December 17, 2008, and Judge Rubick found Tatum in compliance with his probation at that time. On February 25, 2009, Tatum appeared for a compliance hearing in which Judge Lisa Borges found that Tatum had violated conditions of his probation but allowed him to remain on probation with “strict compliance.” Appellant’s App. at 23-24.

On August 3, 2009, the probation department sent an inter-office memorandum to the court asking for guidance regarding Tatum’s noncompliance with employment and fees.<sup>2</sup> The court, on its own motion, set a status hearing for August 26, 2009, which was continued to September 2, 2009. On that date, Judge Borges held a status hearing and ordered Tatum to bring at least fifteen employment applications, if he was not yet employed, to the next hearing. On September 30, 2009, Judge Borges held a status hearing, ordered a probation field team to visit Tatum’s reported employer, and continued the matter until October 21, 2009. On October 21, 2009, the trial court held a status hearing and continued the matter until November 18, 2009.

On November 18, 2009, Tatum appeared for a status hearing and was asked to provide evidence of his good faith effort to obtain gainful employment. Tatum acknowledged that he had told Judge Borges at the September 30, 2009 hearing that he was employed at GRI Communications. Judge Borges responded that the field team’s investigation found that the

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<sup>2</sup> When Tatum was sentenced on June 5, 2007, he was assessed \$2039.00 with monthly payments of \$59.43. An administrative hearing was held on September 11, 2007, due to Tatum’s failure to make monthly payments. Tatum reported that his employer was CBS Staffing, and he agreed to resume payments. Tatum made consistent payments from September 2007 until April 2008.

business did not exist. When asked whether he had brought proof of seeking employment, Tatum stated that he had filled out job applications online but failed to bring proof to the hearing because he was “running late.” Tr. at 17. Judge Borges found that Tatum had violated the conditions of probation by failing to communicate truthfully with probation and with the court. Tatum gave mitigating evidence by testifying that he paid over \$600 in probation fees, completed a twelve-week anger management course, made a good faith effort to obtain his GED, reported to probation as directed, had not been arrested, did not have positive drug test results, and was making his best effort to pay probation fees. Judge Borges ordered Tatum to serve his previously-suspended sentence.

### **Discussion and Decision**

“Probation is a matter of grace and a conditional liberty which is a favor, not a right.” *Noethlich v. State*, 676 N.E.2d 1078, 1081 (Ind. Ct. App. 1997). The decision whether to revoke probation is within the sole discretion of the trial judge. *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007). A probation revocation hearing is in the nature of a civil proceeding, and an alleged violation need be proven only by a preponderance of the evidence. *Baxter v. State*, 774 N.E.2d 1037, 1044 (Ind. Ct. App. 2002), *trans. denied*. Probation revocation requires a two-step process. *Woods*, 892 N.E.2d at 640. First, the court makes a factual determination that a condition of probation was violated. *Id.* If a violation of probation is

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After Tatum reported on May 5, 2009, that he was not receiving hours from CBS Staffing, the probation department instructed him to contact different employment assistance programs and provide verification to the probation department that he had completed ten job applications. During an office appointment with the probation department on July 28, 2009, Tatum reported that the agencies could not assist him. Tatum had completed fourteen job applications and provided verification. Tatum was instructed to complete ten job applications per week and to provide verification. Appellant’s App. at 98.

proven, then the trial court determines whether the violation warrants revocation of the probation. *Id.*

We review a trial court's decision in a probation revocation proceeding for an abuse of discretion. *Sanders v. State*, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), *trans. denied*. We will only find an abuse of discretion if the trial court's decision is clearly against the logic and effect of the facts and circumstances. *Guillen v. State*, 829 N.E.2d 142, 145 (Ind. Ct. App. 2005), *trans. denied*. We consider the evidence that is most favorable to supporting the judgment of the trial court without reweighing the evidence or judging the credibility of witnesses. *Braxton v. State*, 651 N.E.2d 268, 270 (Ind. 1995). If substantial evidence of probative value exists to support the trial court's decision that a probationer has violated any terms of probation, we will affirm the trial court's decision to revoke probation. *Id.*

Even though probationers do not receive the full array of constitutional rights that defendants at trial receive, the Due Process Clause of the United States Constitution does impose procedural and substantive limits on the revocation of the conditional liberty created by probation. *Woods v. State*, 892 N.E.2d 637, 640 (Ind. 2008). A probationer at a revocation hearing is entitled to the following minimum requirements of due process: "(a) written notice of the claimed violations of probation; (b) disclosure 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." *Cooper v. State*, 917 N.E.2d 667, 672 (Ind. 2009). The due process requirements are codified in Indiana Code Section 35-38-2-3, which requires that an evidentiary hearing be held on the revocation and

that probationers are allowed to confront and cross-examine witnesses. *Id.* Probationers must be given an opportunity to offer mitigating evidence suggesting that the violations do not warrant revocation. *Id.*

Tatum argues that he was not afforded the minimal requirements of due process. First, Tatum claims that he did not receive written notice of the alleged probation violations. Tatum states that the last notice of probation violation was filed on December 17, 2008, and the court found him in compliance. Tatum argues that the inter-office memorandum sent by the probation department asking for guidance regarding his employment and fees did not contain certificate of service showing that he was served with a copy of the memorandum.

We disagree with Tatum that he did not have written notice of the claimed violations of probation. The State notes that this appeal “focuses on the second amended violation, which was the last notice that alleged violations of probation to be filed with the court in this matter.” Appellee’s Br. at 9. Included in the second amended notice of probation violation is the allegation that Tatum “failed to communicate truthfully with the Probation Department.” Appellant’s App. at 96. Judge Borges found that Tatum failed to demonstrate a good faith effort of seeking gainful employment, and he violated the conditions of his probation by failing to communicate truthfully with the probation department and the court.

Although the court found Tatum to be in compliance at the December 17, 2008, hearing, the court continued the matter for a compliance hearing in February. After the court found that Tatum violated his probation at the February 25, 2009, hearing and continued him on probation with “strict compliance,” the court held three additional compliance hearings

that Tatum attended before his probation was revoked on November 18, 2009. In addition, as the State argues, the inter-office memorandum “did not contain any new allegations or information that Tatum had not already been notified of or received.” Appellee’s Br. at 9. Therefore, the probation department’s amended notice of violation satisfied the due process requirements of Indiana Code Section 35-38-2-3.

Tatum also argues that since the court “never scheduled an evidentiary hearing on the November 18, 2009 date, the State never disclosed to Tatum any evidence against him.” Appellant’s Br. at 9. Tatum also argues he was denied the opportunity to subpoena witnesses on his behalf. In addition, Tatum argues he did not get an opportunity to cross-examine the probation field team that conducted the visit at his reported employer.

We agree with the State that Tatum waived his claim that he was denied the opportunity to cross-examine the field team by not objecting during the hearing. *See Talley v. State*, 736 N.E.2d 766, 768 (Ind. Ct. App. 2000) (“Failure to object to alleged errors results in waiver and precludes appellate review.”).<sup>3</sup> Waiver notwithstanding, since Tatum was present at the September 30, 2009, compliance hearing and was aware that the probation field team would verify his employment, he was on notice that his employment would likely be addressed during the hearing. Also, a representative of the probation department was present during the hearing, and Tatum could have questioned the officer, and if the officer did not

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<sup>3</sup> Although waiver can be avoided by claiming the fundamental error exception, this exception is extremely narrow and is available “only when the record reveals clearly blatant violations of basic and elementary principles of due process, and the harm or potential for harm cannot be denied.” *Talley v. State*, 736 N.E.2d 766, 768 (Ind. Ct. App. 2000). However, Tatum does not make a fundamental error claim.

have the information Tatum sought then he could have requested a continuance. Tatum did neither of these things.

In addition, Tatum argues that the trial court did not function as a neutral and detached factfinder because it conducted an investigation and acted as a witness during the hearing on November 18, 2009. Tatum argues that Judge Borges gave unsworn testimony as a State's witness when she stated, "And so that's why I did send the field team out and I learned that, basically, that you've been, I think, scamming the court completely with regard to any effort that you've made to work so what do you have to say about that?" Tr. at 16.

We agree with the State that Tatum has not demonstrated that the trial judge's actions crossed the bounds of impartiality and actually prejudiced his case. "The law presumes that a judge is not biased or prejudiced in the matters that come before the court." *Washington v. State*, 758 N.E.2d 1014, 1018 (Ind. Ct. App. 2001). We will not reverse a court's judgment unless the record shows actual bias and prejudice against the defendant. *Id.* The defendant bears the burden of establishing that the judge's actions crossed the bounds of impartiality and actually prejudiced the defendant's case. *Id.* Tatum waived the issue by not objecting to Judge Borges' questions or comments at the hearing. *See Flowers v. State*, 738 N.E.2d 1051, 1061 (Ind. 2000). Also, Tatum was aware that he had to provide evidence of his good faith effort to obtain gainful employment, and his probation was revoked for failing to do so and for lying to the probation department and the court. Waiver notwithstanding, Tatum failed to meet his burden. Tatum did not show that the court's questions regarding his proof of

employment crossed the bounds of impartiality and prejudiced him. Furthermore, the court's statements were not testimony but were merely comments on the field team's findings.

Finally, Tatum argues that "probation may not be revoked for failure to comply with conditions that impose financial obligations, unless the probationer recklessly, knowingly, or intentionally fails to pay." Ind. Code § 35-38-2-3(f). Tatum argues that the concerns of the probation department regarded employment and fees, which are both conditions that imposed financial obligations upon him. Tatum analogizes his case to *Bearden v. Georgia*, 461 U.S. 668 (1983), in which the United States Supreme Court held that "[i]f the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment." *Id.* at 672. The Court stated, "If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority." *Id.* Tatum's case is distinguishable because the court found that he did not make a bona fide effort to seek gainful employment. The trial court did not abuse its discretion, nor did it violate Tatum's due process rights, when it revoked Tatum's probation for failing to provide proof of a good faith effort to seek gainful employment and for communicating untruthfully with the probation department and the court. Consequently, we affirm.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.