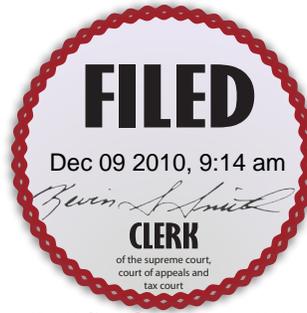


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

THOMAS G. GODFREY
Anderson, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

TYSON D. WARNER,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 48A02-1005-CR-548

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0502-FB-45

December 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Tyson D. Warner contends that the trial court violated his due process rights in denying his motion to compel the production of two pieces of evidence he alleges were used against him at his probation revocation hearing. Finding no due process violation because neither of these items was actually presented as evidence against Warner and because prejudice was neither alleged nor established, we affirm.

Facts and Procedural History

On January 9, 2006, Warner received a twelve-year sentence, with eight years executed and four years suspended to probation, for class B felony armed robbery. The trial court later modified Warner's sentence, reducing the executed portion to seven years and four months and increasing the probationary period to four years and eight months.

On the night of October 24, 2009, Tiffany Bias¹ left a bar where she had consumed a few drinks and walked two or three blocks to a house where her friend, Jessica Hiday, lived. When she arrived, Bias found Hiday, another female, and a male who went by the name "Ty" present. When Bias was in the bathroom sitting on the toilet, Ty busted through the door, put a gun to her head, and demanded her necklace. Bias began to cry and told Ty that he could have anything except her necklace. Ty then ripped a diamond bracelet off her wrist and walked out of the bathroom. At least one other time that night, Ty pointed the gun at Bias's head. After being at Hiday's house for about an hour, Bias left, went to her parents' house, and called the police.

¹ While both parties refer to Tiffany as Tiffany "Buis" in their briefs, the transcript in this case indicates that her name is Tiffany "Bias." For that reason, we refer to her as such in this opinion.

The police arrived at her parents' house around 5:00 a.m. According to the responding officer, Bias was visibly upset, appeared to have been crying, and had alcohol on her breath, but was understandable, responsive, and able to provide the information he requested. Later that day, the officer took Bias to the police station and showed her a photo array. Bias identified one of the males in the photo array as her assailant, and, based on that identification and other information she provided, the officer arrested Warner.

On January 22, 2010, the probation department filed a notice of probation violation alleging that Warner had violated the terms of his probation by committing the new crimes of robbery and carrying a handgun without a permit. Prior to an evidentiary hearing, Warner filed several motions to compel discovery. The trial court granted most of Warner's motions but denied one that sought to obtain an exact copy of the photo array shown to Bias and a copy of a MySpace picture or message that she also might have been shown.

The trial court conducted an evidentiary hearing on April 19 and 20, 2010. At this hearing, over Warner's objection, Bias made an in-court identification of Warner as the man who had robbed her at Hiday's house. Hiday also testified that Warner was present at her house on the night Bias was robbed, that Warner had shown her a gun, and that Warner told her that he had taken Bias's bracelet. The trial court determined that Warner had violated the terms of his probation by committing two additional crimes and revoked his probation.

Discussion and Decision

Warner now alleges that the trial court's denial of his motion to compel the production of the photo array and the MySpace material was a violation of Indiana Code 35-38-2-3 and his due process rights under the Fourteenth Amendment to the United States Constitution. Because he claims that his constitutional right to due process was violated, we review Warner's claim de novo. *See, e.g., United States v. Neal*, 512 F.3d 427, 434 (7th Cir. 2008) (reviewing de novo an alleged due process violation resulting from a denial of a motion to compel in a supervised release revocation hearing); *United States v. Ramos*, 401 F.3d 111, 115 (2d Cir. 2005) (reviewing de novo an alleged due process violation in context of supervised release revocation).

Although probationers are not entitled to the full array of constitutional rights afforded defendants at trial, the Due Process Clause of the Fourteenth Amendment does impose certain procedural and substantive limits on the revocation of the conditional liberty created by probation. *Debro v. State*, 821 N.E.2d 367, 374 (Ind. 2005) (citing *Black v. Romano*, 471 U.S. 606, 610 (1985)). In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the United States Supreme Court set forth the process that is due to an individual already convicted of an underlying crime, but in danger of losing his conditional liberty.

The Court stated that due process requires that a parolee be given:

(a) written notice of the claimed violations of parole; (b) *disclosure to the parolee 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 such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finder as to the evidence relied on and reasons for revoking parole.

Id. at 489 (emphasis added). Indiana Code 35-38-2-3(e) provides that in cases of alleged probation violation “evidence shall be presented in open court” and that a defendant “is entitled to confrontation, cross-examination, and representation by counsel.”²

Warner correctly states that “due process rights in revocation proceedings include disclosure of evidence against a defendant and the right to cross examine witnesses.” Appellant’s Br. at 8. However, he incorrectly classifies the MySpace material and photo array as “evidence against [him] . . . discoverable even though the State did not have such items directly available at the hearing.” *Id.* Warner argues that the trial court’s denial of discovery of these items curtailed his “ability to challenge [Bias’s] in-court identification [of him] and to cross exam[in]e her concerning this.” *Id.* However, in this case, the State did not offer the MySpace material as evidence. Nor did the State present the photo array itself or Bias’s out-of-court identification based upon it as evidence.

As the Seventh Circuit Court of Appeals has noted, evidence that might be useful to a defendant in arguing a defense or rebutting the State’s case is different than evidence that was actually used by the State in making its case. *Neal*, 512 F.3d at 436. The Supreme Court’s decision in *Morrissey* requires disclosure of the latter, but not the former. *Id.* The material that Warner sought was not “evidence against him.” Thus the trial court’s denial of his motion to compel disclosure was not a violation of Warner’s due process rights.

² While Warner states generally that the trial court violated Indiana Code 35-38-2-3, in his brief, he argues only that the evidence that the court refused to compel was “evidence against him.” Appellant’s Br. at 14. The State is not required to provide such evidence to a defendant under Indiana Code 35-38-2-3. Thus, no real violation of this statute is alleged.

Even if Warner had established a due process violation, we would still not reverse the revocation of his probation. Ordinarily, a reviewing court will not disturb the trial court's ruling on discovery matters "absent a clear showing that the denial of discovery resulted in actual and substantial prejudice." *United States v. Pearson*, 340 F.3d 459, 467 (7th Cir. 2003). Throughout his brief, Warner reiterates his belief that the trial court's alleged error was a violation of his due process rights, yet he fails to assert, let alone establish, that this was prejudicial.

Evidence of Bias's out-of-court identification was not presented against Warner. Furthermore, Hiday testified at the hearing that Warner was at her house on the night in question, that he showed her a gun, and that he admitted to taking Bias's bracelet. Tr. at 164-66. Violations of probation need only be proven by a preponderance of evidence, Ind. Code 35-38-2-3(e), and Warner does not challenge the sufficiency of the evidence supporting the trial court's finding that he violated probation.³ Therefore, even assuming *arguendo* that denying the motion to compel was error, we believe that it did not work an actual and substantial prejudice against Warner. *See* Ind. Trial Rule 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.")

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.

³ To the extent that Warner challenges Bias's and Hiday's testimony, his assertions are merely invitations to reweigh evidence and judge the witnesses' credibility. We must decline this invitation. *See Morgan v. State*, 691 N.E.2d 466, 468 (Ind. Ct. App. 1998) ("This court will neither reweigh the evidence nor judge the credibility of witnesses. Rather, we look to the evidence most favorable to the State, and if there is substantial evidence of probative value to support the trial court's decision that the probationer is guilty of any violation, revocation of probation is appropriate.").