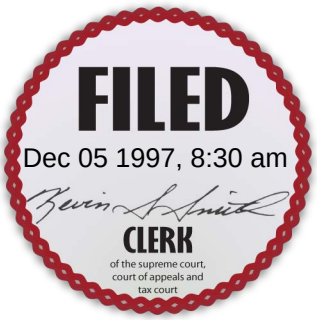

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IN THE
COURT OF APPEALS OF INDIANA

C.W.W.,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff

December 5, 1997

Court of Appeals Case No.
10A01-9706-CR-194

Appeal from the Clark Superior Court.
The Honorable Steven M. Fleece, Judge.
Cause No. 10E01-9501-CF-62

Baker, Judge.

[1] Appellant-defendant C.W.W. appeals the revocation of his probation, presenting several arguments for our review. However, because we find his contention that the State failed to present sufficient evidence of his probation violation to be dispositive, we address only this issue on appeal.

Facts[1]

[2] The facts most favorable to the trial court's judgment reveal that C.W.W. was convicted of Intimidation,[2] a Class D felony, and three counts of Harassment,[3] all Class B misdemeanors, for threatening the life of Dr. Bruce Geer, after Dr. Geer refused to prescribe a controlled substance for him. Thereafter, on May 1, 1995, C.W.W. was sentenced to three years imprisonment for intimidation and six months for each count of harassment. The sentences were to be served consecutively for a total sentence of four and one-half years imprisonment.

[3] During his incarceration, C.W.W. filed a complaint against Dr. Geer, alleging medical malpractice. Shortly thereafter, on July 5, 1996, C.W.W. filed a petition to modify his sentence. Prior to the modification hearing, C.W.W. wrote a letter to Dr. Geer expressing his intent to terminate his action if his sentence were modified and he were permitted to serve the remainder of his

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[1] Oral argument was held in this cause on November 18, 1997, in Bloomington, Indiana.

[2] Ind. Code § 35-45-2-1.

[3] Ind. Code § 35-45-2-2.

sentence on probation. Due to C.W.W.'s letter, Dr. Geer did not contest C.W.W.'s sentence modification. The trial court then granted C.W.W.'s petition, suspending the remainder of his sentence and placing him on probation. As a condition of his probation, C.W.W. was prohibited from contacting Dr. Geer or any member of his family. Thereafter, C.W.W. dismissed his lawsuit against Dr. Geer.

[4] On December 27, 1996, however, C.W.W. filed another complaint against Dr. Geer, alleging common law negligence, destruction of the doctor/patient relationship and harassment. Subsequently, the Clark County Sheriff's Department served Dr. Geer with C.W.W.'s summons, complaint and a set of interrogatories which had been filed with the complaint.

[5] In response, the State filed a petition to revoke C.W.W.'s probation. In particular, the State claimed that C.W.W. had violated the "no contact" condition of his probation by filing the lawsuit against Dr. Geer and serving him with a summons and interrogatories. Following the revocation hearing on February 26, 1997, the trial court revoked C.W.W.'s probation, finding that C.W.W. had violated the "no contact" order. Specifically, the trial court found that C.W.W.'s action of filing a lawsuit was an indirect written communication which was prohibited by the no-contact order. The trial court then ordered C.W.W. to serve the remainder of his executed sentence. C.W.W. now appeals the revocation of his probation.

Discussion and Decision

[6] C.W.W. claims that the State failed to present sufficient evidence that he violated the no-contact order. Specifically, he contends that his mere act of filing a lawsuit against Dr. Geer was insufficient to show that he "contacted" him.

[7] Initially, we note our standard of review. When reviewing the sufficiency of the evidence supporting a trial court's revocation of a defendant's probation, we apply the same standard used to determine any other sufficiency question. *Hensley v. State,* 583 N.E.2d 758, 759 (Ind. Ct. App. 1991). We do not reweigh the evidence or judge the credibility of witnesses; rather, we consider only the evidence most favorable to the State and any reasonable inferences to be drawn therefrom. *King v. State,* 642 N.E.2d 1389, 1393 (Ind. Ct. App. 1994). If there is substantial evidence of probative value to support the trial court's conclusion, revocation is appropriate. *Menifee v. State,* 600 N.E.2d 967, 970 (Ind. Ct. App. 1992).

[8] In order to revoke a defendant's probation, the State must prove, by a preponderance of the evidence, that the defendant violated a condition of his probation. *Id.* In the instant case, the only evidence that the State presented to show that C.W.W. had violated the no-contact order was that he filed a lawsuit against Dr. Geer. According to the State, this evidence showed that C.W.W. "contacted" Dr. Geer because the sheriff served Dr. Geer with a summons and complaint, notifying him of the lawsuit. We disagree.

[9] Contact is defined as "establishing of communication with someone" or "to get in communication with." *Webster's Dictionary* 249 (10th ed.1993). Communication occurs when a person makes something known or transmits information to another. *Ajabu v. State,* 677 N.E.2d 1035, 1042 (Ind. Ct. App. 1997), *trans. denied.* Further, communication may be either direct or indirect and is not limited by the means in which it is made known to another person. *Id.*

[10] In the instant case, the purpose of the no-contact order was to prevent C.W.W. from harassing and intimidating Dr. Geer or his family. Thus, in order for C.W.W. to have "contacted" Dr. Geer in violation of his probation, he must have used the legal process as a means of harassing or making his threats known to Dr. Geer. Although the State contends that the lawsuit was filed solely for this purpose because it was essentially the same claim which C.W.W. agreed to dismiss after his sentence modification and arose out of the same set of facts upon which he was previously convicted, C.W.W. raises additional claims and joins additional parties in his second suit that were not included in his first suit. Therefore, even assuming that C.W.W.'s first lawsuit was dismissed with prejudice, we cannot conclude that his second complaint was filed merely to harass Dr. Geer, absent a determination that his current lawsuit is frivolous, unreasonable or groundless. *See* Ind. Code § 34-1-32-1. Because his mere act of filing a lawsuit did not constitute contact in violation of his probation, the State failed to present sufficient evidence that C.W.W. violated

the no-contact order. As a result, the trial court erred by revoking C.W.W.'s probation.[4]

[11] The trial court's decision revoking C.W.W.'s probation is reversed and remanded for further proceedings not inconsistent with this opinion.

Robertson, J., and Najam, J., concur.

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[4] C.W.W. also contends that the trial court did not have the authority to prevent him from filing a lawsuit against Dr. Geer. Specifically, he contends that such an order violates IND. CODE § 35-38-2-2.3, which permits a trial court to impose conditions of probation, and Article 1, Section 12, of the Indiana Constitution, which guarantees every person open access to the courts.

Initially, we note that this court is not permitted to address a constitutional issue when we can base our decision on any other statutory or common-law basis. *Bayh v. Sonnenburg,* 573 N.E.2d 398, 402 (Ind. 1991), *cert. denied,* 502 U.S. 1094, 112 S.Ct. 1170, 117 L.Ed.2d 415 (1992). Moreover, as discussed above, the trial court prohibited C.W.W. from "contact[ing] ... Dr. Geer or any member of his family." R. at 182. Nothing in this order, however, prohibits C.W.W. from filing a lawsuit as C.W.W. contends. Therefore, we need not determine whether the trial court could have prohibited C.W.W. from filing a lawsuit as a condition of probation.