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# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| JASON E. LAND, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 79A05-0902-CR-59 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0610-FD-43

**July 30, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Jason Land appeals the revocation of his probation. He raises two issues, which we restate as:

I. Whether the trial court improperly denied Land his right to allocution; and

II. Whether the trial court abused its discretion by ordering Land to serve his previously suspended seven-year sentence.

We affirm.

The relevant facts follow. On February 6, 2006, Land entered into a plea agreement with the State in which he agreed to plead guilty to one count of nonsupport of a dependent child as a class C felony. The trial court accepted Land's guilty plea on February 21, 2006, ordered Land to work release, and scheduled a sentencing hearing for August 4, 2006. On April 15, 2006, Land did not return to work release, violating the rules of the work release program. Land returned to the work release program on April 16, 2006. Thereafter, the State charged Land with one count of escape as a class D felony.

On September 6, 2006, the trial court entered an eight-year sentence with six years suspended to probation for Land's nonsupport of a dependent child conviction. On October 6, 2006, Land entered a plea agreement with the State under which he agreed to plead guilty to escape as a class A misdemeanor. On October 16, 2006, the trial court accepted Land's plea of guilty to the charge of escape and sentenced him to one year. The trial court suspended Land's one-year sentence for escape to probation and specified

that the sentence should be served consecutively to Land's sentence for nonsupport of a dependent child.

Although it is not clear from the record, sometime in late 2006 or early 2007, Land completed the executed portion of his sentence and was released on probation. Land reported to probation for a few months, but then left Indiana for Virginia, where his fiancé and daughter lived. On May 25, 2007, the State filed petitions to revoke Land's probation because he had failed to report to probation. In April 2008, Land surrendered to authorities in Virginia and was transported back to Indiana.

On May 30, 2008, the trial court held a hearing on the State's petitions to revoke Land's probation. During the course of the hearing, Land admitted that he violated the terms of his probation. Thereafter, the following exchange took place:

> [The Court]: Now it looks like you've had some charges here and you were given a break. And you broke and run. So you were in Virginia?
>
> [Land]: Yes, sir.
>
> [The Court]: And what were you doing in Virginia work-wise?
>
> [Land]: I was at my fiancé's father's a general contractor and I was just –
>
> [The Court]: And then how much child support have you paid while you were there that you didn't –
>
> [Land]: I wasn't paying any at the time. I was trying to get my life straight with my fiancé and my daughter.
>
> [The Court]: Okay. What I'm inclined to do is revoke seven (7) years. I'm going to order him to execute it all.
>
> [Land's Counsel]: Judge –

> [The Court]: That's what I'm inclined to do.
>
> [Land's Counsel]: I understand. Let me, let me, I think the State has recognized we've got a situation here is he owes this child support.
>
> [The Court]: Uh-huh. (Affirmative.)
>
> [Land's Counsel]: And if we send him for seven (7) years, he's not gonna be able to pay that child support, that support. I believe that [Land] can, uh, can be at Work Release. I think if he has an opportunity to tow the line, make the payments he needs to make with his restitution to the County and on his child support, that he can earn his way back into the good graces of everybody here. The problem that he has is he needs to understand that though he's got a daughter out in Virginia, he's got a child here, too, and they're competing interest [sic]. But this interest includes a Court order.
>
> [The Court]: What it boils down to is he was given a chance, he didn't step up to the plate. I'm revoking his probation, seven (7) years executed.

Transcript at 10-12. That same day, the trial court issued an order revoking Land's probation and ordering him to serve his previously suspended seven-year sentence.

I.

The first issue presented concerns whether the trial court improperly denied Land his right to allocution. Land argues that he was denied this right. He alleges that had he been allowed to make a statement, he would have explained to the trial court that the reason he did not report to probation was because he went to Virginia to protect/rescue his daughter from her mother, who was addicted to crack cocaine. Because he was denied his right to allocution, Land contends that the revocation of his probation should be reversed.

Probation revocation implicates a defendant's liberty interest, which entitles him or her to some procedural due process, but not the full due process rights afforded a defendant in a criminal proceeding. Sanders v. State, 825 N.E.2d 952, 955 (Ind. Ct. App. 2005), trans. denied. Among the minimum requirements of due process that inure to a probationer at a revocation hearing is the opportunity to be heard and present evidence. Id. Based on this, the Indiana Supreme Court has concluded "that the right of allocution should apply to probation revocation hearings." Vicory v. State, 802 N.E.2d 426, 429 (Ind. 2004). In discussing the right of allocution, the Court explained that "[b]ecause the court does not 'pronounce a sentence' at a probation revocation hearing, the judge is not required to ask the defendant whether he wants to make a statement . . . ." Id. But, when the defendant specifically requests that the trial court allow him or her to make a statement, "the request should be granted." Id.

Pursuant to Vicory, Land had a right to allocution. However, the State argues that Land has waived his claim that the trial court denied him his right to allocution because Land "did not ask to make any allocution statement nor did he object when the trial court failed to offer him the opportunity to make such a statement." Appellee's Brief at 5. To support its position, the State, in part, relies on Robles v. State, 705 N.E.2d 183 (Ind. Ct. App. 1998). In that case, Robles was convicted of speeding, driving while intoxicated, and driving with a suspended license. Before imposing a sentence, the trial court did not ask Robles or his counsel whether either of them would like to make a statement, and Robles did not object to this. On appeal, Robles argued that his sentence should be set

aside because the trial court did not afford him an opportunity to speak on his own behalf. We disagreed, concluding that "[i]nasmuch as Robles did not object to the trial court's failure to grant him or his counsel the opportunity to speak before the pronouncement of the sentence, Robles has waived the alleged error and is precluded from raising it for the first time on appeal." 705 N.E.2d at 187.

In Vicory, the State also relied on Robles to argue that Vicory waived his claim that he was denied his right to allocution. In that case, the trial court found that Vicory had violated his probation and asked Vicory if he would like to appeal the court's decision. Vicory did not respond to the court's question and, instead, asked if he could read a statement. The trial court denied Vicory's request. In considering the State's waiver argument, the Indiana Supreme Court concluded that "[o]nce the court denied Vicory's request to read his statement . . . the right to appeal was properly preserved." Vicory, 802 N.E.2d at 428.

Here, unlike in Vicory, neither Land nor his counsel specifically requested from the trial court the opportunity to make a statement. Nor did Land or his counsel object when the trial court concluded the hearing. As such, we conclude that Land has waived his claim that the trial court erred in denying him his right to allocution. See, e.g., Robles, 705 N.E.2d at 187.[1]

[1] Even if we were to conclude that Land somehow evinced a desire to make a statement, he cannot prevail on his claim. "To reverse a trial court's decision to exclude evidence, there must have been error by the court that affected the defendant's substantial rights and the defendant must have made an offer of proof or the evidence must have been clear from the context." Woods v. State, 892 N.E.2d 637, 641 (Ind. 2008).

II.

The second issue is whether the trial court abused its discretion by ordering the execution of Land's previously suspended seven-year sentence. Land contends that the trial court did not have sufficient facts before it to justify ordering the execution of his entire suspended sentence, and therefore, his sentence should be reversed and this case remanded for re-sentencing.

We review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion. Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances before the court. Id. If a trial court finds that an individual has violated the terms of his or her probation, the court may "[o]rder execution of all or part of the sentence that was suspended at the time of initial sentencing." Ind. Code § 35-38-2-3(g)(3). Because a total of seven years of Land's sentences for nonsupport of a dependent child and escape were suspended, under Ind. Code § 35-38-2-3(g)(3), the maximum sentence the trial court could have imposed in this case was seven years.

The record reveals that after pleading guilty to nonsupport of a dependent child in February 2006, the trial court ordered Land to participate in a work release program.

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Here, Land made no offer of proof at the May 30, 2008, revocation hearing as to what he would have said in his statement. The content of any statement Land would have made is also not clear from the context of the hearing. Land testified that he went to Virginia to straighten out his life with his fiancé and his daughter. Nothing in Land's testimony made it clear that he needed to go to Virginia to protect his daughter from her crack-addicted mother. Land's failure to make an offer of proof is fatal to his claim. See id. (defendant's failure to make an offer of proof explaining why he violated the terms of his probation was fatal to his claim that his due process rights were violated by the trial court's denial of his right to allocution).

Land violated the rules of the program on April 15, 2006, when he did not return to work release. This led to Land being charged with and ultimately pleading guilty to escape.

After completing the executed portion of his sentence, Land was released on probation. Land reported to probation for a few months, but sometime in early 2007, he decided to leave Indiana for Virginia so that he could straighten out his life with his fiancé and daughter. Land testified that while in Virginia he worked for his fiancé's father, suggesting that to some extent Land had established himself in Virginia and had no intention of returning to Indiana anytime soon. Additionally, Land testified that he did not pay child support for his child in Indiana while he was in Virginia. Because Land did not report to probation, the State filed petitions to revoke Land's probation in May 2007. Nearly a year passed after the State's petitions to revoke Land's probation were filed before Land turned himself in to Virginia authorities.

"Probation is a favor granted by the State, not a right to which a criminal defendant is entitled." Sanders, 825 N.E.2d at 955. Land's behavior shows disregard for and an unwillingness to abide by the terms of his probation. Based on the facts before us, we cannot say that the trial court abused its discretion by ordering execution of the seven years of Land's sentence that had previously been suspended.

For the foregoing reasons, we affirm the revocation of Land's probation and the sentence imposed by the trial court.

Affirmed.

CRONE, J., and MAY, J., concur.