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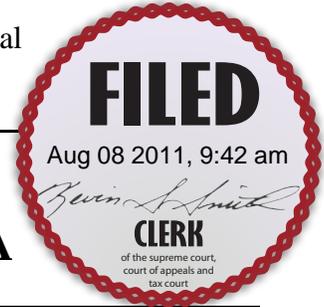
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**IN THE
COURT OF APPEALS OF INDIANA**

PAUL DAVIS,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

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No. 49A02-1012-CR-1445

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Eichholtz, Judge
Cause No. 49G20-0210-FA-258420

August 8, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

Following a probation revocation hearing, Paul E. Davis was found in violation of his probation and ordered to serve the entirety of his previously-suspended sentence. Davis raises one issue for our review: whether pursuant to Post-Conviction Rule 1(10)(b) the trial court erred when it ordered that Davis serve fourteen years of his suspended sentence. Concluding the trial court did not err, we affirm.

Facts and Procedural History

The underlying facts of this case were set out in a previous opinion of this court:

On October 11, 2002, the State charged Davis with six counts of dealing in methamphetamine as a [C]lass A felony; two counts of possession of methamphetamine as a [C]lass C felony; one count of possession of a controlled substance as a [C]lass D felony; and one count of resisting law enforcement as a [C]lass D felony. On or about December 11, 2003, Davis and the State entered into a plea agreement, whereby Davis agreed to plead guilty to Count I, dealing in methamphetamine as a [C]lass A felony; and Count III, possession of methamphetamine as a [C]lass C felony. In exchange, the State agreed to dismiss the remaining charges. As to sentencing, the parties agreed to an executed sentence of six to twenty years on Count I and an executed sentence of no more than six years on Count II, with the sentences to run concurrently. The trial court accepted the plea agreement on January 6, 2004.

The trial court held a sentencing hearing on February 10, 2004. On Count I, it sentenced Davis to twenty years with eight years suspended. On Count II, it sentenced Davis to six years, to run concurrently with Count I. The trial court also ordered Davis to serve five years on probation. On February 8, 2005, the trial court modified Davis'[s] sentence, suspending fourteen years of his twenty year sentence on Count I.

On October 29, 2007, the State filed a notice of probation violation, asserting that Davis had been arrested and charged with [C]lass C felony battery on or about August 20, 2007, under Cause Number 49G05-0708-FC-171545 ("Cause No. 545") and that a probable cause warrant had been issued. The State also alleged that Davis had missed three appointments with his probation officer. The State filed an amended notice on December 4, 2008, further asserting that Davis left the State of Indiana without permission in July of 2008 and that an initial hearing in Cause No. 545 had been held.

The trial court held a probation revocation hearing on December 4, 2008, during which the trial court and Davis'[s] counsel engaged in the following colloquy:

[Court]: All right, we'll show the defendant appears on a violation of probation. And allegations are that he's got – I don't know what he's got.

[Counsel]: I'll make it short for you Judge. We'll admit the new arrest under [Cause No. 545]. Admit that he was arrested only. The agreement is twelve years DOC contingent also upon the fact that if he beats that Court Five case, we would be allowed to come back to have the twelve years revisited.

[Court]: Yes?

[Counsel]: That is the agreement. The agreement is revisited not automatically changed.

...
[Court]: All right, we'll show twelve years. Probation revoked. Twelve years The Court will maintain jurisdiction depending on the outcome of the other case.

Thus, the trial court revoked Davis'[s] probation and imposed a sentence of twelve years. With the exception of a brief discussion regarding credit time, the above exchange constituted the entire hearing.

Davis filed a motion to correct error on January 6, 2009. Following a hearing on March 26, 2009, the trial court denied Davis'[s] motion.

Davis v. State, 916 N.E.2d 736, 738-39 (Ind. Ct. App. 2009) (citation and footnote omitted), trans. denied. Davis appealed the revocation of his probation. This court held that Davis's admission to being arrested while on probation without admission to the probable cause for the arrest was insufficient to support a probation revocation, and as such constituted a denial of minimum due process of law. Id. at 740.

On remand, the State amended the notice of probation violation to indicate that the charges in Cause No. 545 had been dismissed without prejudice and to add an allegation that Davis had been charged with Class D felony strangulation and Class A misdemeanor battery under Cause Number 49G05-0812-FD-281473 ("Cause No. 473"). On July 1, 2010, at the remand revocation hearing, the trial court heard evidence on the allegations

of the notice of probation violation. On July 15, 2010, at the disposition hearing, the trial court stated that it found the State had proved by a preponderance of the evidence that Davis had committed the battery alleged in Cause No. 545 and that there was probable cause to arrest him for the crimes alleged in Cause No. 473. The trial court also noted that Davis admitted to failing to report to probation. The trial court therefore revoked Davis's probation and ordered that he serve the entirety of his previously-suspended sentence.

On August 11, 2010, Davis filed a motion to correct error, arguing that the trial court was precluded from imposing a greater sentence on remand and seeking a term of no more than twelve years executed for the probation violation. On December 1, 2010, the trial court denied Davis's motion as to this issue.¹ Davis now appeals the disposition.

Discussion and Decision

I. Standard of Review

“Probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment.” Abernathy v. State, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006). Trial courts grant probation and set conditions, and may revoke it if those conditions are violated. Id.

Because revocation of probation is in the nature of a civil proceeding, the State must prove an alleged violation only by a preponderance of the evidence. Ind. Code § 35-38-2-3(e). On appeal we do not reweigh the evidence or judge the credibility of witnesses, and we look only to the evidence that supports the judgment and any

¹ Davis's motion to correct error also raised an allegation of error as to the trial court's finding he had violated his probation with respect to Cause No. 473. The trial court agreed with Davis as to this issue, finding the violation had not been timely filed by the State and rescinding its finding as to that allegation.

reasonable inferences flowing therefrom. Baxter v. State, 774 N.E.2d 1037, 1044 (Ind. Ct. App. 2002), trans. denied.

We review a trial court's decisions in a probation revocation proceeding for an abuse of discretion. Woods v. State, 892 N.E.2d 637, 639 (Ind. 2008). An abuse of discretion occurs if the decision misinterprets the law or is against the logic and effect of the facts and circumstances before the trial court. State v. Cozart, 897 N.E.2d 478, 483 (Ind. 2008); Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007).

II. Applicability of Post-Conviction Rule 1(10)(b)

In arguing the trial court erred in imposing the full suspended sentence after he violated his probation, Davis relies on Post-Conviction Rule 1(10)(b), which states:

If a sentence has been set aside pursuant to this rule and the successful petitioner is to be resentenced, then the sentencing court shall not impose a more severe penalty than that originally imposed unless the court includes in the record of the sentencing hearing a statement of the court's reasons for selecting the sentence that it imposes which includes reliance upon identifiable conduct on the part of the petitioner that occurred after the imposition of the original sentence, and the court shall give credit for time served.

P-C.R. 1(10)(b). Davis contends the rule applies to his case based on his observation that in Fields v. State, 852 N.E.2d 1030 (Ind. Ct. App. 2006), trans. denied, this court stated:

We note that Post-Conviction Rule 1(10)(b) says that it applies when "a sentence has been set aside pursuant to this rule." Fields's conviction was set aside on direct appeal and not under the Post-Conviction Rules. However, our supreme court has cited this rule with approval in the direct appeal context. Hicks v. State, 729 N.E.2d 144, 146 (Ind. 2000).

Id. at 1032 n.2. However, Davis does not satisfactorily explain why, given this interpretation, Post-Conviction Rule 1(10)(b) applies to the specific circumstances of his case. The Hicks and Fields cases involved sentencing challenges. See Hicks, 729 N.E.2d

at 146 (defendant arguing forty-year sentence for murder plus twenty-year enhancement on resentencing was harsher than original fifty-year sentence plus ten-year enhancement); Fields, 852 N.E.2d at 1033 (defendant asserting his 105-year sentence on remand was more severe than original 150-year sentence because no portion of 105-year sentence was suspended). Davis, however, challenges the revocation of his probation. Our supreme court has explained that

the action taken by a trial court in a probation revocation proceeding is not a “sentencing.” The court is merely determining whether there has been a violation of probation and, if so, the extent to which the court’s conditional suspension of the original sentence should be modified and/or whether additional conditions or terms of probation are appropriate.

Jones v. State, 885 N.E.2d 1286, 1289 (Ind. 2008). The other two cases that Davis cites, Newville v. State, 511 N.E.2d 1047 (Ind. 1987), and Weaver v. State, 676 N.E.2d 22 (Ind. Ct. App. 1997), trans. denied, are also distinguishable from his case, as neither involves revocation of a suspended sentence of a defendant who violated his probation. Given the plain language of Post-Conviction Rule 1(10)(b) and the absence of legal precedent showing the applicability of the rule to Davis’s particular situation, we conclude Davis has not shown that Post-Conviction Rule 1(10)(b) applies in his case.

Even assuming Post-Conviction Rule 1(10)(b) applies, we note that in Gray v. State, 871 N.E.2d 408 (Ind. Ct. App. 2007), trans. denied, this court concluded “that for purposes of [Post-Conviction Rule] 1(10)(b), ‘more severe penalty’ as used in that [rule] refers to the aggregate sentence, not its component parts.” Id. at 415. On February 10, 2004, Davis was sentenced to an aggregate sentence of twenty years with eight years suspended. On February 8, 2005, Davis’s sentence was modified so that, although his aggregate sentence remained twenty years, his suspended sentence was extended to

fourteen years. During the initial probation revocation proceedings, Davis was ordered to serve twelve years of his fourteen-year suspended sentence. On July 15, 2010, after finding that Davis violated the terms of probation on remand, the trial court revoked his probation and ordered him to serve the entire previously-suspended portion of his sentence. Although the component parts of Davis's sentence have varied throughout these proceedings, his aggregate sentence has always been twenty years. Thus, the trial court did not impose a more severe penalty on remand.

To the extent Davis contends the trial court was bound by the terms of the agreement he and the State had at his initial probation revocation hearing, we disagree. At that hearing, Davis admitted only to an arrest while on probation. Thus, Davis was able to successfully appeal the revocation of his probation. An agreement to admit a violation of probation is "akin to a plea agreement." Watson v. State, 833 N.E.2d 497, 500 (Ind. Ct. App. 2009). "A plea agreement is a contract . . . binding upon both parties when accepted by the trial court. Because a plea agreement is a contract, the principles of contract law can provide guidance in the consideration of plea agreements." Griffin v. State, 756 N.E.2d 572, 574 (Ind. Ct. App. 2001) (quotations and citations omitted), trans. denied. The admission by Davis "that he was arrested only," Davis, 916 N.E.2d at 738, was found on appeal to be insufficient to prove a probation violation; therefore, it provided no benefit to the State. Davis's appeal negated a material term of his agreement with the State, and therefore the agreement was not enforceable. At the revocation hearing on remand, the determination that Davis violated his probation was not made based on any agreement, let alone the previous agreement. Instead, the hearing was

contested, with the State presenting evidence to the trial court regarding the allegations, including an additional allegation added after remand.

Under these circumstances, the trial court proceeded to review the evidence of Davis's probation violation. The trial court concluded Davis violated the conditions of his probation by committing battery in Cause No. 545. Although the charges based on that battery were dismissed because the victim had been unavailable to testify, even in instances where the charges underlying a petition for probation revocation have been dismissed, a defendant may still have his probation revoked. Cooper v. State, 917 N.E.2d 667, 674 (Ind. 2009). Therefore, the trial court revoked Davis's probation and ordered he serve his suspended sentence. Indiana law defines the boundaries of the trial court's authority in this type of case: "Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled. The trial court determines the conditions of probation and may revoke probation if the conditions are violated." Prewitt, 878 N.E.2d at 188 (citations omitted). Furthermore, "the [trial court] judge should have considerable leeway in deciding how to proceed." Id. Here, the trial court found that Davis violated the conditions of his probation by committing a new offense. Davis, without provocation, beat an unarmed man with a metal rod fracturing the man's orbital bones. Indianapolis Metropolitan Police Officer Brad Harvey found the victim lying on the ground unconscious with abrasions, cuts, and blood running from his mouth and nose. Considering the logic and effect of the facts and circumstances of this case, the trial court did not abuse its discretion when it revoked Davis's probation and ordered Davis to serve the entirety of his previously-suspended sentence.

Conclusion

Davis's contention that Post-Conviction Rule 1(10)(b) applies to the circumstances of his case is not supported by Indiana law. The trial court did not abuse its discretion when it ordered that Davis serve the entire fourteen years of his suspended sentence.

Affirmed.

NAJAM, J., and CRONE, J., concur.