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IN THE
COURT OF APPEALS OF INDIANA

JAMES RICHARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A02-0905-CR-466
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Warren Haas, Judge
Cause No. 27D03-0607-FD-599

September 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

James Richard appeals the revocation of his probation and the execution of his previously suspended sentence. Richard presents the following restated issue for our review: Did the trial court err by denying Richard's motion to dismiss the probation revocation petition alleging violations during an agreed-upon extended period of probation?

We affirm.

Richard pleaded guilty to possession of cocaine as a class D felony,[1] and the trial court, pursuant to the fixed plea agreement, sentenced Richard to two years with all but sixty days suspended with twenty-two months of probation and credit for thirty-one actual days served. Richard signed the conditions of probation and immediately began serving his probation. Richard agreed to pay $125.96 in restitution, to obtain a substance abuse evaluation, and to follow any treatment recommendations, *inter alia*, as conditions of probation. The original term of Richard's probation was due to expire on September 6, 2008.

On June 20, 2008, Richard and his probation officer, Jovan McClarty, entered into a written agreement to extend Richard's probation for a period of six months to allow Richard to pay restitution, pay probation fees, and to complete treatment recommendations "in lieu of a Petition to Revoke Suspended Sentenced [sic] being filed against [Richard]." *Appellant's Appendix* at 12. The trial court signed and accepted the agreement to extend Richard's probation until March 6, 2009.

On October 14, 2008, Richard and McClarty entered a violation of probation

[1] *See* Ind. Code Ann. § 35-48-4-6(a) (West, PREMISE through Public Laws approved and effective through 4/20/2009).

agreement which was signed and approved by the trial court. Richard admitted that he had used alcohol and failed a drug test on July 3, 2008. Richard agreed to attend two self-help meetings a week. On December 11, 2008, McClarty filed a petition to revoke Richard's probation alleging that he failed to report to McClarty as directed on November 10, 14, and 20, tested positive for cocaine and methadone on October 28, and during a field visit of Richard's residence on November 13, Richard had four beers in his refrigerator and tested positive for alcohol at .008% on a portable breath test. The petition also indicated that Richard had not verified that he obtained a substance abuse evaluation or completed any recommended treatment. Further, there was no verification that Richard attended the self-help meetings required under the October 14th agreement.

At the February 23, 2009 hearing on the petition to revoke Richard's probation, Richard objected to the petition arguing that his probation had expired prior to the commission of the alleged violations and that the agreement to extend probation was ineffective because it was entered into several months prior to the end of his probation, for financial obligations, and without counsel or an advisement of the right to counsel. The trial court noted that the agreement was approved by the presiding judge on June 20, 2008, and denied Richard's motion to dismiss the petition.

Richard testified in an offer of proof and in his testimony during the evidentiary phase of the hearing that he was not represented by counsel or advised that he could or should seek the advice of counsel when he entered into the agreement to extend his probation. Richard stated that McClarty "just told me he had a paper for me to sign and that it was for my

extension of my probation . . . because I hadn't paid my fines [restitution]." *Transcript* at 5. When Richard's counsel asked Richard whether he had an option to sign the agreement he stated, "No, he told me if, uh, I sign that, that way I would a little bit more time to get that, the forty (40) some dollars for [a drug treatment evaluation]." *Id*. at 18. McClarty confirmed that the purpose of the agreement to extend Richard's probation was to allow Richard more time to complete treatment and pay restitution. The treatment center confirmed to McClarty that Richard had not completed the required evaluation or treatment.

McClarty testified during the evidentiary hearing that Richard failed to report as scheduled for the meeting dates alleged in the petition, tested positive for and possessed alcohol on November 13, failed a drug screen on October 28, and had not verified that he completed the drug treatment evaluation as required. After taking judicial notice of the court's record, the trial court found that Richard violated the terms of his probation as alleged in the petition. The trial court revoked Richard's probation and ordered him to serve his suspended sentence. Richard now appeals.

Richard attacks the validity of the agreement to extend his probation by arguing that the trial court could not modify the terms of or extend Richard's probation without a hearing at which a violation of a term of probation was found and at which he was represented by counsel. He cites to *Gilreath v. State*, 748 N.E.2d 919 (Ind. Ct. App. 2001) to support his argument, but that case is distinguishable.

In *Gilreath*, a motion to extend probation, not a petition to revoke, was filed by the probation officer one day after the original probationary term had expired, and was accepted

by the trial court four days after the original term of Gilreath's probation had expired. We held that Gilreath's due process rights were violated by the absence of a hearing before the trial court issued its order extending Gilreath's probation, treating the order on the motion to extend probation as an order on a petition to revoke probation, arguably the only action which could have been taken. *See* Ind. Code § 35-38-2-3(a) (West, PREMISE through Public Laws approved and effective through 4/20/2009) (probation revocation possible if probation condition violated during probationary period and petition filed within forty-five days of notice to State of violation).

Here, Richard entered into an agreement with his probation officer to extend his probation in lieu of having a petition to revoke his probation filed, and to provide Richard with more time to comply with the terms of his probation, including paying restitution, but also obtaining an evaluation for substance abuse. That agreement to extend his probation, which was filed months before the original probationary period expired, was then approved by the trial court.

We have noted the following about agreements to modify probation entered into between the probation officer and the defendant, and accepted by the trial court:

> On April 30, 2004, Watson entered into a Stipulation of Probation Modification Agreement, which was signed not only by Watson but also by his probation officer, the chief probation officer, and, most importantly, the trial court. The probation modification agreement provided that the State would forego revocation proceedings if Watson complied with the conditions of his probation.
>
> [T]he trial court . . . was a party to the April 30, 2004, Stipulation of Probation Modification Agreement, which we find to be akin to a plea agreement. That is, Watson and the State, through the probation department, agreed to a

> particular punishment, and in turn the State agreed to forego revocation proceedings. The trial court then approved the agreement. A plea agreement is contractual in nature, binding the defendant, the State, and the trial court.
>
> We understand that probation agreements, such as the one in this case, are common. These agreements help alleviate court congestion and give an important tool to trial courts to monitor minor probation violations.

Watson v. State, 833 N.E.2d 497, 500-01 (Ind. Ct. App. 2005). Watson's situation was different from Richard's situation and required reversal because the State, while attempting to have Watson's probation revoked, introduced evidence of violations which had occurred prior to the agreement, not new probation violations occurring after the agreement.

Here, unlike in *Gilreath*, the modification of probation extending Richard's probation was entered into by the probation officer and Richard, and was accepted by the trial court during the original period of probation. The agreement was like the many agreements we acknowledged in *Watson* as being akin to a plea agreement. The State agreed to forego filing a petition to revoke Richard's probation in exchange for an extended probationary period. Richard did not have to be advised of the right to, or in fact be represented by, counsel for the agreement to be effective. Furthermore, because the State was agreeing to forego filing allegations of violations, no hearing was required.

Unlike *Watson*, the violations alleged in the petition to revoke Richard's probation occurred after the agreement and during the extended period of probation. At Richard's probation revocation hearing he was represented by counsel and afforded due process rights. The trial court properly denied Richard's motion to dismiss the petition to revoke his probation challenging the validity of Richard's agreement to extend his probation.

Judgment affirmed.

BAKER, C.J., concurs.

RILEY, J., dissents with separate opinion.

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RILEY, Judge, dissenting with separate opinion

I respectfully dissent. I would hold that Richard's right to counsel was violated when he was presented with the agreement to extend probation and not given the opportunity to consult with counsel prior to signing it. In *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972), the Supreme Court held that probationers were afforded certain *minimum* rights:

> The minimum requirements of due process 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 factfinder as to the evidence relied on and reasons for revoking probation.

In *Eaton v. State*, 894 N.E.2d 213, 217 (Ind. Ct. App. 2008), *trans. denied*, we discussed the "overriding importance of the right to counsel" in context of probation violation proceedings. We explained that in distinction to the rights enunciated in *Morrissey*, the right to counsel "will often be the vehicle by which all the other rights are protected." *Id*. at 218. This seems ever so true here. Richard's probation was extended "in lieu of a Petition to Revoke Suspended Sentenced [sic] being filed against me." (Appellant's Br. p. 2). The majority relies upon this alleged impending probation violation as the glue which holds the "agreement" for the extension of probation together. However, the reason for this allegedly impending probation violation was payment of restitution and probation fees, which Richard apparently did not have the money to pay. If he had been afforded counsel before entering into the agreement, counsel likely would have informed him 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." Ind. Code 35-38-2-3(f). Thus, the danger in the majority's approach in this case will be that those too poor to afford to pay restitution fees, more than likely the same who cannot afford to pay for counsel, will be kept perpetually on probation if they are not shrewd enough to see the deficiencies in the threats from probation officers without advice from counsel. This, I cannot sanction.