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**IN THE
COURT OF APPEALS OF INDIANA**

GREGORY S. TAPLEY,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 42A01-0702-CR-75
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE KNOX SUPERIOR COURT
The Honorable W. Timothy Crowley, Judge
Cause No. 42D01-0509-FD-184

August 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Gregory S. Tapley appeals the revocation of his probation. He presents the following dispositive issue for review, which we restate as: Did the trial court abuse its discretion in revoking Tapley's probation?

We reverse.

Pursuant to a plea agreement, on October 13, 2005, Tapley pleaded guilty to attempted possession of anhydrous ammonia, as a class D felony. In the same agreement, he also pleaded guilty to a charge in another cause (FD-14). The trial court subsequently sentenced him to two consecutive, two-year, suspended sentences.

On January 27, 2006, Tapley was found to have violated probation. Accordingly, the trial court revoked Tapley's probation in FD-14, but continued his probation in the instant case as previously ordered. On December 6, 2006, Tapley was released from prison after serving his sentence for FD-14. At that point, his period of probation in the instant case commenced.

Two days later, around 10:30 p.m. on December 8, Tapley and another individual were passengers in a vehicle driven by nineteen-year-old Mark Marshall when the vehicle went off the road and rolled over into a ditch. Marshall, who was intoxicated at the time, remained at the accident site, while Tapley and the other person ran off. When Deputy Brian Hicks arrived at the scene, he observed approximately thirty beer cans strewn throughout the overturned vehicle. Some cans had been opened and the others were cold to the touch. Marshall refused to identify the other two occupants of the vehicle. Soon thereafter, however, Deputy Hicks found Tapley walking on the side of a nearby highway attempting to flag down vehicles. Tapley admitted being involved in the accident, and

Deputy Hicks determined Tapley had not been drinking. Later that night, Deputy Hicks arrested Tapley for contributing to the delinquency of a minor because Tapley had let Marshall drive while intoxicated.

As a result of the arrest, the State filed a notice of probation violation on December 11, 2006. Specifically, the State alleged Tapley had violated probation “by being arrested in Knox County, Indiana on December 9, 2006 for Contributing to the Delinquency of a Minor.” *Appellant’s Appendix* at 17. Following a hearing on January 2, 2007, the trial court found that Tapley had violated probation by being arrested for contributing to the delinquency of a minor.¹ The court revoked Tapley’s probation and ordered him to serve the balance of his sentence in prison. Tapley now appeals.

We initially observe that probation is a matter of grace and is a conditional liberty that is a favor, not a right. *See Kincaid v. State*, 736 N.E.2d 1257 (Ind. Ct. App. 2000). The trial court determines the conditions of probation and may revoke probation if the probationer violates a condition of probation. *Id.* A trial court’s order regarding revocation of probation is reviewed for an abuse of discretion. *Johnson v. State*, 692 N.E.2d 485 (Ind. Ct. App. 1998). Further, a probation hearing is civil in nature, and the State must prove the alleged violation of probation by a preponderance of the evidence. *Braxton v. State*, 651 N.E.2d 268 (Ind. 1995). On review, we neither reweigh the evidence nor judge the credibility of witnesses, and we look only to the evidence most favorable to the State. *Id.*

¹ On December 26, 2006, the State filed an amendment to the notice of probation violation, in which it claimed Tapley had also violated probation by failing to timely report to probation and work release. The trial court, however, specifically found that Tapley had not violated probation by failing to report.

On appeal, Tapley argues that an arrest alone is not sufficient to establish a violation of probation. Moreover, he claims the trial court did not find and, in fact, could not have found that his arrest for contributing to the delinquency of a minor was supported by probable cause.

“It has long been established that an arrest alone does not warrant the revocation of probation.” *Martin v. State*, 813 N.E.2d 388, 390 (Ind. Ct. App. 2004). “[I]f the trial court, after a hearing, finds that the arrest was reasonable and there is probable cause to believe the defendant violated a criminal law, revocation will be sustained.” *Pitman v. State*, 749 N.E.2d 557, 560 (Ind. Ct. App. 2001), *trans. denied*; *see also Martin v. State*, 813 N.E.2d at 391 n. 3 (“[t]he filing of criminal charges may be sufficient to support revocation of probation if the trial court finds by a preponderance of the evidence that there is probable cause to support them”).

In the instant case, the trial court made the following statement regarding the alleged probation violation:

[T]his isn't a case today where we've tried the contributing to the delinquency of the minor case and I don't know how that's going to shake out, but there is a probation rule, Probation Rule 3, that says you are to obey all town, city, county, state and federal laws and ordinances. Any arrest for a violation a [sic] law except for a minor traffic offense will be considered a violation of your probation and may result in a petition being filed in this Court to revoke your suspended sentence. You must immediately notify your probation officer if you are arrested for the commission of a criminal offense. That's what Paragraph 3 says and that's the basis for the State's filing of a probation violation, at least originally was that he had been re-arrested. I can't honestly say what the truth is there. I haven't heard enough evidence and testimony[;] I mean we haven't heard Mr. Marshall's testimony, this mysterious third party that was in the back seat. I don't know where that cold beer came from, but the point is that he was, in fact, arrested. That's the point and I assume there's a

criminal charge pending against him at Superior II or there will be, if it hasn't been filed. For that reason and by virtue of the fact that the Defendant basically admitted, in his testimony today, that he had been arrested, the Court finds that Mr. Tapley has violated his probation by being arrested for the charge of Contributing to the Delinquency of a Minor her in Knox County.

Transcript at 69-70. This statement reveals the trial court found a probation violation based solely upon Tapley's arrest, without finding that the arrest was reasonable and supported by probable cause.² This was an abuse of discretion.

Judgment reversed.

BAKER, C.J., and CRONE, J., concur.

² The State acknowledges the contributing statute could not apply under the facts of the instant case because Marshall was over eighteen years old. *See* Ind. Code Ann. § 35-46-1-8(a) (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007) (offense defined as: "A person at least eighteen (18) years of age who knowingly or intentionally encourages, aids, induces, or causes a person less than eighteen (18) years of age to commit an act of delinquency"). The State, however, argues there is evidence demonstrating by a preponderance of the evidence that Tapley violated the criminal law by furnishing alcohol to a minor, which in that statute a minor is defined as someone under the age of twenty-one. *See* Ind. Code Ann. § 7.1-5-7-8 (West 2005); I.C. § 7.1-1-3-25 (West 2005). As set forth above, the trial court violated Tapley's probation based solely upon his arrest and made no probable cause determination (with respect to contributing or any other criminal offense, for that matter).