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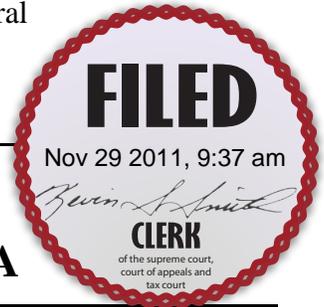
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**IN THE  
COURT OF APPEALS OF INDIANA**

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STEVE BARNETT, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 87A01-1008-CR-397

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APPEAL FROM THE WARRICK SUPERIOR COURT  
The Honorable Keith A. Meier, Judge  
Cause No. 87D01-0907-FB-109

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**November 29, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Steve Barnett appeals the revocation of his probation. He claims the trial court denied him due process and erred by ordering him to serve executed the remainder of his suspended sentence. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On July 31, 2009, Barnett pled guilty to Class B felony possession of methamphetamine within one thousand feet of school property<sup>1</sup> and Class A misdemeanor possession of marijuana.<sup>2</sup> On September 28, the trial court imposed a ten-year sentence, all suspended to probation on the condition Barnett participate in the Warrick County Drug Court Program (“the Program”). Before entering the Program, Barnett signed a Waiver of Rights acknowledging he was

voluntarily agreeing to **WAIVE AND GIVE UP** the following rights which I would have if I did not go into the Program, as long as I am in the Program . . .

10. . . . **WRITTEN NOTICE OF VIOLATION.** Anytime I break a rule or order of the Program Court, I know and agree that neither the Program nor the Prosecutor has to file any papers with the Program Court saying that I have broken a rule or order of the Program Court before the Judge of the Program Court can act on the alleged violation.

11. . . . **SANCTIONS.** I know and agree that if I break any rule of the Program, disobey any Order of the Program court, commit another crime, or for another good reason, the Program Court can impose a sanction(s) (like a punishment) on me, including removing me from the Program.

12. . . . **DETENTION.** I know and agree that: A.) if an employee of the Program, a team member, or someone working for or with the Program thinks I have broken a rule or order of the Program Court, they might contact the Judge of the Program Court (either orally or in writing) and tell him; and B.) The Judge can then immediately order that I be taken immediately to jail, or

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<sup>1</sup> Ind. Code § 35-48-4-6.1(b)(2).

<sup>2</sup> Ind. Code § 35-48-4-11.

that I stay in my home or other place, until I can go in front of the Judge of the Program Court; and C.) As a sanction for breaking a Program rule or order of the Program Court, the Judge can order me to stay in jail or put me in jail but not for longer than any sentence which has been imposed on me; and D.) If I drop out of the Program or if I am removed from the Program for any reason, I will have to immediately go to jail and stay in jail until a decision is made by the Judge as to whether or not I have violated any sentence(s) which resulted in my being placed in the Program; . . . .

\* \* \* \* \*

14. . . . **RECUSAL OF JUDGE.** I know and agree that if I have been or if I am sentenced by the Judge of the Program Court, I give up my right to have that judge removed from my case(s) for any reason, including the following:

1. The Judge's involvement with me while I am in the Program.
2. What that Judge knows about me and what I did or didn't do while I was in the Program.
3. That Judge's decision to remove me from the Program.
4. That I think I made that Judge mad while I was in the Program.

15. . . . **ADMISSIONS OF DRUG AND ALCOHOL SCREEN AND TEST RESULTS.** I give up my right to challenge the results of, reports from, or challenge the admissibility into evidence in the Program Court of: all certified drug or alcohol screens and tests; all pager, electronic monitoring, and monitoring devices; any ignition interlock device; and, any lie detection test, including polygraph and voice analysis.

\* \* \* \* \*

18. . . . **SELF-INCRIMINATION.** I know that I have the right not to say anything that may incriminate me to anyone which includes any member of the Program staff, any Program team member, Field Compliance Officer, anyone working for or with the Program, any of my treatment providers, and the Program Judge. If I do say something that incriminates me, I will have waived my right not to incriminate myself. However, I retain my right when speaking to my attorney or the Public Defender assigned to the Program.

19. . . . **SEARCH AND SEIZURE.** I know and agree that:

- a) I have the right not to permit myself, my home, my property, my car or anything else owned by me or in my possession to be searched or anything found to be seized, unless I go into the Program.
- b) I have the right to require that Program staff or team members, the police, or someone else acting for or with the Program, obtain a search or arrest warrant before they can come into or search myself, my home, my property, my car or anything else owned by me or in

my possession, unless I go into the Program.

- c) Anytime the Program wants to, they can send one of their staff or team members, the police, or someone else acting for or with the Program, without a search warrant or arrest warrant, to my work, my home and/or any other place I may be.
- d) The purpose of these visits is so that they can talk to me about my progress in the Program, to conduct a drug and/or alcohol test, and to see if I am obeying the Program Rules and Orders of the Program Court. These people can go inside my place of work, my vehicle(s), my home, my garage and all buildings around where I live. They can look around, open things, move things around, and search me.
- e) If they find anything that the Program or Program Court says is not supposed to be there or is evidence of any crime, they can take it and it can be used against me.
- f) They can use a drug or alcohol detection device or animal to help them.
- g) They can take pictures or movies of me, the people there, my place of work, my home and all buildings, my vehicle and anything they find in them.
- h) They can talk with me and anyone else who is there.

(Appellee's App. Vol. 1 at 4-6) (emphasis in original). When admitted to the Program, Mel Catlin became Barnett's case manager.

On December 28, Barnett tested positive for methamphetamine. Two days later, the Supervising Judge of the Program ordered Barnett to spend six days in jail for drug use and then return to the Program.

On March 9, 2010, when Barnett arrived at the Program office, he was given a routine breathalyzer test, which indicated he had not consumed any alcohol. Nevertheless, Catlin continued to question Barnett and collected a urine sample from Barnett. When Barnett realized Catlin was sending his urine sample to a lab for testing, Barnett admitted he had consumed alcohol. His failure to admit using alcohol before learning his urine would be

tested violated the Program's requirement that he be honest with Program staff. Based on those violations of the terms and conditions of the Program, the Supervising Judge of the Program found Barnett in contempt and ordered him to spend ninety days in jail.

On April 29, Catlin filed an affidavit of non-compliance, which explained Barnett had violated the terms of the Program by using methamphetamine, drinking alcohol, and failing to obey the "rules, terms, conditions, requirements, and/or orders." (Appellee's App., Vol. 1 at 10.) The affidavit also indicated the Program "team" had decided to terminate Barnett's participation in the Program. (*Id.* at 11.) The next day, the Probation Department filed a petition alleging Barnett violated probation by testing positive for methamphetamine, drinking alcohol, and being terminated from the Program. The trial court ordered Barnett officially removed from the Drug Court and returned to Criminal Court, and then the court set a hearing on the petition to revoke Barnett's probation.

At the probation revocation hearing, Catlin testified regarding the three Program rules that Barnett violated. At the end of the hearing, the trial court found Barnett had violated probation:

I think the key to all of this is not so much the particular violations of the Drug Court rules as it is Defendant's sentence was suspended on the condition that he successfully complete the Drunk Driving and Drug Court program. The testimony was that he was ejected from the program. So, I mean, that's the bottom line issue, is that he was ejected from the program, and the reasons were as set out in the Affidavit of Non-Compliance. As to the methamphetamine that [sic] Exhibit One, Defendant also admitted to using the meth. Defendant admitted to using alcohol and is -- as I understood this witness, part of the reason for terminating the Defendant is because he did not freely admit, and that is a requirement under the rules and conditions of the program. The Defendant asked to be placed back in the program. By the documents which created the Drug Court and under which it operates, you

can't go into the Drug Court program twice. So there isn't a possibility for the Defendant to go back into the Drug Court program. But based on the conditions on his sentence, the rights that he waived in his Waiver of Rights that was filed on September 28th of 2009 and the evidence presented, I would find that the Defendant has violated the terms and conditions of his probation. Now, the question is is [sic] what to do with Mr. Barnett.

(Tr. Vol. 3 at 24-5.)<sup>3</sup> After additional hearings regarding sentencing options, the court revoked the remainder of Barnett's suspended sentence, ordered him to participate in and complete the "GRIP Purposeful Incarceration Program," (App. of Appellant at 8), and stated it would consider moving Barnett to another treatment facility when he finished the GRIP program.

## **DISCUSSION AND DECISION**

### **1. Revocation Proceedings**

We review the revocation of probation under an abuse of discretion standard. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). An abuse of discretion occurs where the trial court's decision "is clearly against the logic and effect of the facts and circumstances." *Id.*

Barnett asserts the revocation of his probation based on his ejection from the Program violated his right to due process because, before his removal from the Program, he did not receive a hearing before a neutral body or an opportunity to present evidence or confront and cross-examine witnesses. We have held that the due process rights afforded to a probationer facing revocation of probation apply to a defendant facing termination of participation in a drug court program. *Gosha v. State*, 931 N.E.2d 432, 434-35 (Ind. Ct. App. 2010). Those

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<sup>3</sup> We received three separately bound volumes of transcript from the trial court clerk, which we labeled chronologically as "Vol. 1 of 3," "Vol. 2 of 3," and "Vol. 3 of 3."

rights include written notice of alleged violations, a hearing, disclosure of the evidence, an opportunity to present evidence, the right to confront and cross-examine witnesses, and a neutral and detached hearing officer.” *Id.* at 435. However, Barnett’s circumstances differ from those in *Gosha* in a number of important respects.

First, in *Gosha*, we noted, “We agree with the State that a defendant may waive his right to procedural due process” *see id.* at 435 n.3, but found “the evidence does not show that Gosha knowingly waived that right here.” *Id.* In contrast, before admission to the Program, Barnett signed a waiver of rights form voluntarily waiving his rights to notice of alleged crimes or violations of Program rules; to change the Judge or have a decision made by someone aside from the Program Court; to not incriminate himself; to not be searched; to not give blood, breath or urine samples for drug testing; and to not have incriminating evidence admitted against him. He also agreed the Program Court could act on an alleged violation without any paperwork being filed and the Program Court could “impose a sanction(s) (like a punishment) on me, including removing me from the Program,” if he committed crimes, disobeyed Program rules, “or for another good reason.” (Appellee’s App. at 4.) Thus, before he entered the Program, Barnett waived most, if not all, of the rights he now claims the court violated.

In addition, although the trial court said it was revoking Barnett’s probation because “he was ejected from the [Program] . . . that’s the bottom line issue,” (Tr. Vol. 3 at 24-5), the court did not simply revoke Barnett’s probation based on the fact of his ejection. The court received evidence at the revocation hearing regarding the grounds underlying Barnett’s

ejection from the Program, Barnett had received notice of those alleged violations, and Barnett had the opportunity to cross-examine the witnesses and present evidence of his own. In revoking probation, the court specifically discussed how the evidence supported the grounds underlying Barnett's ejection from the Program. The court noted Barnett admitted using methamphetamine and alcohol, and it noted the testimony from Catlin supported finding Barnett violated Program Rules by failing to freely admit his use of alcohol.

Thus, although the court may have said Barnett's ejection from the Program was "the bottom line," *id.*, the court did not rely blindly on that ejection when deciding to revoke Barnett's probation. Even had Barnett not waived his rights prior to entering the Program, the court's decision still would not have violated his right to due process as discussed in *Gosha*.<sup>4</sup>

## 2. Sanction

Barnett next asserts the court erred by ordering him to serve the remainder of his sentence in the Department of Correction. However, as Barnett himself notes, "the trial court may order execution of a suspended sentence upon a finding of a violation." (Br. of Appellant at 9) (quoting *Goonen v. State*, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999)). *See also* Ind. Code § 35-38-2-3(g) (providing court may, upon finding of probation violation, continue probation, extend probation, or order execution of all or part of the sentence suspended). In light of the court finding Barnett had violated three conditions of probation --

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<sup>4</sup> Because the trial court proceedings did not deny Barnett's right to due process, we need not address his allegation that his counsel's failure to object to the proceedings on this basis rendered his assistance constitutionally ineffective.

failing to complete the Program, using alcohol, and using methamphetamine -- we cannot find the court abused its discretion by revoking all of the time originally suspended.<sup>5</sup> *See, e.g., Goonen*, 705 N.E.2d 209, 212-13 (no error in revoking probation and reinstating sixteen-year sentence where Goonan committed another crime).

Affirmed.

BAKER, J., and BRADFORD, J., concur.

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<sup>5</sup> Barnett also alleges the revocation subjects him to double jeopardy, because he had already been sanctioned to jail time for the Program violations; however, the trial court's final order indicates the probation department was to determine the amount of "credit time" Barnett had earned while incarcerated before the revocation hearing, (App. of Appellant at 12), and thus it is not apparent Barnett will be subjected to double jeopardy. Neither is there reasonable support for his assertion that his incarceration will "exceed the sentence of the underlying charge." (Br. of Appellant at 10.)