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.

FILED
Dec 29 2010, 9:03 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

JOHN T. WILSON
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

WADE JAMES HORNBACHER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

EDWARD WEAVER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-1004-CR-460
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0704-FC-99

December 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Edward Weaver's home detention and probation were revoked when the trial court found that he violated the terms thereof by committing the offenses of operating while intoxicated, public intoxication, and driving while suspended; failing to abstain from drugs and alcohol; and failing to report his arrest to the probation department within forty-eight hours. Weaver argues that there is insufficient evidence that he committed operating while intoxicated and public intoxication. Because the trial court was not required to credit Weaver's evidence that his intoxication was involuntary and the evidence is otherwise sufficient, we affirm the trial court's findings. Weaver also argues that the trial court abused its discretion by ordering him to serve his sentence in the Department of Correction. We conclude that the violations in this case and Weaver's history of similar conduct warrant revocation; however, we remand for the trial court to clarify its sentencing order, as we cannot reconcile the conflict between its written and oral statements.

Facts and Procedural History

On February 10, 2009, Weaver pled guilty to class C felony burglary pursuant to a plea agreement. On March 23, 2009, he was sentenced to eight years, with two years on home detention and six years suspended to probation. Less than a month later, a notice of violation was filed. Weaver admitted that he had used marijuana and cocaine and was continued on home detention.

On January 6, 2010, Weaver was arrested for class A misdemeanor operating while intoxicated, class A misdemeanor driving while suspended, and class B misdemeanor public

intoxication. The State filed petitions to revoke Weaver's home detention and probation, alleging that he had violated the terms thereof by committing new offenses, failing to abstain from drug and alcohol use, and failing to report his arrest to the probation department within forty-eight hours.

On March 8, 2010, an evidentiary hearing was held. Officer Gary Smith testified that on January 6, 2010, he was involved in investigating a single-vehicle crash in which Weaver was the driver. Officer Smith stated that it was "immediately apparent[]" that Weaver was "under the influence of something," because he had poor balance, slurred speech, bloodshot and dilated eyes, and he had difficulty remembering what had happened. Tr. at 28. Officer Smith administered the horizontal gaze nystagmus test, which Weaver failed. Officer Smith did not offer any other field sobriety tests because Weaver had been recently injured. There was no evidence that Weaver was under the influence of alcohol. Officer Smith testified that Weaver did not smell of alcohol and that no alcohol was found in his breath when he was given a certified breath test. Officer Smith testified that Weaver was taken to the hospital for a blood draw, but he did not know the results of the blood test, and the State did not present any evidence of the results.[1]

Weaver, however, presented evidence that he was under the influence of PCP. Matthew Norwood testified that Weaver gave him a ride on January 6. Weaver asked him for a cigarette, and Norwood gave him one that was laced with PCP. Norwood claimed that

[1] We note that one of the officers involved in this case, Officer Stacey Lettinga, did not respond to the State's subpoena, even after the trial court granted the prosecutor a continuance to track down the officer. The record suggests that she may have had additional information about the blood draw.

he unintentionally gave Weaver "the wrong cigarette" and therefore did not inform him that it contained PCP. *Id*. at 37.

Weaver admitted that he drove while suspended. He testified that his boss usually gives him a ride to work, but was out of town on January 6. He stated that he stopped at a gas station, where he saw Norwood and offered him a ride. He asked Norwood for a cigarette, and he claimed that he did not realize that it was not a normal cigarette until he "woke up in handcuffs." *Id*. at 53. Weaver did not remember the crash at all.

The court found that Weaver had violated the conditions of his home detention and probation as alleged and ordered him to serve his sentence in the Department of Correction.

Discussion and Decision

"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. If a violation is proven, then the trial court must determine if the violation warrants revocation of the probation." *Id*. A probation hearing is civil in nature; therefore, the State need only prove the alleged violations by a preponderance of the evidence. *Holmes v. State*, 923 N.E.2d 479, 485 (Ind. Ct. App. 2010). Our standard of review is the same for a petition to terminate home detention. *Brooks v. State*, 692 N.E.2d 951, 953 (Ind. Ct. App. 1998), *trans. denied*.

I. Sufficiency of the Evidence

Weaver argues that there is insufficient evidence that he violated his home detention and probation by committing the offenses of operating while intoxicated and public

intoxication. When reviewing the sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Smith v. State*, 727 N.E.2d 763, 765 (Ind. Ct. App. 2000). We consider the evidence most favorable to the judgment of the trial court, and we will affirm if there is substantial evidence of probative value to support the trial court's determination. *Holmes*, 923 N.E.2d at 485.

With respect to operating while intoxicated, Weaver argues that the State failed to prove a violation of Indiana Code Section 9-30-5-1 because it did not establish the existence or amount of alcohol or a controlled substance in his breath or blood.[2] The State argues that it established a violation of Indiana Code Section 9-30-5-2,[3] which states:

---

[2] Indiana Code Section 9-30-5-1 states:

> (a) A person who operates a vehicle with an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol but less than fifteen-hundredths (0.15) gram of alcohol per:
> (1) one hundred (100) milliliters of the person's blood; or
> (2) two hundred ten (210) liters of the person's breath;
> commits a Class C misdemeanor.
> (b) A person who operates a vehicle with an alcohol concentration equivalent to at least fifteen-hundredths (0.15) gram of alcohol per:
> (1) one hundred (100) milliliters of the person's blood; or
> (2) two hundred ten (210) liters of the person's breath;
> commits a Class A misdemeanor.
> (c) A person who operates a vehicle with a controlled substance listed in schedule I or II of IC 35-48-2 or its metabolite in the person's body commits a Class C misdemeanor.
> (d) It is a defense to subsection (c) that the accused person consumed the controlled substance under a valid prescription or order of a practitioner (as defined in IC 35-48-1) who acted in the course of the practitioner's professional practice.

[3] The record does not include a copy of the charging information, so it is not clear which statute was used to charge him. The fact that he was charged with a class A misdemeanor suggests that he was charged under Indiana Code Section 9-30-5-2. Indiana Code Section 9-30-5-1(c) makes operating a vehicle with a controlled substance in the person's body a class C misdemeanor. An offense under Indiana Code Section 9-30-5-1 may be a class A misdemeanor if the quantity of alcohol exceeds a certain threshold, but this section does not contain a similar enhancement based on the quantity of drugs. Weaver does not respond to the State's argument that Indiana Code Section 9-30-5-2 is the pertinent provision.

> (a) Except as provided in subsection (b), a person who operates a vehicle while intoxicated commits a Class C misdemeanor.
>
> (b) An offense described in subsection (a) is a Class A misdemeanor if the person operates a vehicle in a manner that endangers a person.

Indiana Code Section 9-13-2-86 defines intoxication in pertinent part as under the influence of alcohol or a controlled substance "so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties." Impairment can be established by evidence of: (1) the consumption of a significant amount of alcohol or drugs; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of alcohol or drugs; (5) unsteady balance; (6) failure of field sobriety tests; and (7) slurred speech. *Fought v. State*, 898 N.E.2d 447, 451 (Ind. Ct. App. 2008).

> The element of endangerment can be established by evidence showing that the defendant's condition or operating manner could have endangered any person, including the public, the police, or the defendant. Endangerment does not require that a person other than the defendant be in the path of the defendant's vehicle or in the same area to obtain a conviction.

Outlaw v. State, 918 N.E.2d 379, 381 (Ind. Ct. App. 2009) (citations omitted), *aff'd* 929 N.E.2d 196 (Ind. 2010).

The evidence favorable to the judgment demonstrates that Weaver was intoxicated. He had poor balance, slurred speech, bloodshot and dilated eyes, and poor memory, and he failed a field sobriety test. In addition, Weaver crashed his vehicle, endangering himself and his passenger. This is sufficient evidence to establish an offense under Indiana Code Section 9-30-5-2.

A person commits the offense of public intoxication if the person is "in a public place or a place of public resort in a state of intoxication caused by the person's use of alcohol or a

controlled substance (as defined in IC 35-48-1-9)." Ind. Code § 7.1-5-1-3. The State must prove that the intoxication was caused by alcohol or a controlled substance. *Upp v. State*, 808 N.E.2d 706, 707 (Ind. Ct. App. 2004). Weaver himself presented evidence that his intoxication was caused by PCP. He does not dispute that he was in a public place.

To the extent that Weaver argues that the evidence is insufficient because he presented evidence that his intoxication was involuntary,[4] we note that the trial court was not required to credit Weaver's testimony that he did not know that the cigarette contained illegal drugs or Norwood's testimony that he did not tell Weaver that the cigarette contained illegal drugs. Weaver is merely asking us to weigh the credibility of witnesses, which we will not do. *Smith*, 727 N.E.2d at 765. Therefore, we conclude that there was sufficient evidence that Weaver violated the terms of his probation and home detention by committing public intoxication and operating while intoxicated.

II. Sentence

Weaver also argues that the trial court abused its discretion by sentencing him to the Department of Correction instead of extending his probation or home detention. When a violation of probation or home detention is found, the court may impose the following sanctions:

> (g) 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.

[4] Involuntary intoxication is a defense pursuant to Indiana Code Section 35-41-3-5.

> (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.
> (h) If the court finds that the person has violated a condition of home detention at any time before termination of the period, and the petition to revoke probation is filed within the probationary period, the court shall:
> (1) order one (1) or more sanctions as set forth in subsection (g); and
> (2) provide credit for time served as set forth under IC 35-38-2.5-5.

Ind. Code § 35-38-2-3(g)-(h).

"Probation is a matter of grace and a conditional liberty which is a favor, not a right." *Cooper v. State*, 917 N.E.2d 667, 671 (Ind. 2009).

> We review for an abuse of discretion the trial court's decision to revoke probation. An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. . . . The violation of a single condition of probation is sufficient to permit a trial court to revoke probation.

Rosa v. State, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005) (citations omitted).

Weaver does not challenge the trial court's findings that he committed the offense of driving while suspended and failed to report his arrest to the probation department. We have also found that there is sufficient evidence that he committed operating while intoxicated and public intoxication. Weaver has several prior convictions, including operating a vehicle having never been licensed and possession of cocaine or a Schedule I or II drug. Weaver has previously been placed on probation and has had probation revoked. A notice of violation was filed less than a month after Weaver was sentenced to home detention and probation in this case. He admitted to using marijuana and cocaine, but the court exercised leniency and continued him on probation. Under the circumstances, we cannot say that the trial court

abused its discretion by ordering Weaver to serve his sentence in the Department of Correction.

The State concedes, however, that there is a discrepancy between the trial court's oral sentencing statement, which imposed a term of six years, and the abstract of judgment, which shows a sentence of eight years. We cannot discern the reason for the discrepancy nor determine what amount of credit time, if any, Weaver was given. Therefore, we remand to the trial court to clarify its sentencing order.

Affirmed and remanded.

KIRSCH, J., and BRADFORD, J., concur.