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IN THE
COURT OF APPEALS OF INDIANA

HERSHEL L. SPARKS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 53A04-0907-CR-400
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Marc Kellams, Judge
Cause No. 53C02-0712-FB-01245

December 31, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The Monroe Circuit Court found that Hershel L. Sparks ("Sparks") violated the conditions of his probation, revoked Sparks' probation, and ordered Sparks to serve the remainder of his previously suspended sentence. Sparks appeals and presents two issues for our review, which we restate as: (1) whether the trial court erred by allowing into evidence a sworn statement made by someone who did not testify at the probation revocation hearing, and (2) whether the trial court abused its discretion in ordering Sparks to serve his previously suspended sentences. We affirm.

Facts and Procedural History

On December 21, 2007, the State charged Sparks with Class B felony criminal confinement, Class C felony intimidation, Class C felony battery by means of a deadly weapon, Class D felony domestic battery, Class D felony criminal recklessness, Class D felony strangulation, and Class A misdemeanor interference with the reporting of a crime. Sparks' wife, Jamie Sparks ("Jamie"), was the victim in the charged offenses. On April 10, 2008, Sparks agreed to plead guilty to the charges of intimidation, domestic battery, and criminal recklessness. In exchange, the State agreed to dismiss the remaining charges. On May 7, 2008, the trial court sentenced Sparks to consecutive sentences of four years,[1] suspended to probation.

[1] Although not mentioned by Sparks, we recognize that two of Sparks' convictions were for Class D felonies, yet the trial court sentenced him to suspended sentences of four years, which is beyond the maximum term for a Class D felony. See Ind. Code § 35-50-2-7 (2004). We have held before that "a prison sentence, the imposition of probation, or any combination of the two, may not exceed the maximum term for the conviction." Jester v. State, 746 N.E.2d 437, 439 (Ind. Ct. App. 2001). However, after revoking Sparks' probation, the trial court sentenced him to three years upon each of the Class D felonies, which is within the relevant statutory limits.

In July of 2008, police were investigating complaints from residents in Monroe County that unknown individuals had been riding a dirt bike and a four-wheeled all-terrain vehicle ("ATV") on the back roads near Ellettsville, Indiana. On July 27, 2008, Sergeant Troy Thomas ("Sergeant Thomas") of the Monroe County Sheriff's Department responded to a call concerning the dirt bike and ATV. Sergeant Thomas saw one man, later identified as Edward Etheridge ("Etheridge"), riding a dirt bike and another man, wearing camouflage pants, riding an ATV. Sergeant Thomas activated his emergency lights and attempted to stop the vehicles. Etheridge stopped, but the other man fled, taking the ATV off the roadway. Sergeant Thomas initially attempted to follow the ATV, but soon lost track of it and returned to Etheridge. Etheridge told Sergeant Thomas that the man riding the ATV was Sparks.

Deputy Stephen Hale ("Deputy Hale") spotted Sparks on the ATV approximately one and a half miles away. Sparks fled again when he saw Deputy Hale's patrol car, and the police again lost track of him. The police then set up a perimeter and attempted to find Sparks. As they did so, a local resident told Sergeant Thomas that he had seen a man hiding behind a nearby house and watching the police. When Sergeant Thomas went to that house to investigate, he recognized Sparks,[2] wearing camouflage pants, hiding behind the house. When Sparks saw Sergeant Thomas, he fled yet again, this time on foot. Sparks momentarily avoided capture, but the police narrowed their search to the area near where Sparks was last seen and soon found Sparks hiding in a nearby garage.

[2] Sergeant Thomas knew Sparks from his prior encounters with law enforcement.

As a result of this incident, the State filed a petition to revoke Sparks' probation on July 28, 2008, alleging, *inter alia*, that Sparks had committed the crime of resisting law enforcement. On August 5, 2008, at a bail review hearing following his arrest for resisting law enforcement, the trial court placed Sparks on home detention. On September 9, 2008, the trial court removed Sparks from home detention and placed him on "day reporting," so that Sparks could be with his wife who "had a risky pregnancy." Tr. p. 117.

By December 2, 2008, Sparks and his wife Jamie were estranged. On that date, Jamie, her sister Tracy Utlin Corbin ("Tracy"), and Tracy's friend Sherry Garland ("Sherry"), went to a pub owned by Sparks' mother in order to pick up some clothes and other items for Jamie and her children.[3] Shortly thereafter, Sparks arrived with a friend and began to beat on the door, yelling, "where [is that] f***ing bitch," referring to Jamie. Tr. p. 78. Jamie then went downstairs to hide in the bar. Sparks went around to a side door and attempted to enter, but Sherry blocked the door. Sparks pushed Sherry away from the door, came inside, and pushed her up against the wall by the throat. Tracy telephoned the police and told Sparks that the police were on their way.

When Tracy refused to tell Sparks where Jamie was, he told her, "you'll tell me where that f***ing bitch is or I'll kill you." Tr. p. 81. Sparks threatened to shoot Tracy if she did not tell him where Jamie was and placed his hand in his pocket as if he were armed. The police soon arrived and separated the parties. Sparks showed the police a purported protective order, but the police noticed that the order was not signed. In the

[3] Sparks and Jamie had been living in the area above the pub.

presence of the police, Sparks again threatened Tracy. Eventually, Sparks was allowed to collect some of his property and leave.

When Jamie and Tracy left, they noticed Sparks driving slowly down the road. Sparks followed Jamie and Tracy to a nearby gas station, where he parked his vehicle and watched them. When Jamie and Tracy drove away, Sparks followed them. Sparks drove up beside Jamie and Tracy's vehicle, and yelled, ""the next time I catch you bitches, you're dead." Tr. p. 89. Sparks then pulled in front of Jamie and Tracy's vehicle, slammed on his brakes, and drove away.

As a result of this incident, Sparks was arrested, and on December 10, 2008, the State filed an amended petition to revoke Sparks' probation, alleging that Sparks had committed the additional criminal offenses of Class D felony intimidation and Class B misdemeanor disorderly conduct. On June 19, 2009, the trial court held a probation revocation hearing. At the hearing, Sergeant Thomas testified regarding the July 27, 2008 incident where Sparks fled from the police on the ATV. The State then offered into evidence a sworn statement made by Etheridge, who did not testify at the hearing. Sparks objected, arguing that because Etheridge did not testify, he had no opportunity to confront him. After the parties presented their arguments, the trial court admitted the statement, but told Sparks' counsel, "I think it is of little weight because of all the things you point out." Tr. p. 61.

At the conclusion of the hearing, the trial court found that the State had proved that Sparks had violated the conditions of his probation, concluding that there was sufficient evidence to find that Sparks fled from the police "even without Mr. Etheridge's

statement." Tr. p. 174. With regard to the allegations that Sparks had committed the crimes of intimidation and disorderly conduct, the trial court acknowledged that Sparks presented his own version of events, but specifically credited the testimony of Sparks' sister-in-law Tracy. The trial court concluded, "there's clearly enough evidence in this whole thing to find by [a] preponderance of the evidence that he violated his probation by committing the offenses of Resisting Law Enforcement, Intimidation and Disorderly Conduct." Tr. p. 176. The trial court then ordered Sparks to serve consecutive terms of three years incarceration, with credit for time served. Sparks now appeals.

I. Admission of Sworn Statement

Sparks first claims that the trial court erred in admitting into evidence the sworn statement made by Etheridge. Sparks argues that because Etheridge did not testify, admission of his sworn statement constitutes a denial of his right to confront witnesses against him. In addressing this claim, we recognize that probationers must be afforded certain due process rights at revocation hearings. Reyes v. State, 868 N.E.2d 438, 440 (Ind. 2007) (citing Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); Morrissey v. Brewer, 408 U.S. 471, 489 (1972)). Included among these rights are "'the right to confront and cross-examine adverse witnesses.'" Gagnon, 411 U.S. at 786 (quoting Morrissey, 408 U.S. at 489).[4] But probationers do not have the full extent of constitutional rights afforded to criminal defendants.[5] Reyes, 868 N.E.2d at 440.

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[4] See also Ind. Code § 35-38-2-3(e) (2004) (providing that a probationer is "entitled to confrontation, cross-examination, and representation by counsel.").

[5] Sparks does not claim that the trial court violated his right to confrontation as set forth in Crawford v. Washington, 541 U.S. 36 (2004). Regardless, our courts have held that Crawford is not applicable to

Here, we need not address the extent of Sparks' confrontation rights, for even if we were to assume that the trial court erred in admitting Etheridge's sworn statement, Sparks would not prevail. First, the sworn statement was cumulative of Sergeant Thomas's testimony that Etheridge told him that Sparks was the man riding the ATV,[6] and the erroneous admission of evidence that is merely cumulative of other evidence in the record is not reversible error. Pavey v. State, 764 N.E.2d 692, 703 (Ind. Ct. App. 2002), trans. denied. Also, any error in the admission of Etheridge's sworn statement was at most harmless given the other evidence which showed that Sparks fled from the police on the ATV and committed the additional crimes of intimidation and disorderly conduct. Indeed, the trial court stated that it gave little weight to Etheridge's sworn statement and that the evidence was sufficient to prove that Sparks violated his probation even without the statement. Under these facts and circumstances, we cannot say that the trial court's admission of Etheridge's sworn statement was reversible error.

II. Revocation of Probation and Sentence

Probation revocation is a two-step process: first, the court must make a factual determination that a violation of a condition of probation actually occurred; second, if a violation is proven, the trial court must then determine if the violation warrants revocation of the probation. Woods v. State, 892 N.E.2d 637, 640 (Ind. 2008). Sparks does not directly deny that the evidence was sufficient to support the trial court's finding

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probation revocation hearings because they are not criminal trials. See Reyes, 868 N.E.2d at 440 n.1; Marsh v. State, 818 N.E.2d 143, 146-76 (Ind. Ct. App. 2004).

[6] Although Sparks objected to this testimony as hearsay, his objection was overruled, and he does not challenge the trial court ruling on appeal.

that he violated the terms of his probation. He instead claims that the trial court abused its discretion in revoking his probation and ordering him to serve his previously suspended sentences. A trial court's sentencing decisions for probation violations are reviewed for an abuse of discretion. Milliner v. State, 890 N.E.2d 789, 793 (Ind. Ct. App. 2008), trans. denied.

In arguing that the trial court's decision to re-incarcerate him was an abuse of discretion, Sparks claims that "the circumstances surrounding Mr. Sparks' alleged violation were disputed." Appellant's Br. p. 5. The fact that Sparks disputed the facts presented by the State is of no moment; the trial court specifically credited the State's evidence and found that it proved by a preponderance of the evidence that Sparks did in fact violate the conditions of his probation. We will not second-guess the trial court's factual determinations. Woods, 892 N.E.2d at 639. Further, although Sparks points to evidence that he "successfully completed several of the required steps during his probation and is actively participating in rehabilitation activities," Appellant's Br. p. 5, we may consider only the evidence favorable to the trial court's decision. Woods, 892 N.E.2d at 639. The same is true for Sparks' claims that he has entered a twelve-step program and life skills class and made "significant progress." Appellant's Br. p. 6.

The facts favorable to the trial court's judgment reveal that Sparks has a significant criminal history, including five felony convictions prior to the felony convictions which resulted in him being placed on probation in the present case. Despite this criminal history, the trial court gave Sparks the grace of probation. See Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007) (noting that probation is a matter of grace, not a

right). Instead of taking advantage of the trial court's display of lenience, Sparks committed another felony by fleeing from the police on the ATV less than three months after being placed on probation. Then, after the trial court placed Sparks on "day reporting," he committed the additional crimes of felony intimidation and misdemeanor disorderly conduct. Under these facts and circumstances, the trial court clearly did not abuse its discretion by ordering Sparks to serve his previously suspended sentences.

Affirmed.

BARNES, J., and BROWN, J., concur.