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**IN THE
COURT OF APPEALS OF INDIANA**

ERIC MARKWITH,)
)
Appellant-Respondent,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Petitioner.)

No. 79A02-1007-CR-756

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0701-FA-2

February 28, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, Eric Markwith (Markwith), appeals the trial court's revocation of his placement in community corrections following an evidentiary hearing.

We affirm.

ISSUE

Markwith raises one issue on appeal, which we restate as follows: Whether he received proper notice that the trial court might revoke his community corrections placement when the probation department filed both a notice of home detention violation and a petition to revoke probation.

FACTS AND PROCEDURAL HISTORY

On January 31, 2007, the State filed an Information charging Markwith with Count I, dealing in a narcotic drug, a Class B felony, Ind. Code § 35-48-4-1; Count II, possession of a narcotic drug, a Class B felony, I.C. § 35-48-4-6; Count III, possession of a schedule II controlled substance, a Class C felony, I.C. § 35-48-4-7; Count IV, dealing in a narcotic drug, a Class A felony, I.C. § 35-48-4-1; Count V, possession of a narcotic drug, a Class C felony, I.C. § 35-48-4-6; Count VI, conspiracy to deal in a narcotic drug, a Class A felony, I.C. §§ 35-48-4-1 and 35-41-5-2; Count VII, possession of paraphernalia, a Class A misdemeanor, I.C. § 35-48-4-8.3(a); Count VIII, conspiracy to commit robbery, a Class C felony, I.C. §§ 35-42-5-1 and 35-41-5-2; Count IX, possession of a narcotic drug, a Class D felony, I.C. § 35-48-4-6; Count X, possession of marijuana, a Class A misdemeanor, I.C. § 35-48-4-11; and Count XI, attempt to carry a handgun by a convicted felon, a Class C felony, I.C. §§ 35-47-2-

1; 35-47-2-23(c); and 35-41-5-1. On November 26, 2007, Markwith entered a plea of guilty to Count II, possession of a narcotic drug, as amended to a Class D felony, and Count XI, attempt to carry a handgun by a convicted felon, a Class C felony. In a separate case, he entered into a plea agreement for possession of a narcotic drug, a Class D felony. Both plea agreements were compiled into the same written plea agreement. Under the terms of this written plea agreement, the State agreed to dismiss all of Markwith's other charges, and Markwith agreed that the trial court could sentence him as it deemed appropriate.

Subsequently, on December 21, 2007, the trial court sentenced Markwith to two years for Amended Count II, six years for Count XI, and two years for his possession of a narcotic drug charge in the other case, with sentences to be served consecutively. The trial court ordered Markwith to serve five years in the Indiana Department of Correction (IDOC), followed by three years in the Tippecanoe County Community Corrections and two years of supervised probation.

On November 20, 2008, Markwith filed a petition for modification of sentence, requesting to serve the remainder of his executed sentence in community corrections. The trial court granted the petition on February 13, 2009. On June 9, 2009, though, the probation department filed a notice of home detention violation, stating that Markwith had been arrested for drug-related charges while on home detention. On June 24, 2009, as a result of that violation, the State filed a petition to revoke Markwith's probation. At the time, Markwith still had 337 days left to serve on his placement in community corrections, and he also had his two year probation sentence left to serve.

On May 12, 2010, Markwith pled guilty to conspiracy to possess a narcotic drug and admitted to being an habitual substance offender. On June 25, 2010, the trial court held a hearing regarding Markwith's probation violation and noted that Markwith had pled guilty to those offenses. Accordingly, the trial court determined that Markwith had violated the terms of his community corrections placement and the terms of his probation. The trial court ordered that Markwith serve the remaining 337 days of his executed sentence in the IDOC, one year of his previously ordered probation sentence in community corrections, and one year on probation.

Markwith now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

For purposes of review, we treat a hearing on a petition to revoke a placement in a community corrections program the same as we do a hearing on a petition to revoke probation. *Holmes v. State*, 923 N.E.2d 479, 482 (Ind. Ct. App. 2010). We take this approach because we have determined that the difference between the two is “insignificant.” *Pavey v. State*, 710 N.E.2d 219, 220-21 (Ind. Ct. App. 1999). Both are alternatives to commitment to the IDOC, and both are made at the discretion of the trial court. *Holmes*, 923 N.E.2d at 482. A placement in either is a “matter of grace” and a “conditional liberty that is a favor, not a right.” *Id.* (quoting *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999)). Accordingly, a community corrections hearing is civil in nature like a probation hearing, and the State need only prove the alleged violations by a preponderance of the evidence. *See*

Monroe v. State, 899 N.E.2d 688, 691 (Ind. Ct. App. 2009). We will consider all the evidence most favorable to the trial court’s judgment without reweighing that evidence or judging the credibility of the witnesses. *Id.* If a person placed in community corrections violates his or her terms of placement, the court may, after a hearing:

- (1) [c]hange the terms of the placement[;]
- (2) [c]ontinue the placement[; or]
- (3) [r]evoke the placement and commit the person to the department of correction for the remainder of the person’s sentence.

I.C. § 35-38-2.6-5.

While a community corrections placement revocation hearing has certain due process requirements, it is not equivalent to an adversarial criminal proceeding. *Holmes*, 923 N.E.2d at 482. The court’s inquiry is narrow, and its procedures are more flexible. *Id.* Nevertheless, a defendant is entitled to certain “minimum requirements of due process,” including:

- (a) [w]ritten notice of the claimed violations [of placement in community corrections]; (b) disclosure to the [defendant] 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...; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [the community corrections placement].

Pope v. State, 853 N.E.2d 970, 972-73 (Ind. Ct. App. 2006).

II. *Revocation of Markwith's Placement in Community Corrections*

Here, Markwith argues that he was denied due process because he never received notice that the trial court might revoke his placement in community corrections; specifically, the probation department filed a notice of home detention violation and a petition to revoke probation, but not a petition to revoke placement in community corrections. We do not agree with Markwith's argument that he was denied due process, and we affirm the trial court's decision to revoke his placement in community corrections.

In *Washington v. State*, 758 N.E.2d 1014 (Ind. Ct. App. 2001), we confronted a very similar issue. There, the trial court sentenced the defendant, Washington, to eight years, with two years to be spent in community corrections and two years on probation. *Id.* at 1016. Subsequently, Washington violated his probation, and Washington's probation officer filed a "notice of probation violation" and "petition for court action" with the trial court. *Id.* The trial court held a hearing on Washington's alleged violation and then revoked his probation. *Id.* at 1016-17. Washington appealed and argued that he did not receive sufficient notice that the trial court might revoke his probation because the State never filed a petition to revoke his probation. *Id.* at 1017.

On appeal, we determined that Washington did receive sufficient notice that the trial court could revoke his probation because the probation department informed him of the specific violations he was accused of committing in its notice of probation violation. *Id.* at 1017-18. In addition, the notice of probation violation was also titled "petition for court action," which provided Washington with notice that the trial court might take legal action to

address his probation violation. *Id.* at 1017. As a result, we determined that “[t]he probation department’s notice/petition satisfied the requirements of Indiana Code section 35-38-2-3, and Washington was not deprived of notice of the grounds supporting the revocation of his probation.” *Id.* at 1018.

Likewise, Markwith received adequate notice that the trial court could revoke his placement in community corrections. As stated above, the difference between a revocation of probation proceeding and a revocation of placement in community corrections proceeding is “insignificant.” *Pavey*, 710 N.E.2d at 22-21. Correspondingly, the holding in *Washington* is relevant here. Although the State did not file a petition to revoke Markwith’s placement in community corrections, Markwith did receive a notice of home detention violation. In that notice, the probation department identified Markwith’s alleged violation when it stated that: “[w]hile being monitored electronically, the [d]efendant was arrested for [d]ealing and [p]ossession of a [s]chedule I [s]ubstance.” (Appellant’s App. p. 54). In the notice, the probation department also “refer[red] this matter back to the court for appropriate action,” which provided Markwith with notice that his placement in community corrections was

subject to court review and revocation. (Appellant's App. p. 54). In light of these circumstances, we cannot conclude that the trial court denied Markwith due process.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly revoked Markwith's placement in community corrections.

Affirmed.

ROBB, C.J., and BROWN, J., concur.