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FILED
Oct 29 2009, 9:10 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

LEO L. VALLE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 57A03-0905-CR-218
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Michael J. Kramer, Judge
Cause No. 57D02-0903-FD-7

October 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Leo L. Valle appeals the revocation of his probation. Valle raises two issues, which we revise and restate as follows:

I. Whether the trial court violated due process requirements by failing to follow the proper procedure in revoking Valle's probation;

II. Whether the evidence is sufficient to support the revocation of his probation; and

III. Whether the trial court abused its discretion by ordering Valle to serve his suspended sentence.

We affirm and remand.

The facts most favorable to the probation revocation follow. In July 2006, the State charged Valle with possession of cocaine as a class D felony under cause number 57D01-0607-FD-164 ("Cause No. 164"). In January 2007, the State filed an information charging Valle with being a habitual substance offender. In March 2008, Valle pled guilty to possession of cocaine as a class D felony and to being a habitual substance offender. Valle was sentenced to 582 days for the class D felony and to three years suspended to probation for the habitual substance offender adjudication.

On September 20, 2008, Deter and his wife were leaving Cripe's Bar and Grill when Valle and another man approached them and asked for a ride. Deter and his wife declined to give Valle and the man a ride, and then either Valle or the other man hit Deter with a beer bottle. Then both Valle and the other man "started hitting and punching and kicking" Deter, and Deter fell to the ground and "almost blacked out." Transcript at 34. At some point during the attack, Deter's wife went back inside the bar and told Cripe that her husband was "being jumped" in the bar's parking lot. Id. at 25. Cripe asked one of

the waitresses to call the police and went outside to the parking lot. Cripe observed Valle and another man "getting into it" with Deter. Id. at 26. He noticed that Deter's lip had been cut and that there was a broken beer bottle on the ground. Cripe started yelling at Valle and the other man to leave and stated that the police were on the way. Valle then punched Cripe in the left eye, which caused Cripe's left eyebrow area to swell and become black and blue and caused Cripe pain. When Valle and the other man heard police sirens, they "took off." Id. at 39.

On October 24, 2008, the State filed a probation violation report which alleged that Valle violated his probation because he: (1) failed to report to scheduled appointments with his probation officer; (2) failed to obey the laws of the city, county, state, or federal government because he allegedly committed two counts of battery as charged under cause number 57D02-0809-CM-967 ("Cause No. 967"); and (3) failed to complete a substance abuse treatment program. On December 12, 2008, the trial court held an initial hearing regarding the alleged probation violation. On February 19, 2009, the probation revocation proceedings under Cause No. 164 were ordered transferred and assigned a new cause number of 57D02-0903-FD-000007 ("Cause No. 7"). On March 3, 2009, the trial court scheduled a probation violation hearing under Cause No. 7 for March 18, 2009.

On March 18, 2009, the trial court conducted a joint proceeding under Cause No. 7 and Cause No. 967. The trial court began the joint proceeding by stating "[t]his is [Cause No. 967] and [Cause No. 7] and . . . these are set for a trial and also I believe a

fact finding hearing in the second case." Transcript at 13. Valle was represented by two attorneys at the joint proceeding: Howard Hanson represented Valle in connection with the two counts of battery, each a class A misdemeanor, under Cause No. 967; and James Mowery represented Valle in connection with the alleged probation violation under Cause No. 7. Valle requested a continuance to obtain bond and hire private counsel, and the trial court denied Valle's requests.

Hanson stated that Valle indicated that he desired to plead guilty to the State's two charges of class A misdemeanor battery under Cause No. 967. The trial court then asked Mowery about the probation violation, and Mowery stated "I, that is a significant part of the probation violation so I assume there will be an admission on the probation violation as well." Id. at 16-17. The trial court then asked Valle if he "wish[ed] to plead guilty and admit to the probation violation," and Valle responded by saying "Yes." Id. at 17. Because Valle indicated that he wished to plead guilty, the trial court asked that Valle be questioned in order to establish a factual basis for the guilty plea. Valle initially testified that he visited Cripe's Bar and Grill in Noble County, Indiana, on September 20, 2008, and struck both Judd Cripe and Todd Deter in the face. However, when the prosecutor questioned Valle about his specific actions on September 20, 2008, Valle testified that he did not "even [have] a closed fist" and that he "definitely [did] not" cause Cripe's bruised and swollen eye or Deter's lacerated lip. Id. at 23. The prosecutor then stated that he thought a trial was needed, and the trial court agreed and asked the State to call its first

witness. Cripe, Deter, and Deter's wife testified regarding Valle's involvement in the attack on Deter in the parking lot of Cripe's bar on September 20, 2008.

Following the trial, the trial court found Valle guilty as charged of two counts of battery, each as a class A misdemeanor. The trial court then asked if there was any additional evidence related to the probation violation allegation. The State stated that Valle committed the battery offenses and violated several other probation conditions, although the State did not present evidence regarding the other alleged violations. The trial court found that Valle violated the terms of his probation and asked for arguments regarding sentencing. Hanson made a recommendation regarding Valle's sentence for his battery convictions, and Mowery made a recommendation regarding Valle's probation violation. The trial court also asked Valle if he had any comments he wanted to make on his own behalf. Valle made several arguments related to his health, the health of his child, the fact that he was drug-free, his church attendance, and his AA meeting attendance. Following recommendations and arguments regarding sentencing, the trial court revoked Valle's probation under Cause No. 7 and ordered Valle to serve the previously-suspended sentence of three years, and the court sentenced Valle to 180 days for each battery conviction under Cause No. 967, to be served concurrently to each other but consecutive to the sentence under Cause No. 7. The trial court's order found that Valle violated the terms of his probation "in failing to report to his probation officer as ordered, in violating the law, in failing to complete substance abuse evaluation and

treatment, and in failing to pay probation user fees as ordered." Appellant's Appendix at 17.

I.

The first issue is whether the trial court violated due process requirements by failing to follow the proper procedure in revoking Valle's probation. Probation revocation is a two-step process. Parker v. State, 676 N.E.2d 1083, 1085 (Ind. Ct. App. 1997). First, the court must make a factual determination that a violation of a condition of probation actually occurred. Id. If a violation is proven, then the trial court must determine if the violation warrants revocation of the probation. Id.

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 the witnesses. Vernon v. State, 903 N.E.2d 533, 536 (Ind. Ct. App. 2009), trans. denied. Probation is an alternative to commitment in the Department of Correction, and it is at the sole discretion of the trial court. Lightcap v. State, 863 N.E.2d 907, 911 (Ind. Ct. App. 2007) (citing Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999), reh'g denied). Probation is a favor granted by the State, not a right to which a criminal defendant is entitled. Parker, 676 N.E.2d at 1085. However, once the State grants that favor, it cannot simply revoke the privilege at its discretion. Id. Probation revocation implicates a defendant's liberty interest, which entitles him to some procedural due process. Id. (citing Morrissey v. Brewer, 408 U.S. 471, 482, 92 S. Ct. 2593, 2600-2601 (1972)). 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 a defendant in a criminal proceeding. Id. The due process rights granted to a probationer at a revocation hearing include the opportunity to be heard and present evidence. Vernon, 903 N.E.2d at 536-537; see also Ind. Code § 35-38-2-3 (requiring that an evidentiary hearing be held on probation revocation).

Valle argues that the trial court "fail[ed] to conduct a hearing on the probation violations or hear evidence on those issues before determining Valle had violated the terms of his probation." Appellant's Brief at 11. Valle also argues that "at no point did the trial court indicate that the trial on the Battery charges also constituted the fact finding hearing on the probation violation allegations." Id. at 12.

Initially, we note that Valle did not object when his probation was revoked without an evidentiary hearing. If an issue is not objected to at trial, it may not be raised on appeal. Townsend v. State, 632 N.E.2d 727, 730 (Ind. 1994). "However, we may bypass an error that a party procedurally defaults when we believe that the error is plain or fundamental. To qualify as 'fundamental error,' the error must be a substantial blatant violation of basic principles rendering the trial unfair to the defendant." Id. (quoting Hart v. State, 578 N.E.2d 336, 337 (Ind. 1991)). We also observe that the deprivation of due process is fundamental error. See Goodwin v. State, 783 N.E.2d 686, 687 (Ind. 2003); Wilson v. State, 514 N.E.2d 282, 284 (Ind. 1987).

Here, the record reveals that, on March 3, 2009, the trial court scheduled a probation violation hearing for March 18, 2009, at 10:00 a.m. On March 18, 2009, the

trial court held a joint proceeding to try Valle for two counts of battery under Cause No. 967 and to hold a probation revocation hearing under Cause No. 7. At the joint proceeding, Valle was represented by two attorneys. Hanson represented Valle in connection with the alleged battery charges under Cause No. 967, and Mowery represented Valle in connection with the alleged probation violation under Cause No. 7. Hanson stated that Valle desired to plead guilty to the State's two charges of class A misdemeanor battery under Cause No. 967. The trial court then asked Mowery about the probation violation case under Cause No. 7. Mowery stated that the alleged battery offenses were "a significant part of the probation violation so I assume there will be an admission on the probation violation as well." Transcript at 16-17.

The trial court then asked Valle whether he "wish[ed] to plead guilty and admit to the probation violation," and Valle said "Yes." Id. at 17. The trial court asked that Valle be questioned to establish a factual basis for a guilty plea. However, Valle appeared to deny some of the allegations against him. Specifically, Valle testified that he "barely touched [Cripe]," that he "didn't hit him," that he did not "even [have] a closed fist," and that he "just like pushed [Cripe] away that's it." Id. at 23. Similarly, Valle testified that he "definitely [did] not" cause Deter's lacerated lip. Id. The prosecutor stated that a trial was needed, and the trial court agreed and asked the State to call its first witness. Following the trial, the trial court found Valle guilty as charged of two counts of battery, each as a class A misdemeanor, under Cause No. 967.

After the conclusion of the portion of the joint proceeding in connection with the trial under Cause No. 967, the trial court asked: "As to the probation violation I don't know was there any additional evidence?" Id. at 43. The State noted that "the major allegation was . . . the commission of the new crime." Id. However, the State did not present any evidence regarding its other allegations. The trial court found that Valle violated the terms of his probation. The trial court then asked Hanson for arguments regarding sentencing under Cause No. 967. Following Hanson's arguments, the trial court asked Mowery if he had any arguments under Cause No. 7, and Mowery argued that the trial court should reinstate Valle's probation. The trial court then asked Valle if he had any comments he wanted to make on his own behalf, and Valle made several arguments related to his probation violations. Following several exchanges between the trial court and Valle regarding the seriousness of Valle's probation violation, the trial court revoked Valle's probation under Cause No. 7 and ordered Valle to serve the previously-suspended sentence of three years in the Indiana Department of Corrections.

The joint proceeding conducted by the trial court on March 18, 2009, constituted an evidentiary hearing, and there is no indication in the record that the trial court prevented Valle from presenting evidence on his behalf with respect to either the court's determination that a violation of a condition of probation occurred or the court's determination of whether the violation warranted the revocation of probation. We observe that Valle had the opportunity to make, and in fact did make, arguments related to the seriousness of his violation and other factors that the trial court should consider in

deciding whether to revoke his probation and reinstate an executed sentence. Valle also made arguments related to his health, the health of his child, the fact that he was drug-free, his church attendance, and his AA meeting attendance.

Based upon the record of the joint proceeding, we cannot say that Valle was denied his due process rights to a probation violation hearing or to present evidence. See Vernon, 903 N.E.2d at 536-538 (holding that the defendant was afforded an evidentiary hearing at which he was given an opportunity to be heard and to present evidence that suggested the violation did not warrant revocation); Sanders v. State, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005) (holding that the trial court followed the proper procedure when revoking the defendant's probation and did not violate her procedural due process rights where the court gave the defendant an opportunity to present evidence and arguments prior to an entry on disposition), trans. denied.

II.

The second issue is whether the evidence is sufficient to support the revocation of Valle's probation. The State must prove a probation violation by a preponderance of the evidence. Parker, 676 N.E.2d at 1086 (citing Braxton v. State, 651 N.E.2d 268, 270 (Ind. 1995), reh'g denied). On review, we neither weigh the evidence nor judge the credibility of witnesses. Id. We look only to the evidence most favorable to the State. Id. So long as substantial evidence of probative value exists to support the trial court's finding that a violation occurred, we will affirm the judgment. Id. The 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).

Valle was convicted of two counts of battery, each as a class A misdemeanor, while he was on probation. The order of probation in this case included a condition that Valle "obey all laws of the city, county, state and federal government." Appellant's Appendix at 65. Also, the requirement that a probationer obey federal, state, and local laws is automatically a condition of probation by operation of law. Williams v. State, 695 N.E.2d 1017, 1019 (Ind. Ct. App. 1998) ("A criminal conviction is prima facie evidence of a violation and will alone support a revocation of probation."); Ind. Code § 35-38-2-1(b) ("If the person commits an additional crime, the court may revoke the probation."). We observe that "[p]roof of any one violation is sufficient to revoke a defendant's probation." Brooks v. State, 692 N.E.2d 951, 953 (Ind. Ct. App. 1998), reh'g denied, trans. denied.

Here, as previously mentioned, the trial court found Valle guilty of two counts of battery, each as a class A misdemeanor, and then revoked Valle's probation. Valle's misdemeanor battery convictions are prima facie evidence of a violation. Based upon the convictions, the evidence is sufficient to support the trial court's revocation of Valle's probation. See, e.g., Williams, 695 N.E.2d at 1019 (holding that evidence of the probationer's conviction was sufficient to support the revocation of his probation); Fields v. State, 676 N.E.2d 27, 31 (Ind. Ct. App. 1997) (noting that the trial court had the

authority to revoke the defendant's probation as soon as he was convicted of additional crimes), trans. denied.

We do observe that the trial court's written order on March 18, 2009, found that Valle violated the terms of his probation in failing to report to his probation officer as ordered, in violating the law, in failing to complete substance abuse evaluation and treatment, and in failing to pay probation user fees as ordered. However, the only evidence before the court during its joint proceeding on March 18, 2009, was Valle's two battery convictions. As previously mentioned, the State did not present any evidence regarding its other allegations. Therefore, we remand to the trial court with instructions to strike from its order of revocation those bases for revocation that are not supported by the record. See Appellant's Appendix at 17.

III.

The next issue is whether the trial court abused its discretion by ordering Valle to serve his suspended sentence. Valle argues that "the trial court abused its discretion in revoking Valle's probation and imposing a fully executed sentence." Appellant's Brief at 18.

Ind. Code § 35-38-2-3(g) sets forth a trial court's sentencing options if the trial court finds a probation violation. The provision provides:

> 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:
>
> > (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; or
>
> (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing.

Ind. Code § 35-38-2-3(g). Ind. Code § 35-38-2-3(g) permits judges to sentence offenders using any one of or any combination of the enumerated options. Prewitt v. State, 878 N.E.2d 184, 187 (Ind. 2007).

The Indiana Supreme Court has held that a trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. Id. at 188 (citation omitted). The Court explained that "[o]nce a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed. If this discretion were not afforded to trial courts and sentences were scrutinized too severely on appeal, trial judges might be less inclined to order probation to future defendants." Id. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. Id. (citation omitted). As long as the proper procedures have been followed in conducting a probation revocation hearing, "the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence." Goonen v. State, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999).

Here, approximately six months after the trial court imposed a suspended sentence and probation for a period of three years under Cause No. 164, Valle violated the conditions of his probation when he committed two counts of battery, each class A

misdemeanors. Specifically, when Deter and his wife refused Valle and another man a ride on September 20, 2008, Valle and the other man "started hitting and punching and kicking" Deter, who fell to the ground and "almost blacked out" as a result. See Transcript at 34. When Cripe came to the parking lot to stop the attack, Valle punched Cripe in the left eye, which caused Cripe's left eyebrow area to swell and become black and blue and caused Cripe pain. Further, the trial court noted that Valle engaged in "a very vicious and brutal unprovoked attack" on two individuals. Id. at 51. Indeed, Deter's wife testified that Valle and the other man had borrowed cigarettes from her and her husband inside the bar, and when she and her husband left the bar for the evening, "[Valle] came up and approached us and asked us to give him a ride home and uh, my husband was telling him no and then you could see his friend coming up but you know they had been nice all evening so I didn't think anything of it and his friend came up and didn't say a work [sic] and then just went BAM and they both started hitting on him." Id. at 40-41.

Given the circumstances, we cannot say that the trial court abused its discretion in ordering Valle to serve the entire portion of his previously suspended sentence. See Milliner v. State, 890 N.E.2d 789, 793 (Ind. Ct. App. 2008) (holding that the trial court did not abuse its discretion in reinstating the probationer's entire previously-suspended sentence), trans. denied; Crump v. State, 740 N.E.2d 564, 573 (Ind. Ct. App. 2000) (holding that the trial court did not abuse its discretion in reinstating the probationer's full previously suspended sentence), trans. denied.

For the foregoing reasons, we affirm the trial court's revocation of Valle's probation, and we remand to the trial court with instructions to modify its revocation order consistent with Part II of this opinion.

Affirmed and remanded.

CRONE, J., and MAY, J., concur.