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.

ATTORNEY FOR APPELLANT:

LISA M. JOHNSON
Brownsburg, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JANINE STECK HUFFMAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JAMES GOINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1012-CR-1321
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol J. Orbison, Judge
The Honorable Amy J. Barbar, Magistrate
Cause No. 49G22-0908-FC-074580
Cause No. 49G22-0912-FB-101558

July 26, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant James Goins appeals the revocation of his probation. Specifically, Goins argues that his due process rights were violated because the trial court denied him the opportunity to present evidence or argument at the revocation hearing. Goins also alleges that his counsel was ineffective for failing to object to the trial court's decision ordering him to serve the entire, originally-suspended, sentence at the Indiana Department of Corrections (DOC).

We conclude that Goins was not denied his right to due process because the trial court did afford him the opportunity to present evidence. We also find that the trial court properly revoked his probation and ordered him to serve the originally-suspended sentence at the DOC. Finally, we conclude that Goins's counsel was not ineffective.

FACTS

On August 24, 2009, Goins was charged with one count of child molesting under cause FC-074580 (FC-074), for fondling or submitting to fondling by D.G., a child who was then five years old. Thereafter, on December 22, 2009, Goins was charged with five counts of child molesting, as class B felonies, and two counts of child molesting, as class C felonies, under cause FB-101558 (FB-101). These offenses involved R.M., a child who was between ten and thirteen years old, and S.M., who was between eight and ten years old at the time of the incidents.

In accordance with a plea agreement, Goins pleaded guilty to one count of class C felony child molesting under FC-074, and to one count of child molesting as a class C

felony, under FB-101. The agreement provided for the dismissal of the remaining charges in both causes, and it was determined that Goins would serve a total of four years at the DOC, with credit for time served. The remaining time was to be suspended, and Goins would be placed on probation.

On March 2, 2010, the trial court sentenced Goins to four years pursuant to the plea agreement, credited him with 190 days of time served, placed him on probation for the remainder of the sentence, and assessed fees and fines.

On October 27, 2010, the State filed a petition to revoke Goins's probation, alleging that Goins: (a) failed to refrain from having contact with minor children; (b) failed to make a good faith effort towards the payment of his financial obligation; (c) failed to complete community service work; and (d) was arrested and charged with a violation of a court order on October 26, 2010. The allegations set forth in (a) and (d) both involved an incident where two probation officers went to the residence that Goins shared with his grandmother. When the officers arrived, they noticed two baby strollers sitting outside the residence. Goins was arrested and the probation department subsequently determined that Goins's relatives and their three minor children were visiting the home that day.

On November 17, 2010, the trial court conducted a hearing on the violation of probation. Goins admitted to the allegations set forth in (b) and (c) above, and denied allegations (a) and (d). Thereafter, the trial court heard evidence as to whether Goins had been in contact with any minor children. The State presented testimony from a Marion

County probation officer who read some notes that had been written by Goins's supervising probation officer who had conducted a "field visit" to Goins's home in October 2010. Tr. p. 5-7. Although the trial court sustained Goins's objection to the testimony on hearsay grounds, the State proceeded to establish a foundation as to the admissibility of the notes. Thereafter, the probation officer was permitted to testify that the visiting probation officers had observed two baby strollers outside the Goins's residence. After Goins was arrested, it was determined that his sister and cousin were present, along with three minor children.

Goins also objected when the State offered the minute entries of the initial hearing regarding his arrest on October 26, 2010, into evidence. After final arguments, the trial court revoked Goins's probation and ordered him to serve the remainder of his 1080-day sentence in the DOC, with credit for time served.

The trial court determined that

> [T]he State has met its burden as to allegation [(b), (c), (d)]. . . . I would like to have seen a little more on [allegation (a)] and I think the presence of baby strollers is very telling. I can't help but notice what it says in the probation notice which was that the defendant said his sister and his cousin were there. Considering the defendant now has three child molesting convictions involving cousins, his family . . . what in the world is going on over there to let him be around? I believe he was around children but I am finding him in violation because of [(b), (c), and (d)].

Tr. p. 18. The trial court also reduced the remaining unpaid fees and fines to a civil judgment. Goins now appeals.

DISCUSSION AND DECISION

I. Order of Revocation and Imposition of Suspended Sentence

Goins first claims that the revocation of probation must be set aside because he was not afforded the opportunity to present evidence or argument "explaining or mitigating the violation." Appellant's Br. p. 1. As a result, Goins contends that his right to minimal procedural due process was violated, and the trial court abused its discretion in revoking his probation.

When reviewing an appeal from the revocation of probation, we consider only the evidence most favorable to the judgment. We will not reweigh the evidence or judge the credibility of the witnesses. Piper v. State, 770 N.E.2d 880, 882 (Ind. Ct. App. 2002). We review the trial court's sentencing decisions for violations of probation under an abuse of discretion standard. An abuse of discretion will be found where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Figures v. State, 920 N.E.2d 267, 273 (Ind. Ct. App. 2010). The violation of a single condition is sufficient to revoke probation. Rosa v. State, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005).

Probation is a favor granted by the State, not a right to which a criminal defendant is entitled. Parker v. State, 676 N.E.2d 1083, 1085 (Ind. Ct. App. 1997). However, once the State grants that favor, it cannot simply revoke the privilege at its discretion. Id. Probation revocation implicates liberty interests that entitle the defendant to some

procedural due process rights. Id. (citing Morissey v. Brewer, 408 U.S. 471, 482, (1972)). However, because a probation revocation does not deprive the defendant of his absolute liberty—and only conditional liberty—he is not entitled to the panoply of rights that a defendant is afforded in a criminal proceeding. Id.

Minimum due process requirements 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 finder as to the evidence relied on and reasons for revoking probation. Id.

These due process requirements are codified at Indiana Code Section 35-38-2-3. An evidentiary hearing must be held on the revocation and the defendant must be permitted to confront and cross examine witnesses and is entitled to representation by counsel. However, a defendant's failure to attempt to explain why he violated the terms of his probation, either at the trial court level or upon direct appeal, is fatal to his claim. See Woods v. State, 892 N.E.2d 637, 642 (Ind. 2008) (standing for the proposition that a defendant's failure to make an offer of proof and explain why he violated the terms of his probation should not entitle him to relief upon appeal).

On the other hand, we note that when a probationer admits to violating the conditions of his probation, due process procedural safeguards and an evidentiary hearing

on the revocation are not necessary. Rather, the trial court is permitted to proceed to the second step of the probation revocation inquiry and determine whether the violation warrants revocation. I.C. § 35-38-2-3; Parker, 676 N.E.2d at 1085. Also, there is no requirement of a bifurcated hearing. See Vernon v. State, 903 N.E.2d 533, 537 (Ind. Ct. App. 2009) (holding that a single evidentiary hearing is sufficient to provide a probationer the opportunity to present mitigating evidence in a case where the underlying question of a violation is also addressed in the same hearing), trans. denied.

Here, the record demonstrates that Goins admitted at the beginning of the hearing that he did not make a good faith effort towards paying his financial obligations and that he failed to complete community service work in lieu of finding full time employment. Tr. p. 3-4. Moreover, after the State presented its case, Goins's counsel specifically informed the trial court that it had "no evidence, just argument." Id. at 15. In the event that Goins had mitigating circumstances to present regarding his ability to pay his fees and fines or those relating to his ability to obtain employment or complete community service, the trial court did, in fact, afford him the opportunity to present his evidence at the hearing. However, Goins did not do so. Therefore, Goins cannot successfully complain that his due process rights were violated.

That being said, we note that when the trial court finds a probation violation, the court may continue the person on probation, extend the probationary period, or order execution of all or part of the suspended sentence. I.C. § 35-38-2-3(g). As discussed above, Goins admitted that he failed to make a good faith effort towards the payment of

his financial obligations and acknowledged that he had not completed any of the community service that he was required to complete. Tr. p. 3-4. Furthermore, it was found that Goins had violated a court order, which amounted to a third violation. Id. at 18-19.

In light of this evidence, it is apparent that Goins, for whatever reason, has simply chosen not to follow the conditions of his probation. As a result, the trial court was left with little choice but to revoke Goins's probation and order him to serve executed time. We decline to disturb the trial court's decision to revoke Goins's probation, and Goins has failed to show that the trial court abused its discretion in ordering him to serve the entire term of the originally-suspended sentence.

II. Ineffective Assistance of Counsel

Goins claims that his counsel at the probation revocation hearing was ineffective. More specifically, Goins contends that the revocation order must be set aside because his counsel did not "object to the trial court's failure to give Goins an opportunity to present evidence or argument explaining or mitigating his probation violation." Appellant's Br. p. 13.

Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668 (1984). Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). That is, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms and that his counsel's deficient performance resulted in

prejudice. Strickland, 466 U.S. at 687-88. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome." Id.

A claim may be disposed of on either prong of the two-part Strickland test. Grinstead, 845 N.E.2d at 1031. An inability to satisfy either prong of the Strickland test is fatal to an ineffective assistance claim. Vermillion v. State, 719 N.E.2d 1201, 1208 (Ind. 1999). Generally, we need not evaluate counsel's performance if the defendant has suffered no prejudice. And most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

We also note that a probationer's right to counsel in a revocation hearing is a statutory right that is guaranteed under Indiana Code Section 35-38-2-3(e). Because a probation revocation hearing is in the nature of a civil proceeding, we apply a less stringent standard of review in assessing counsel's performance. If counsel appeared and represented the probationer in a procedurally fair setting that resulted in judgment of the court, it is not necessary to judge counsel's performance by rigorous standards. Baum v. State, 533 N.E.2d 1200, 1201 (Ind. 1989).

First, as we discussed above, the trial court did afford Goins the opportunity to present evidence and explain the alleged violations. Moreover, Goins admitted committing two of the charged violations, and, following the presentation of evidence,

the trial court found that the State had proven a third that involved the violation of a court order. Any of these grounds served as a basis for the revocation, and the trial court was authorized to order Goins to serve all or part of the originally-suspended sentence. I.C. § 35-38-2-2.

Finally, we note that defense counsel lodged successful objections and vigorously defended Goins's rights at the revocation hearing. Tr. p. 5-18. More particularly, Goins's counsel objected to the probation officer's testimony on hearsay grounds regarding the investigation at his residence in October 2010. Id. at 7-8. The trial court sustained the objection, and while the State established a foundation for the admission of the probation officer's notes, Goins's counsel again objected when the State elicited additional testimony. Id. at 9-11. Goins's counsel also objected when the State offered minute entries of the initial hearing that pertained to the allegation that Goins had been in contact with minor children. Id. at 13-14.

In sum, the record demonstrates that defense counsel vigorously argued on Goins's behalf and objected many times to the admission of evidence during the revocation hearing. Moreover, because Goins admitted to two of the alleged violations and the State's evidence established that he had violated a third condition of probation, Goins has failed to show that the outcome would have been different had his counsel presented evidence or further argument "explaining or mitigating the violations." Appellant's Br. p. 1. As a result, we conclude that Goins did not receive ineffective assistance of counsel at the probation revocation hearing.

The judgment of the trial court is affirmed.

MAY, J., and BRADFORD, J., concur.