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IN THE
COURT OF APPEALS OF INDIANA

STEPHEN E. ABERNATHY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 23A01-1104-CR-182
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FOUNTAIN CIRCUIT COURT
The Honorable Susan Orr Henderson, Judge
Cause No. 23C01-1103-FD-90; 23C01-1007-FD-311

December 12, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Stephen E. Abernathy appeals the conditions of probation that were imposed following his plea of guilty to Resisting Law Enforcement,[1] a class D felony, and Driving While Suspended,[2] a class A misdemeanor. Specifically, Abernathy maintains that the drug and alcohol countermeasure fee, the conditions that required him to submit to and pay for alcohol and drug testing, and the requirement that he waive objection to the admissibility of alcohol or drug test results in a future revocation proceeding amounted to an abuse of discretion by the trial court and are unconstitutional. Finding no error, we affirm the judgment of the trial court.

FACTS

After a vehicle chase that involved a police officer in Fountain County, Abernathy was charged with resisting law enforcement, reckless driving, and driving while suspended, on March 1, 2011. The State also filed a notice of probation violation because Abernathy had been on probation following a conviction for resisting law enforcement.

On April 8, 2011, Abernathy pleaded guilty to resisting law enforcement and driving while suspended and admitted to the probation violation. In exchange, the State agreed to dismiss the reckless driving count. Although the terms of Abernathy's sentence were set forth in the plea agreement, the conditions of probation were left to the trial court's discretion.

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[1] Ind. Code § 35-44-3-3.

[2] Ind. Code § 9-21-8-52.

Among those conditions, Abernathy was ordered to perform fifty hours of community service and submit to and pay for drug and alcohol tests. Abernathy also agreed to waive objection to the admissibility of the results of those tests in any subsequent probation revocation hearing. Finally, the trial court ordered Abernathy to pay a drug and alcohol countermeasure fee in the amount of $200. Abernathy now appeals.

DISCUSSION AND DECISION

Abernathy argues that the trial court's order directing him to pay the countermeasure fee and the directive that he submit to, and pay for, alcohol and drug testing, must be set aside. Abernathy also challenges the validity of his purported agreement to waive any objection to the admissibility of drug and alcohol tests at subsequent probation revocation hearings. In short, Abernathy asserts that these conditions of probation constituted an abuse of the trial court's discretion and are unconstitutional.

At the outset, we note that probation is a favor granted by the State, whereby the defendant agrees to certain restrictions on his behavior rather than imprisonment. Mathews v. State, 907 N.E.2d 1079, 1081 (Ind. Ct. App. 2009). Although limited by the principle that the conditions of probation be reasonably related to the treatment of the defendant and the protection of public safety, the trial court enjoys broad discretion in creating the terms of the probation. Collins v. State, 911 N.E.2d 700, 712 (Ind. Ct. App. 2007).

As for Abernathy's claim regarding the order directing him to pay the alcohol and drug countermeasure fee, we note that the trial court subsequently issued an order vacating its earlier order that Abernathy pay such a fee. Appellee's App. p. 1. Therefore, this issue is moot and we need not address it. See Mays v. State, 907 N.E.2d 128, 133 (Ind. Ct. App. 2009) (observing that this court does not generally engage in discussions of moot questions).

As for the condition of probation requiring that Abernathy submit to drug and alcohol screenings, we note that Abernathy did not object to any of the conditions at the trial court level. Thus, Abernathy has waived the argument. See Hale v. State, 888 N.E.2d 314, 319 (Ind. Ct. App. 2008) (holding that by failing to object to the conditions of probation at the sentencing hearing, the defendant failed to preserve the issue for appellate review).

Waiver notwithstanding, Abernathy claims that any concern about how drugs and alcohol might "lower his inhibitions and make him more likely to commit a crime or probation violation" should not apply to him. Appellant's Br. p. 6. However, in our view, restrictions on alcohol and drug use and testing for the presence of those substances is a common sense condition of probation, regardless of the crime that is involved. More particularly, we have observed that

> The sine qua non of illegal drugs and alcohol is that they alter mental functioning to varying degrees and have great potential to negatively impact a person's judgment. As such, the detrimental effect from . . . rehabilitation and the increased risk to the public that may result for the use of such substances is readily apparent.

Kopkey v. State, 743 N.E.2d 331, 338 (Ind. Ct. App. 2001).

In Carswell v. State, 721 N.E.2d 1255, 1265 (Ind. Ct. App. 1999), we specifically pointed out that the "propensity of alcohol to impair judgment and reduce inhibition is known." And even though nothing in the record in Carswell suggested that there was any direct relationship between the defendant's behavior and the use of alcohol, we declined to hold that the trial court abused its discretion in requiring abstention from the use of alcohol as a condition of probation following his conviction for child molesting. Id. at 1266.

Also, Abernathy's reliance on Steiner v. State, 763 N.E.2d 1024 (Ind. Ct. App. 2002) is misplaced because that case involved the reasonableness of imposing random drug screening and testing as a condition of bail rather than probation. In Steiner, we determined that the imposition of random drug screenings as a condition of bail, without an individualized determination that the defendant would use drugs, was unreasonable. Id. at 1028.

The decision in Steiner notwithstanding, we note that unlike an arrestee released on bail who has only been charged with an offense, a probationer has already been convicted of a crime. And in these circumstances, Abernathy not only pleaded guilty to the instant offenses, but he was also on probation for a previous felony when he committed the instant offenses and he had more than one felony conviction. Tr. p. 8-9. In short, Abernathy's prior convictions and most recent offenses demonstrate that he

makes impulsive decisions and is unwilling to obey the law. That said, the trial court's condition of probation regarding the alcohol and drug screening provides a remedy and deterrence for such continued behavior. Indeed, we believe that this condition of probation serves the State's interest in promoting rehabilitation and reducing the high recidivism rates of persons convicted of crimes. The conditions of probation that were imposed provide a deterrent to engaging in behavior that could impair Abernathy's judgment and lead to criminal activity. In short, Abernathy has failed to show that the trial court abused its discretion in imposing these conditions of probation.

As for the condition that Abernathy has agreed to waive any objection to the admissibility of the test results at a revocation hearing, we note that Indiana Code section 35-38-2-2.3(a)(19) permits the use of periodic tests to detect or confirm the use of a controlled substance as a condition of a defendant's probation. Although a defendant cannot be required to waive his right to object to the admissibility of such test results in a criminal trial, a probation revocation hearing is not an adversarial criminal proceeding. And a civil matter requires more flexible procedures. See, e.g., Hoeppner v. State, 918 N.E.2d 695, 700 (Ind. Ct. App. 2009) (observing that results of a polygraph examination are admissible in a probation revocation proceeding because such a hearing is not an adversarial criminal proceeding, but a civil matter which requires more flexible procedures); see also, Carswell, 721 N.E.2d at 1265-66 (same).

The conditions of Abernathy's probation do not require him to waive objection to the admission of alcohol or drug tests at a subsequent criminal trial. Rather, the

agreement to waive, specifically applies to the admission of evidence at a revocation hearing. Appellant's App. p. 67. Moreover, a waiver of an objection to the admissibility of the tests does not automatically result in a probation violation. Id. at 695. To be sure, the State must still prove that a probation violation occurred and the trial court still has the duty to weigh the evidence and determine its probative value. As a result, Abernathy's claim fails.[3]

Finally, we reject Abernathy's contention that the conditions of probation are unconstitutional because they violate Article 1, Section 11 of the Indiana Constitution. As noted above, Abernathy failed to make any objection to the conditions of probation at the sentencing hearing. Again, this constitutional claim is waived on appeal. See N.W. v. State, 834 N.E.2d 159, 162 n.2 (Ind. Ct. App. 2005) (holding that the failure to object on Indiana Constitutional grounds in the trial court resulted in waiver of the argument on appeal).

Waiver notwithstanding, it was noted in Hoeppner that in determining whether a condition of probation is unduly intrusive on a constitutional right, the following three factors must be balanced: (1) the purpose sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law abiding citizens should be afforded to probationers; and (3) the legitimate needs of law enforcement. Hoeppner, 918 N.E.2d at 700.

[3] As an aside, we note that while a defendant can be required to waive his or her right to object to the admissibility of drug and alcohol tests in a probation revocation proceeding, there is no restriction in either Hoeppner or Carswell that would preclude the defendant from presenting evidence and challenging the validity of those tests.

The purposes of probation include the probationer's rehabilitation and the protection of the community. As noted above, alcohol consumption reduces inhibitions, impairs judgment, and is frequently connected to criminal behavior. And in our view, testing for alcohol and drug use is reasonably calculated to aid in preventing a recurrence of criminal behavior. Additionally, we have held that a probationer has a reduced expectation of privacy in light of the supervisory relationship between the Sate and the probationer. Kopkey, 743 N.E.2d at 337. Thus, the second factor does not weigh against the probation condition that the trial court imposed.

Finally, we note that the State has a strong and compelling interest in monitoring Abernathy's behavior and attempting to prevent him from engaging in behavior that will lead him to commit additional crimes. And, as we observed in Kopkey, alcohol and illegal drugs have the propensity to negatively impact one's judgment. In sum, balancing the factors above establishes that the probation condition does not violate Article 1, Section 11 of the Indiana Constitution.

The judgment of the trial court is affirmed.

BROWN, J., concurs.

KIRSCH, J., concurs and dissents with opinion.

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	)	
Appellee-Plaintiff.	)	

KIRSCH, Judge, ***concurring in part and dissenting in part.***

I fully concur in the decision of my colleagues with the exception of their decision to affirm the imposition of a condition of probation that Abernathy waive any objection to the admissibility of alcohol and drug tests in a future revocation proceeding. To me, requiring that a probationer waive *a priori* any objection to the introduction of evidence derived from scientific testing is denial of due process. I would remand with instructions that this condition be deleted.