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# IN THE
# COURT OF APPEALS OF INDIANA

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| MICHAEL B. KERN, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 35A02-0904-CR-304 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas M. Hakes, Judge
Cause No. CR-78-69

**October 20, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Michael B. Kern ("Kern") appeals the revocation of his probation. We affirm.

## Issue

Kern presents the issue of whether the probation revocation was improper because there is a lack of evidence that he was subject to probationary obligations.

## Facts and Procedural History

On December 10, 1979, Kern received a fifty-year executed sentence following his conviction of Burglary, as a Class A felony.[1] On October 1, 1990, the trial court modified Kern's sentence by suspending twenty years, five of which were to be served on probation.

In 2001, Kern's probation was revoked because he committed a new offense, child molesting. The trial court ordered that Kern be imprisoned for four years of the previously-suspended sentence and be on probation for fifteen years thereafter.

On January 5, 2007, the State filed a petition to revoke Kern's probation, alleging that he had been arrested for failure to register as a sex offender. Kern subsequently pled guilty to the crime of failing to register as a sex offender. On March 26, 2007, the trial court conducted a hearing on the petition for probation revocation. At that hearing, the State requested the reinstatement of Kern's suspended sentence in its entirety, while Kern argued for a one-year period of imprisonment followed by probation. The trial court ordered that one and one-half years of Kern's previously-suspended sentence be executed and observed "he will then [be] on probation with all the rules and all the responsibilities." (Tr. 33.) The

[1] Ind. Code § 35-43-2-1.

chronological case summary entry indicates only that Kern was "sentenced on the petition to revoke to a term of one-and-one half (1 ½) years[.]" (App. 11.)

The abstract of judgment[2] sent to the Indiana Department of Correction ("the DOC") indicates that Kerns was to be returned to the trial court for probation following his release from incarceration. However, on February 29, 2008, the DOC released Kern on parole without informing him that he was to return to probation.

On April 25, 2008, the State filed a petition to revoke Kern's probation, alleging that he failed to report to probation upon his release from prison. On April 30, 2008, the State filed an amended petition adding the allegation that Kern had been arrested in Grant County on April 29, 2008 for failure to register as a sex offender.

On March 11, 2009, the trial court conducted an evidentiary hearing on the petition to revoke probation. At that hearing, Kern admitted that he had failed to register as a sex offender when required to do so. However, he argued that the 2007 order could be construed as reinstating one and one-half years of his suspended sentence with no probationary obligations, and further, the DOC's review of available documentation caused the DOC to release him on parole and not probation.

At the conclusion of the March 11, 2009 hearing, the trial court ordered that Kern be imprisoned for the balance of his previously-suspended sentence for Burglary. He appeals.

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[2] This form is not a "judgment of conviction" but is a "form issued by the Department of Correction and completed by trial judges for the convenience of the Department." Robinson v. State, 805 N.E.2d 783, 792 (Ind. 2004).

## Discussion and Decision

Kern argues that the trial court improperly found that he violated a term of his probation and reinstated his suspended sentence, because the "trial court's order from a previous petition to revoke made no mention that [he] was on probation." Appellant's Brief at 1. Kern has conceded that he committed a new offense. However, he claims that the trial court improperly found a probation violation because the record does not clearly and unequivocally show that he was on probation when he committed the new offense. In essence, he challenges the sufficiency of the evidence to support the trial court's revocation decision.

Placement on probation is a conditional liberty and not a right. Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999). A probation revocation hearing is in the nature of a civil proceeding and, therefore, the violation need only be proven by a preponderance of the evidence. Smith v. State, 727 N.E.2d 763, 765 (Ind. Ct. App. 2000).

Indiana Code Section 35-38-2-3(g) provides as follows:

> If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may impose one (1) or more of the following sanctions:
>
> (1) Continue the person on probation, with or without modifying or enlarging the conditions.
>
> (2) Extend the person's probationary period for not more than one (1) year beyond the original probationary period.
>
> (3) Order execution of all or part of the sentence that was suspended at the time of initial sentencing.

We review the trial court's revocation of probation and sentencing decision for an abuse of discretion. Sanders v. State, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. Rosa v. State, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005). If the trial court finds the person violated a condition of probation, it may order execution of any part of the sentence that was suspended at the time of initial sentencing. Stephens v. State, 818 N.E.2d 936, 942 (Ind. 2004). Proof of a single violation of the conditions of probation is sufficient to support a decision to revoke probation. Bussberg v. State, 827 N.E.2d 37, 44 (Ind. Ct. App. 2005), trans. denied.

As Kern points out, the documentary evidence of whether his probation continued after 2007 is conflicting. The CCS notes only the 1 and ½ year term of imprisonment, while the abstract of judgment indicates Kern was to be returned to probation after imprisonment. The oral statement is consistent with the abstract of judgment as opposed to the CCS. When faced with a conflict between oral and written sentencing statements, our supreme court has found it appropriate to examine the entire sentencing record to discern the trial court's intent. See McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007) (rejecting a bright line rule that, in the case of conflict, an oral sentencing statement trumps a written one).

At the 2007 hearing, the trial court stated that one and one-half years of Kern's previously-suspended sentence would be executed and observed "he will then [be] on probation with all the rules and all the responsibilities[.]" (Tr. 33.) This was preceded by Kern's request for a one-year term of imprisonment followed by probation (as opposed to a

request for the elimination of probation). Moreover, the State and Kern proceeded under the assumption that Kern was to be subject to probation after his incarceration, in that Kern was immediately presented with, and re-signed, a Conditions of Probation form showing the "term of probation" as "5/23/2003 to end 5/23/2018." App. 98.

At the revocation hearing in the instant matter, probation officer Marcia Wiblin-Whited testified that she was present at the March 26, 2007 hearing and met with Kern at the conclusion of that hearing. She stated that she "had [Kern] re-sign conditions of probation" and identified State's Exhibit 1 as the document that Kern had signed. (Tr. 91.) Kern also testified, and corroborated Wiblin-Whited's testimony as to their meeting and his signature on the conditions of probation form. Kern affirmed that Wiblin-Whited told him that he would be on probation upon his release.

Accordingly, there is sufficient evidence that Kern, upon his release from incarceration in 2008, was subject to probationary obligations imposed in 2007, including the requirement that he commit no new criminal act.[3] Kern admitted that he failed to register as a sex offender in 2008.[4] As such, the trial court properly revoked Kern's probation.

Affirmed.

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

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[3] Not committing further crimes is a condition of any suspended sentence or probation whether the defendant is specifically informed of such or not. See Boyd v. State, 481 N.E.2d 1124, 1127 (Ind. Ct. App. 1985).

[4] The revocation decision did not rest upon the State's initial allegation, Kern's failure to report to his probation officer upon his release from imprisonment. It is uncontroverted that the DOC informed Kern that he was released to parole and that DOC's search of its internal records revealed no "current probation obligations upon his latest release." (Defendant's Ex. A)