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IN THE
COURT OF APPEALS OF INDIANA

ROCKY FLASH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0605-CR-407
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Nancy Broyles, Commissioner
Cause No. 49G05-0307-FC-128688

December 11, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Rocky Flash[1] appeals the revocation of his probation. Flash raises two issues, which we revise and restate as:

I. Whether the trial court violated due process requirements by denying Flash's right to be heard;

II. Whether Flash was denied the right to allocution;

III. Whether Flash was denied the effective assistance of trial counsel; and

IV. Whether Flash was advised of the conditions of his probation.

We affirm.

The relevant facts, as set out in Flash's direct appeal of his sentence, follow:

> Flash and Susan Holtsclaw met and began dating in October 1999. After the relationship fizzled, Holtsclaw obtained a permanent protective order against Flash in November 2001. On June 2, 2003, Flash threw a large yellow envelope containing a letter onto Holtsclaw's driveway, and on July 29, 2003, Flash left a letter and an e-mail on her car. Both actions were taken in violation of the protective order that required that any contact that needed to be made between Flash and Holtsclaw should occur through her attorney, Barbara Malone.

Hurricane v. State, No. 49A02-0311-CR-971, slip op. at 2 (Ind. Ct. App. July 19, 2004).

On July 31, 2003, the State charged Flash with stalking as a class C felony[2] and two counts of invasion of privacy as class A misdemeanors.[3] On September 29, 2003, Flash

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[1] In his direct appeal, Flash listed his name as "Darth Hurricane" on the briefs and signed his brief "Rocky 'Hurricane' Flash." Hurricane v. State, No. 49A02-0311-CR-971, slip op. at 2 n.1 (Ind. Ct. App. July 19, 2004). At the probation revocation hearing, Flash indicates that his birth name is "Jonathan Sharkey." Transcript at 3.

pleaded guilty to the two counts of invasion of privacy as class A misdemeanors, and the State dismissed the remaining count. The trial court sentenced Flash to 365 days and suspended 245 days. Flash appealed his conviction and we affirmed.[4] See Hurricane, No. 49A02-0311-CR-971, slip op. at 2.

On January 27, 2004, the State filed a notice of probation violation and alleged that Flash violated his probation because he: (1) violated a no contact order; (2) failed to comply with his court ordered mental health treatment; and (3) failed to comply with his court ordered financial obligation. On September 16, 2005, the State filed an amended notice of probation violation, which stated: (1) Flash violated his no contact order; (2) Flash failed to comply with his court ordered mental health treatment; (3) Flash failed to comply with his court ordered financial obligation; (4) a probable cause warrant was issued for Flash for escape; and (5) Flash failed to report to the probation department as instructed. The trial court held a probation revocation hearing. At the hearing, the State withdrew allegations one, three, and four. The trial court found that Flash violated his probation and ordered him to serve the remaining 245 days of his sentence.

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[2] Ind. Code § 35-45-10-5 (2004).

[3] Ind. Code § 35-46-1-15.1 (2004).

[4] Flash raised the following six issues in that appeal: "(1) whether the trial court erred in denying his motion to dismiss; (2) whether the trial court erred in ordering him to submit to GPS monitoring and a mental health evaluation as a condition of probation; (3) whether the trial court erred in ordering the disposal of his firearms; (4) whether the trial court erred in denying his motion for a change of venue; (5) whether the trial court erred in denying his request to leave the state while on probation; and (6) whether the trial court erred in denying his motion to amend the terms of his probation." Hurricane, No. 49A02-0311-CR-971, slip op. at 2.

I.

The first issue is whether the trial court violated due process requirements by denying Flash's right to be heard. It is well settled that, although a probationer is not entitled to the full array of rights afforded at trial, certain due process rights are granted to a probationer at a revocation hearing. Isaac v. State, 605 N.E.2d 144, 148 (Ind. 1992), cert. denied, 508 U.S. 922, 113 S. Ct. 2373 (1993). Those rights include the opportunity to be heard and present evidence. Id.

Flash directs our attention to the following exchange during his attorney's direct examination of Flash:

> Q Now Mr. Flash, you said you left the State, was due to an emergency?
>
> A That was due because I had an opportunity to run for the United States Congress in Tampa, Florida, on President Bush's line, and I made a . . .
>
> [Flash's Attorney]: No further questions of the witness, Your Honor.
>
> [Flash]: If I may be allowed to speak though because Mr. Lopes does not . . .
>
> [Flash's Attorney]: I don't believe it would be in his best interests, Your Honor, to allow him to speak at this point here.
>
> [Flash]: I wish to take the chance and do so. Because immediately upon getting down to Tampa I went to the VA Hospital to see a doctor to be scheduled for mental health.
>
> THE COURT: Just a second, sir. You have no further questions of him?

[Flash's Attorney]: No, not at this point, Your Honor.

THE COURT: Cross-examination?

[Prosecutor]: No, Your Honor.

THE COURT: Any rebuttal?

[Prosecutor]: No, Your Honor.

THE COURT: Any closing argument?

Transcript at 25-26.

The State argues that, even assuming that the trial court erred, any error was harmless. We agree. The following exchange occurred on direct examination of Flash:

> Q Now Probation has alleged that you have not reported to them after January 7th of '04, is that correct?
>
> A That is correct. If I may be able to continue about the mental health matter. I went to --- I contacted Tom McKias who is the executive assistant director at the VA. I told him I was not happy with Laura because she was saying that I had been stalking Susan, when in reality Susan had been stalking me and I have proof of that and staying in contact with me, which violated the order anyway. I did leave the State, I do not dispute that one bit, however . . .

Id. at 24-25. Thus, Flash admitted to violating his probation by failing to report to the probation department. "Proof of any one violation is sufficient to revoke a defendant's probation." Brooks v. State, 692 N.E.2d 951, 953 (Ind. Ct. App. 1998), reh'g denied, trans. denied. Thus, even assuming that the trial court erred, any error is harmless because Flash admitted to violating his probation. See, e.g., Bussberg v. State, 827 N.E.2d 37, 44 (Ind. Ct. App. 2005) (holding that error that violated due process was

harmless and affirming revocation of probation) reh'g denied, trans. denied; see also Bush v. State, 775 N.E.2d 309, 311 (Ind. 2002) ("[T]rial court error, even of constitutional dimension, does not necessarily require reversal of a conviction. Rather, if the error is such that it would not affect the outcome of the trial, we deem it harmless.").

II.

The next issue is whether the trial court erred by refusing to permit Flash to make a statement of allocution. The right of allocution applies to probation revocation hearings. Vicory v. State, 802 N.E.2d 426, 429 (Ind. 2004). The purpose of the right of allocution is to give the trial court the opportunity to consider the facts and circumstances relevant to the sentencing of the defendant in the case before it. Id. "When the defendant is given the opportunity to explain his view of the facts and circumstances, the purpose of the right of allocution has been accomplished." Id. at 430.

Article 1, section 13 of the Indiana Constitution provides in part: "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel." The Indiana Constitution "places a unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charges." Id. at 429 (quoting Sanchez v. State, 749 N.E.2d 509, 520 (Ind. 2001)). "The right of allocution is minimally invasive of the sentencing proceeding; the requirement of providing the defendant a few moments of court time is slight." Id. (quoting U.S. v. Barnes, 948 F.2d 325, 331 (7th Cir. 1991)).

"Notwithstanding, a defendant claiming that he was denied his right to allocution carries a strong burden in establishing his claim." Id.

The State argues that Flash waived this claim by not preserving it for appeal. Flash argues that he preserved this issue by his request to speak. Specifically Flash directs our attention to the following exchange:

> [Flash's Attorney]: No further questions of the witness, Your Honor.
>
> MR. FLASH: If I may be allowed to speak though because Mr. Lopes does not . . .
>
> [Flash's Attorney]: I don't believe it would be in his best interests, Your Honor, to allow him to speak at this point here.
>
> MR. FLASH: I wish to take the chance and do so. Because immediately upon getting down to Tampa I went to the VA Hospital to see a doctor to be scheduled for mental health.
>
> THE COURT: Just a second, sir. You have no further questions of him?
>
> [Flash's Attorney]: No, not at this point, Your Honor.

Transcript at 25-26. We conclude that Flash did not waive this issue because he made a specific request to speak. See, e.g., Vicory, 802 N.E.2d at 428 (holding that "[o]nce the court denied Vicory's request to read his statement, however, the right to appeal was properly preserved").

The State also argues that Flash has failed to make any assertion as to the content of any purported statement that he might have made or how a statement may have benefited him. Flash argues that "[i]t is inequitable and inexplicable for the State to

suggest that because Mr. Flash was denied his opportunity to speak he has not shown what he would have said or how the outcome would have been different." Appellant's Reply Brief at 2. Indiana courts have relied on whether a defendant has identified a statement or argument that the defendant would have made when considering this issue. See Vicory, 802 N.E.2d at 430 ("Nevertheless, because Vicory testified at his hearing and because he has not identified any statement or argument he would have made had the court permitted him to read his statement, the court's refusal did not affect his substantive rights such that reversal is warranted.") (citing Ind. Trial Rule 61); Robles v. State, 705 N.E.2d 183, 187 (Ind. Ct. App. 1998) (noting that the defendant had "not made any assertion as to the content of any purported statement that he might have made, how a statement may have benefited him, or that he intended to call any witnesses to testify on his behalf" when addressing defendant's argument that the trial court failed to grant him an opportunity to speak in his own behalf). Because Flash has failed to make any assertion as to the content of any purported statement that he might have made or how a statement may have benefited him and because he admitted to violating his probation by failing to report to the probation department, we conclude that the trial court's refusal did not affect his substantial rights. See Palmer v. State, 654 N.E.2d 844, 846 (Ind. Ct. App. 1995) (holding that exclusion of alibi testimony was harmless error).

III.

The next issue is whether Flash was denied the effective assistance of trial counsel. Flash argues that his trial counsel was ineffective because he prevented Flash

from testifying. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh'g denied), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. Failure to satisfy either prong will cause the claim to fail. Id. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

Because we have already determined that Flash has failed to demonstrate prejudice, his claim of ineffective assistance of trial counsel fails. See, e.g., Clayton v. State, 658 N.E.2d 82, 85 (Ind. Ct. App. 1995) (holding that defendant failed to show how he was prejudiced); Isom v. State, 585 N.E.2d 1347, 1350 (Ind. Ct. App. 1992) (holding that the "[defendant] fails to present any argument that as a result of counsel's actions, or lack thereof, he suffered prejudice" and "[a] mere assertion of error, absent evidence of prejudice, will not support a claim of ineffective assistance of counsel"), trans. denied.

IV.

The next issue is whether Flash was advised of his conditions of probation. In Flash's direct appeal he argued that the trial court erred "in imposing certain of the conditions of his probation." Hurricane, No. 49A02-0311-CR-971, slip op. at 5. Specifically, Flash argued that "he should not have been ordered to submit to GPS monitoring and a mental evaluation," but he did not argue that the trial court did not advise him of his probation conditions. Id. Flash also did not make this argument at the probation revocation hearing. Because Flash did not properly bring an objection to the trial court's attention so that the trial court could rule upon it, he is deemed to have waived this issue. See, e.g., Brewer v. State, 816 N.E.2d 514, 516 (Ind. Ct. App. 2004) (holding that the defendant waived his argument because he did not make any objection during the probation revocation hearing).

For the foregoing reasons, we affirm the trial court's revocation of Flash's probation.

Affirmed.

KIRSCH, C. J. and MATHIAS, J. concur