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IN THE
COURT OF APPEALS OF INDIANA

KIMBERLY J. PAYNE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 19A01-0906-CR-262
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DUBOIS SUPERIOR COURT
The Honorable Mark R. McConnell, Judge
Cause No. 19D01-0710-FD-984

October 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Kimberly J. Payne's probation was revoked in two cause numbers for failing drug tests as required by the Dubois County Drug Court Program, and she now appeals the revocation of her probation in one of those cases. Specifically, she contends that the evidence is insufficient to support the revocation of her probation. Finding the evidence sufficient, we affirm.

Facts and Procedural History

In September 2003 the State charged Payne under Cause No. 19D01-0309-FC-785 ("FC-785") with eleven counts of Class D felony obtaining or attempting to obtain legend drugs by fraud.[1] In May 2004 Payne entered into a plea agreement with the State whereby she agreed to plead guilty to three of the counts and the State agreed to dismiss the remaining counts. The trial court sentenced Payne to four years on each count with two years suspended to probation. The court ordered the executed portion to be served on work release. The court then ordered the sentences on each of the counts to be served concurrently to each other but consecutive to a sentence Payne was serving in another cause number.

Shortly after Payne began serving her sentence on work release, the court modified her sentence to home detention and then day reporting. However, in November 2007 the State filed a petition to revoke Payne's probation. Payne admitted that she had violated her probation, and the court extended her probation and ordered that she successfully complete the Dubois County Post-Conviction Forensic Diversion Program,

[1] Ind. Code § 16-42-19-16(1).

which included successful completion of the Dubois County Drug Court Program. Appellant's App. p. 23. The court added that "termination from the Post Conviction Forensic Diversion Program and/or Dubois County Drug Court shall be considered a violation of deft's probation." *Id.* (capitalization omitted).

In October 2007 the State charged Payne under Cause No. 19D01-0710-FD-984 ("FD-984") with Class D felony obtaining or attempting to obtain a legend drug by fraud or alteration.[2] In December 2007 Payne pled guilty as charged, and the trial court sentenced her to three years with two and one-half years suspended to probation. Payne's probation included successful completion of the Dubois County Post-Conviction Forensic Diversion Program and the Dubois County Drug Court Program. Further, the court provided that "termination from the Post Conviction Forensic Diversion Program and/or Dubois County Drug Court shall be considered a violation of deft's probation and violation of the court's stay of deft's nonsuspendable sentence." *Id.* at 6 (capitalization omitted). The court ordered the sentence in this case to be served consecutive to Payne's sentence in Cause No. FC-785.

For approximately the next fifteen months, Payne participated in the Drug Court Program. During this time period, Payne had approximately thirteen diluted urine screens and twelve non-diluted urine screens. Payne's last diluted urine screen was on January 22, 2009. This sample was resubmitted for testing, taking into account the dilution, and the sample tested positive for opiates confirmed as "total morphine." State's Ex. 1. At the next Drug Court staff meeting, the staff members decided to

[2] *Id.*

discharge Payne from the program based upon her history of diluted urine screens, positive test result for opiates, late arrival for appointments, a missed appointment, and failure to report for a breathalyzer.

On February 18, 2009, the State filed a petition to revoke Payne's probation under Cause No. FD-984. The State amended the petition on March 10, 2009.[3] Specifically, the petition alleged that the terms of Payne's probation under Cause No. FD-984 included that Payne (1) was not to purchase, use, or possess alcohol or any illegal drugs or drugs not prescribed to her, (2) shall submit to and pass random urinalysis, breathalyzer, blood, hair, oral fluids, or other tests required by the probation department and be prepared to pay for costs associated with such tests at each appointment, and (3) shall successfully complete the Dubois County Post-Conviction Forensic Diversion Program and the Dubois County Drug Court Program. The State alleged that Payne violated her probation as follows:

> 1. [Payne] tested positive for Opiates (Total Morphine) on a urinalysis drug screen administered by Dubois County Drug Court Program personnel on 1/22/09.
> 2. [Payne] was discharged from the Dubois County Drug Court Program on 2/23/09.

Appellant's App. p. 1. After a hearing, the trial court found that the State established that Payne was properly discharged from Drug Court and that the discharge was grounds for the petition to revoke her probation. *Id.* at 11. In its Commitment Order, the court found that Payne "failed a drug screen on January 22, 2009 and was discharged from the Dubois County Drug Court Program on February 23, 2009." *Id.* at 2. The court modified

[3] The State also filed a petition to revoke Payne's probation under Cause No. FC-785, and Payne appealed the revocation of her probation in that case as well. We are issuing an opinion in that case today, *Payne v. State*, No. 19A01-0906-CR-269 (Ind. Ct. App. Oct. 21, 2009).

Payne's probation by sentencing her to the Department of Correction for 959 days with 959 days suspended to supervised probation. Payne now appeals the revocation of her probation under Cause No. FD-984.

Discussion and Decision

Payne contends that the trial court erred in revoking her probation. There is no right to probation: the trial court has discretion whether to grant it, under what conditions, and whether to revoke it if conditions are violated. *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007), *reh'g denied*. Probation revocation is governed by Indiana Code section 35-38-2-3. A probation revocation hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999), *reh'g denied*. It is well settled that violation of a single condition of probation is sufficient to revoke probation. *Wilson v. State*, 708 N.E.2d 32, 34 (Ind. Ct. App. 1999). If the court finds that the probationer has violated a condition of her probation at any time before the termination of the probationary period and the petition to revoke is filed within the probationary period, then the court may order execution of the sentence that had been suspended. *Wilburn v. State*, 671 N.E.2d 143, 147 (Ind. Ct. App. 1996), *trans. denied*; *see also* Ind. Code § 35-38-2-3(g)(3) ("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: . . . (3) Order execution of all or part of the sentence that was suspended at the time of initial sentencing.").

In addition, when reviewing the sufficiency of the evidence to revoke probation, we consider only the evidence most favorable to the judgment without reweighing that evidence or judging the credibility of the witnesses. *Woods v. State*, 892 N.E.2d 637, 639 (Ind. 2008). If there is substantial evidence of probative value to support the trial court's decision that a probationer has violated any terms of probation, the reviewing court will affirm its decision to revoke probation. *Id.* at 639-40.

As a condition of her probation, Payne was required to successfully complete the Drug Court Program and not use drugs. The State proved by a preponderance of the evidence that Payne violated the terms of her probation by failing drug tests as required by the Drug Court Program. Thirteen of Payne's drug screens were diluted, and the Drug Court Handbook provides that any diluted drug screens are to be considered as positive results. Tr. p. 39. In addition, Payne was instructed that any additional diluted drug screens would be considered as positive results. Moreover, the last diluted drug screen was re-tested, and it tested positive for opiates confirmed as "total morphine."

Nevertheless, Payne argues that the evidence is insufficient to support the revocation of her probation for three reasons. First, she points to the testimony of a medical doctor who testified at her revocation hearing. Dr. Leroy Schaefer, Payne's own doctor, testified at the hearing that Payne came to see him the year before concerning problems she was having with diluted drug screens. Dr. Schaefer also said he performed blood work on Payne to check her creatinine level to see if that was the source of her diluted drug screens. However, Payne's creatinine level and kidney function were normal.

Payne next argues that she was taking over-the-counter cough medications that caused a false positive in her January 22, 2009, drug screen. According to the Drug Court Participation Contract, participants are instructed to notify a caseworker if they are taking an over-the-counter medication. At the hearing, Dr. Schaefer discussed over-the-counter medications that could cause a false-positive in drug tests, such as cough medicines and suppressants that contain dextromethorphan, like Robitussin DM. There is conflicting evidence in the record regarding whether Payne was taking an over-the-counter medication at the time of her January 22, 2009, positive test result. William Clyde Wells, Program Director for Drug Court, testified that on January 5, 2009, there was a case management note that Payne was "feeling better" "after" a week-long bout with the "flu bug." Tr. p. 34. Wells clarified that there was "no note" that Payne was taking any over-the-counter medications "after that point." *Id.* at 35. Payne, however, testified that she became sick "right after New Years" and that she took three over-the-counter cough medications for "approximately . . . two and a half to three weeks," which meant that she quit taking the medications sometime between January 12 and January 19, 2009. Appellant's App. p. 100. Taking the evidence most favorable to the judgment, however, Payne ceased taking any medicine more than two weeks before the January 22, 2009, drug screen which tested positive for morphine.

Finally, Payne argues that she had requested a re-test following the January 22, 2009, positive test result, but she was not allowed to provide a new sample. In support of her argument, Payne points to Paragraph 19 of the Drug Court Participation Contract. Paragraph 19 provides:

> I understand that I may dispute positive test results, but that re-testing will be at my expense, and that I may face more severe sanctions for a re-test that is still positive.

Id. at 15. Program Director Wells testified, however, that "re-testing" means that the same sample is tested again, not that a new sample is taken from the participant and then tested. Tr. p. 42-43. We agree with Wells' reading of this paragraph. Allowing a participant to submit a new sample after a positive test result comes back gives the participant a second bite at the apple. As such, re-testing means that the same sample is tested again, not that the participant is allowed to provide a new sample after a positive test result comes back, thereby giving the participant an unearned chance to clean up his or her act. The evidence is sufficient to support the revocation of Payne's probation under Cause No. FD-984.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.