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IN THE
COURT OF APPEALS OF INDIANA

JAMES J. DUCHENE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A01-1012-CR-679
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D3-0605-FC-1611

August 24, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

James J. Duchene ("Duchene") appeals from the trial court's order revoking his probation and imposing the execution of eighteen months of his previously-suspended sentence. Duchene presents the following restated issue for our review: whether the trial court abused its discretion by failing to consider the undue hardship that the revocation and incarceration in the Department of Correction would cause his disabled wife and dependent son.

We affirm.

FACTS AND PROCEDURAL HISTORY

The State charged Duchene with three counts of Class C felony forgery[1], and after pleading guilty to the charges, Duchene was sentenced to six years for each count to be served concurrently, with three years executed and three years suspended to probation. Duchene was also ordered to pay restitution in the amount of $3.528.50, and was fully advised of the conditions of his probation. On September 22, 2010, the State filed a "Notice of Probation Violation" alleging that on September 17, 2010, Duchene was charged with one count of conspiracy to commit theft[2] as a Class D felony, criminal trespass[3] as a Class A misdemeanor, and resisting law enforcement[4] as a Class A misdemeanor, each in violation of the conditions of his probation. Duchene pleaded guilty to one count of conspiracy to

[1] *See* Ind. Code § 35-43-5-2(b).

[2] *See* Ind. Code § 35-43-4-2 (theft); Ind. Code § 35-41-5-2 (conspiracy).

[3] *See* Ind. Code § 35-43-2-2.

[4] *See* Ind. Code § 35-44-3-3.

commit theft and the remaining charges were dismissed. A probation revocation hearing was held on November 15, 2010.

Duchene testified that he had been employed at Best Western where he earned minimum wage, but had recently been laid off from that employment. While employed, however, Duchene made no restitution payments. Duchene also testified that he resides with his wife, who has a disability, and his fifteen-year-old son. He stated that further incarceration would be a hardship on his wife and son. At the probation revocation hearing, Duchene's probation officer recommended the revocation of Duchene's probation and that he serve the remainder of his previously-suspended sentence. The trial court noted that Duchene had been convicted of conspiracy to commit theft during his probationary term, revoked Duchene's probation, and ordered him to serve eighteen months of his previously-suspended sentence.

Duchene now appeals.

DISCUSSION AND DECISION

Duchene appeals from the trial court's order revoking his probation and ordering him to serve eighteen months of his previously-suspended sentence. A probation revocation hearing is in the nature of a civil proceeding and a violation only has to be proven by a preponderance of the evidence. *Whatley v. State*, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006). When reviewing an appeal from the revocation of probation, we consider only the evidence most favorable to the judgment, and we will not reweigh the evidence or judge the credibility of witnesses. *Sanders v. State*, 825 N.E.2d 952, 957 (Ind. Ct. App. 2005).

"Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled." *Prewitt v. State*, 878 N.E.2d 184, 187 (Ind. 2007). The trial court imposes the conditions of probation and may revoke it if those conditions are violated. *Id.* Because probation revocation does not deprive a defendant of his absolute liberty, but only his conditional liberty, he is not entitled to the full due process rights afforded to a defendant in a criminal proceeding. *Piper v. State*, 770 N.E.2d 880, 882 (Ind. Ct. App. 2002). Criminal defendants must agree to abide by specific conditions imposed by the court to avoid imprisonment. *Mathews v. State*, 907 N.E.2d 1079, 1081 (Ind. Ct. App. 2009).

"Generally, violation of a single condition of probation is sufficient to revoke probation." *Brabandt v. State*, 797 N.E.2d 855, 860-61 (Ind. Ct. App. 2003). "We review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion." *Carneal v. State*, 859 N.E.2d 1255, 1257 (Ind. Ct. App. 2007). An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. *Whatley*, 847 N.E.2d at 1009.

Here, the trial court based its decision to revoke Duchene's probation on Duchene's conviction of a Class D felony during his probationary term. The evidence in the record supports that finding, and the trial court did not abuse its discretion by revoking Duchene's probation on that basis. Duchene, however, argues that the trial court abused its discretion by failing to consider the undue hardship further incarceration would cause his wife and son, and contends that this court should create a new exception to the general rule that the trial court is not required to consider aggravators and mitigators in probation revocation

proceedings. Indiana Code section 35-38-2-3 does not require a trial court to balance aggravating and mitigating circumstances when considering sentencing upon a finding of a probation violation. *Mitchell v. State*, 619 N.E.2d 961, 963 (Ind. Ct. App. 1993), *overruled in part by Patterson v. State*, 659 N.E.2d 220, 223 (Ind. Ct. App. 1995) (trial court should consider probationer's mental health in probation revocation proceeding). While it may be appropriate for the trial court to consider such undue hardship when determining the appropriate disposition for a violation of its probation order, we have not imposed such an obligation on the trial court and decline to do so now.

Furthermore, Duchene waived any error by failing to present evidence at his probation revocation hearing establishing undue hardship, beyond his statement that his wife was disabled. There was no evidence before the trial court of the extent of Duchene's wife's disability, whether she received disability compensation, or if she can be employed despite her disability. "Many persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). As there was no evidence before the trial court to support Duchene's assertion that he provides financial support for his wife and son, we conclude that the trial court did not abuse its discretion by failing to consider that Duchene's incarceration would result in undue hardship to his family.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.