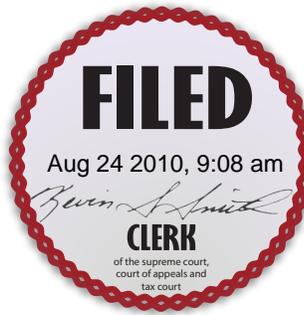


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

SHANE SCHMUTTE,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A04-0912-CR-693

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0702-FC-31878

August 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Shane Schmutte appeals the trial court's revocation of his probation. We affirm.

Issues

We address the following issues raised in the parties' briefs:

- I. Did the trial court abuse its discretion when it revoked Schmutte's probation?
- II. Did Schmutte voluntarily, knowingly, and intelligently waive his right to counsel?
- III. Did the trial court abuse its discretion when it ordered Schmutte to execute his previously suspended sentence?

Facts and Procedural History

On February 29, 2008, Schmutte pled guilty to three counts of class C felony robbery.

On March 28, 2008, the trial court sentenced Schmutte to five years of imprisonment and two years suspended to probation, with 366 days' credit time and restitution. Schmutte was released to probation on June 25, 2009. Schmutte's probation terms required that he submit to drug and alcohol testing and that he pay ten dollars per test. Schmutte's first "baseline" urine drug screen was scheduled for July 1, 2009, but he missed the drug screen. Tr. at 17. Despite having worked for several weeks after his release from prison, he claimed his reason for missing the test was his lack of money to pay the fee. *Id.* Schmutte did not report to any of his ten scheduled urine drug screens while on probation. Appellant's App. at 125; Tr. at 13-14.

On September 22, 2009, the probation department issued a notice of administrative hearing regarding Schmutte's noncompliance with his urine drug screens and financial

obligation. At the hearing, Schmutte admitted to using marijuana on September 20, 2009. Appellant's App. at 125. Because Schmutte admitted using marijuana and claimed that being homeless resulted in financial difficulties, the probation department scheduled urine drug screens for October 5, 2009, and October 19, 2009.¹ *Id.* Schmutte agreed to make regular monthly payments for restitution, assuming that he remained employed, and he was made aware that future noncompliance would result in a notice of probation violation. *Id.*

Schmutte did not report to his scheduled urine drug screen, and on October 14, 2009, the probation department filed a notice of probation violation for "fail[ing] to report to the Drug Lab as directed on 10/5/09." *Id.* at 126. On November 2, 2009, the trial court held an initial probation violation hearing, at which it informed Schmutte of his right to an attorney at a contested hearing at no cost to him, that it was the probation department's burden to prove a violation by a preponderance of the evidence, and that if the court found a violation he could be subjected to all or part of his suspended sentence. Schmutte stated that he understood those rights but did not need an attorney. Schmutte admitted that he did not go to the drug lab, but he claimed that "the only thing that [the] violations [were] about [was] money" and asked the court to find him indigent with regard to his drug lab costs but did not ask to be found indigent with regard to his restitution. Tr. at 7-8. When the trial court asked Schmutte why he had never asked the court to find him indigent with regard to his drug lab costs, he stated that he was working with the probation department and had not been

¹ When Schmutte disclosed to the probation department at the administrative hearing that he would test positive for marijuana, the probation department gave him a couple weeks to get the marijuana out of his system "in order not to set him up to fail." Tr. at 13.

informed that there were procedures available to him to take drug tests without cost. *Id.* at 9. The court continued the hearing until November 6, 2009.

At the November 6 hearing,² a probation officer testified that Schmutte was not told at the administrative hearing about procedures for being declared indigent for drug test costs because Schmutte had stated that he was going to begin a new job and would not have difficulty paying the fees for the October drug tests. *Id.* at 12-14. The trial court found that Schmutte admitted to violating his probation. The trial court executed Schmutte's entire suspended sentence, with nine days' credit for time served. On November 9, 2009, the trial court held another hearing to inform Schmutte of his right to appeal the revocation and sentence.

Discussion and Decision

I. Revocation of Probation

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). The violation of a single condition of probation is sufficient grounds for a trial court to revoke probation. *Rosa v. State*, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005). 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 v. State*, 892 N.E.2d 637, 640 (Ind.

² On November 4, 2009, the probation department filed an amended notice of probation violation. Appellant's App. at 127. However, the trial court did not review the notice until November 12, 2009, when Schmutte's probation had already been revoked, so the court declared the notice moot. *Id.* at 27.

2008). First, the court makes a factual determination that a condition of probation was violated. *Id.* Second, if a violation of probation is 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 find an abuse of discretion only 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 the trial court's judgment 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.*

Schmutte claims that the trial court revoked his probation due to his inability to pay his drug screen fee, which he argues is a violation of his due process rights under the Fourteenth Amendment. *See Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (holding that when fine or restitution is imposed as condition of probation and probationer cannot pay fine through no fault of his own, it is contrary to fundamental fairness required by Fourteenth Amendment to deprive probationer of his conditional liberty by revoking probation). Schmutte cites Indiana Code Section 35-38-2-3(f), which states that “[p]robation may not be revoked for failure to comply with conditions of a sentence that imposes financial obligations on the person unless the person recklessly, knowingly, or intentionally fails to pay.”

Schmutte asserts that he was unable to pay the fee for his drug screens “because of his inability to gain regular employment despite his best efforts.” Appellant’s Br. at 7. Schmutte also argues that there was insufficient evidence to support the revocation of his probation because the State did not prove that he was actually able to pay the fees as required. *See Szpunar v. State*, 914 N.E.2d 773, 779 (Ind. Ct. App. 2009) (finding that State had burden of proof regarding probationer’s ability to pay probation user fees).

We disagree. The probation department did *not* cite Schmutte’s alleged probation violation as his inability to pay his drug screen fees. The notice of probation violation alleged that Schmutte “failed to report to the Drug Lab as directed on 10/5/09.” Appellant’s App. at 126. When asked whether he went to the drug lab, Schmutte admitted, “No, I didn’t go.” Tr. at 7.

Here, Schmutte claimed that he never reported for a scheduled drug test because he did not have the money to pay the drug screen fees, yet he also claimed that he was employed when he was released from prison and was able to “save[] up all [his] little pennies to buy a car.” *Id.* at 8.³ Despite having sufficient funds to purchase a vehicle, Schmutte neglected to

³ The trial court heard the following evidence regarding Schmutte’s employment:

Mr. Schmutte: [W]hen I first got out [of prison] I was working every week, man. I was working every week, I saved up all my little pennies to buy a car, man.

....

Mr. Schmutte: [W]hen I first got out of prison I got a job immediately, didn’t I, Ms. Pitstick [probation officer] –

Ms. Pitstick: Uh-huh.

report to *any* of his ten scheduled drug screens because he purportedly did not have money to pay the drug screen fee. Schmutte claims that he did not know that he could ask the court to find him indigent with regard to his drug screen fee because he thought the probation department was his only “avenue” and that they were “working” with him. *Id.* at 9-10. Even though the probation department tried to work with Schmutte because he admitted to using marijuana and promised that he would be able to pay for the October drug screens because “he was going to be getting a painting job and money was not an issue at that point[,]” he still did not take advantage of the probation department’s accommodations and failed to report to the drug screen. *Id.* at 13. Given Schmutte’s admitted marijuana use, repeated excuses, and failure to report for any of his drug screens, the trial court did not abuse its discretion when it revoked Schmutte’s probation.

II. Waiver of Right to Counsel

A probationer has a statutory right to representation by counsel in a probation revocation hearing. *See* Ind. Code § 35-38-2-3(e). However, that right may be waived so long as the probationer’s waiver is “knowing, intelligent, and voluntary.” *Greer v. State*, 690 N.E.2d 1214, 1216 (Ind. Ct. App. 1998), *trans. denied*. When a probationer decides to proceed without counsel, he “must be fully advised regarding the dangers and disadvantages

Mr. Schmutte: I showed her my check stubs and everything, (inaudible), but I bought a car ... [but] they took the car back I lost my job because of that, man, because I couldn’t go to work.

Tr. at 8, 15-16. Furthermore, Schmutte stated that his car was purchased from a car lot, but there was a lien on the title of the car and it was taken away from him. Tr. at 16. Schmutte was arrested as a result of this, but no charges were filed because he had proper documentation showing that he purchased the car. *Id.*

of self-representation.” *Hagy v. State*, 639 N.E.2d 693, 694 (Ind. Ct. App. 1994). However, when a probationer chooses to admit his probation violation, it is unnecessary to warn him of the “pitfalls of self-representation, for those pitfalls exist only when he is confronted with prosecutorial activity which is designed to establish his culpability.” *Greer*, 690 N.E.2d at 1217. *Cf. Hagy*, 639 N.E.2d at 694-95 (finding that probationer was entitled to be advised of pitfalls of self-representation because there was no indication that she intended to admit to her probation violation).

Schmutte contends that he did not knowingly, intelligently, and voluntarily waive his right to counsel at his probation revocation hearing because he was not advised of the pitfalls of self-representation. Here, after the trial court informed Schmutte that he could be required to serve all or part of his two-year suspended sentence if found to have violated his probation, it advised him of his right to a contested hearing and right to an attorney at that contested hearing. Tr. at 4-5. The trial court also advised Schmutte that the probation department must prove the violation by a preponderance of the evidence and that if that burden is satisfied he may have to serve all or part of his “backup time.” *Id.* at 5. Schmutte stated that he understood these rights. *Id.* Again, the trial court advised Schmutte of his right to an attorney at his contested hearing and that if he could not afford to hire a lawyer then one would be appointed at no cost to him. *Id.* When asked whether he understood, Schmutte stated, “Absolutely.” *Id.* at 5-6. When asked if he needed an attorney, Schmutte stated, “No.” *Id.* at 6. As the trial court tried to schedule a contested hearing, Schmutte interrupted and stated that the “only thing [his] violation [was] about [was] money.” *Id.* at 7. However,

once the trial court asked whether he went to the drug lab, which was the alleged probation violation, he admitted “No, I didn’t go.” *Id.* at 6-7. By admitting his probation violation, Schmutte was no longer faced with the State’s attempt to establish culpability, so it was unnecessary to advise him of the pitfalls of self-representation. *See Greer*, 690 N.E.2d at 1218-19.

III. Execution of Suspended Sentence

Schmutte also takes issue with the trial court’s decision to execute his two-year suspended sentence. “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*, 868 N.E.2d at 440. We review a trial court’s decision to revoke probation and its sentencing decision in a probation revocation proceeding for an abuse of discretion. *Sanders*, 825 N.E.2d at 956. We cannot review the appropriateness of the sanction because Indiana Appellate Rule 7(B), which allows a reviewing court to revise a sentence if it finds the sentence inappropriate in light of the nature of the offense and the character of the offender, does not apply to probation revocation proceedings. *Prewitt v. State*, 878 N.E.2d 184, 187-88 (Ind. 2007). We will find an abuse of discretion only if the trial court’s decision is clearly against the logic and effect of the facts and circumstances. *Guillen*, 829 N.E.2d at 145.

Schmutte argues that the trial court’s execution of his entire previously suspended sentence was an abuse of discretion because “this is not a case in which any of the typical benchmarks justifying imposition of an entire backup sentence are met.” Appellant’s Br. at

15. Schmutte asserts that the execution of a probationer's entire suspended sentence is generally reserved for cases in which the violations are many and severe.

We disagree. The trial court may require a probationer to serve his previously suspended sentence as long as it follows the procedures outlined in Indiana Code Section 35-38-2-3. *Carneal v. State*, 859 N.E.2d 1255, 1257 (Ind. Ct. App. 2007), *trans. denied*. Furthermore, the trial court was not required to give reasons why it chose to impose the particular punishment that it did for the probation violation. *See Bussberg v. State*, 827 N.E.2d 37, 43 (Ind. Ct. App. 2005), *trans. denied*. Here, the trial court's decision to execute two years of Schmutte's previously suspended sentence was not clearly against the logic and effect of the facts and circumstances given that Schmutte failed to report multiple times to his drug screens despite efforts by the probation department to work with him so that he would remain in compliance with his probation. Consequently, we affirm.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.