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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL C. BREWER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 36A01-0901-CR-21
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JACKSON CIRCUIT COURT
The Honorable William E. Vance, Judge
Cause No. 36C01-0310-FB-73

October 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Michael C. Brewer appeals the revocation of his probation. We affirm.

Issues

Brewer raises two issues on appeal:

I. Whether the denial of his motion to continue the revocation hearing violated his privilege against self-incrimination; and

II. Whether there was substantial evidence of probative value to prove that Brewer had violated his probation.

Facts and Procedural History

On October 8, 2003, the State charged Brewer with Dealing in Methamphetamine,[1] as a Class B felony.[2] After a judgment of conviction was entered, Brewer was sentenced on April 27, 2007, to twelve years imprisonment with six years suspended and ordered to be placed on supervised probation for three years.

On January 3, 2008, a Jackson County Deputy Sheriff observed a white vehicle make a turn without engaging a turn signal. The deputy turned onto State Road 135 North to follow the vehicle, which then accelerated. In response, the deputy activated the siren and emergency lights on his patrol car. In pursuit of the vehicle, the deputy reached eighty to ninety miles per hour. After driving three to four miles, the white vehicle stopped but when the deputy arrived at the location the car was empty. Shortly thereafter, the deputy received a phone call from Carl Lamb, a Seymour Police Detective. Detective Lamb informed the

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[1] Ind. Code § 35-48-4-1.1.
[2] It is not clear from the record whether this was the only charge filed.

deputy that Brewer had contacted him via cell phone and stated that he had run from police and was hiding in the woods because he was scared that the police would shoot him. Brewer eventually exited the woods and was arrested.

After being read his Miranda rights,[3] Brewer told the deputy that the reason he did not stop was because Charles Fritz Newby ("Fritz"), who Brewer alleged to have been in the vehicle during the chase, had threatened him and told him to keep driving. Brewer also stated that Newby had jumped from the car during the pursuit.

Prior to January of 2008, Brewer had been supplying information regarding Fritz to Detective Lamb. Brewer had been instructed to inform Detective Lamb of any stolen property possessed by Fritz and where Fritz was staying. Although he did not inform Brewer, Detective Lamb testified that his information relationship with Brewer ended once Brewer was arrested on January 3, 2008.

On March 20, 2008, a detective for the Jackson County Sheriff's Office received a phone call from a local citizen, who provided the location of Brewer. Because there was an outstanding arrest warrant for Brewer, the detective ordered two deputies to respond to the Jackson County address provided by the citizen to arrest Brewer.

When the deputies arrived at the address, they observed Brewer exiting the garage on the property. While placing Brewer under arrest, the deputies noticed a very strong odor of

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[3] See Miranda v. Arizona, 384 U.S. 436, 479 (1966) ("He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.").

anhydrous ammonia emanating from the garage. Methamphetamine and a set of scales were found on Brewer's person, and after obtaining a search warrant for the garage, a five gallon bucket that contained a substance that tested positive for methamphetamine, containers of toluene and Liquid Fire, a handgun, as well as other items indicative of a methamphetamine lab were recovered. This garage was the same location where Brewer had previously been investigated for manufacturing methamphetamine between 2000 and 2002.

On April 14, 2008, a petition to revoke Brewer's probation was filed. The petition alleged that, in violation of the conditions of his probation, Brewer had committed new criminal offenses of Dealing and Possession of Methamphetamine and possessed a handgun. After a hearing on the petition, the trial court found that Brewer violated his probation and ordered Brewer to execute the suspended portion of his sentence.

Brewer now appeals.

Discussion and Decision

I. Self-Incrimination

First, Brewer argues that the trial court violated his privilege against self-incrimination[4] by denying his motion to continue until the criminal trials upon which the petition to revoke were completed. Davis v. State specifically addressed the argument that failure to continue a probation revocation hearing until after the resolution of the criminal charges upon which the revocation petition was based violated the Fifth Amendment

[4] Brewer does not specify whether his argument is based on the privilege arising from the federal constitution or the Indiana state constitution.

privilege against self-incrimination of the defendant. 743 N.E.2d 793, 795 (Ind. Ct. App. 2001), trans. denied. The Davis court first noted that there simply is no governmental compulsion for a defendant to testify at the probation revocation hearing when the foundational criminal charges have not been resolved. Id. A defendant has the option of testifying at the hearing, and regardless of that choice, the defendant still has the opportunity to present evidence and witnesses and cross-examine the witnesses of the State. Id. The court also noted the policy reasons that support proceeding with a probation revocation hearing despite pending criminal charges: judicial efficiency in addressing the potential revocation immediately; that probation is a favor rather than a right and that society has an interest in the prompt determination of whether the defendant may pose a danger if left at liberty; and the probation violation hearing provides each side an equal opportunity to test the strength of its witnesses and case for the criminal trial. Id. at 795.

Brewer claims that his situation is distinguishable from Davis because he was a confidential informant for a witness for the State, Detective Lamb. He asserts that due to this relationship, which involved a state actor directing him to collect certain evidence, a greater policy argument exists to require the State to first prove the crimes beyond a reasonable doubt before holding the revocation hearing. Brewer argues that this situation heightens the position of a defendant having to choose between his right to be heard at the revocation hearing and his right to remain silent. "If Brewer had chose[n] to testify at the revocation hearing[,] he would have sacrificed his right to remain silent at the pending criminal trials[] and would have disclosed to the prosecution his trial strategy." Appellant's Brief at 9.

This argument fails. The act of Brewer testifying is not the sole manner in which he can defend himself at the revocation hearing or the only conduit through which his criminal trial strategy could be disclosed. In fact, the cross-examination of Detective Lamb and the closing argument for Brewer specifically referenced the concept that the relationship between Brewer and Detective Lamb is a defense to Brewer's actions. Furthermore, without Brewer testifying, Brewer could have further questioned Detective Lamb as to the details, including the timeframe and methods by which Brewer was to obtain information, of the relationship to further develop a defense. Brewer also had the ability to call witnesses to support such a defense. Based on these circumstances, the denial of the motion to continue did not violate Brewer's privilege against self-incrimination.

II. Evidence Supporting Revocation of Probation

Second, Brewer claims that there is not substantial evidence to support the conclusion that he violated the conditions of his probation. According to Indiana Code Section 35-38-2-1(b), a court may revoke the probation of a defendant if he commits an additional crime. Because a probation hearing is civil in nature, the State need only prove the alleged violations by a preponderance of the evidence. Watson v. State, 833 N.E.2d 497, 500 (Ind. Ct. App. 2005). When reviewing the revocation of probation, we consider only the evidence most favorable to the judgment and will not reweigh the evidence or judge the credibility of the witnesses. Cox v. State, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006). When, as here, the alleged violation is the commission of a new crime, the State does not need to demonstrate that the probationer was convicted of a crime. Whatley v. State, 847 N.E.2d 1007, 1010 (Ind.

Ct. App. 2006). Rather, it only needs to prove that there was probable cause to believe that the defendant violated a criminal law. Id.

Here, the petition to revoke probation alleged that Brewer committed two new crimes and violated a probation condition by possessing a handgun. One of the alleged crimes is possession of methamphetamine. Brewer does not deny the possession. However, he claims that because he was acting as a confidential informant for Detective Lamb that Brewer's possession of a small amount of the drug may have been legitimate. This claim is not supported by the evidence. Detective Lamb testified that he requested Brewer to notify him of information of Fritz's location or possession of stolen property. Thus, there is no evidence that Brewer was instructed to set up a drug buy or was encouraged to participate or be near the production of methamphetamine. Furthermore, there was no one with Brewer when he was arrested at the garage. Finally, the garage was the exact same location where Brewer had previously been investigated for operating a methamphetamine lab. This evidence alone is substantial probative evidence that Brewer violated the conditions of his probation.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.