

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Carl Jay Cooper, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 25, 2021

Court of Appeals Case No.
20A-CR-1715

Consolidated Appeal from the
Vanderburgh Circuit Court

The Honorable Robert J. Pigman,
Judge

Trial Court Cause Nos.
82D03-1906-F5-3874
82D03-1910-F3-7303

Crone, Judge.

Case Summary

- [1] Carl Jay Cooper, Jr., was convicted of class A misdemeanor battery resulting in bodily injury. During the sentencing hearing, the trial court also revoked his probation in a separate cause. Cooper now brings this consolidated appeal, arguing that the trial court violated his constitutional right to self-representation at trial and that there was insufficient evidence to support the finding that he violated his probation. We affirm.

Facts and Procedural History

- [2] In 2019, Cooper was convicted of level 5 felony domestic battery in cause number 82D03-1906-F5-3874 (Cause 3874). The trial court imposed a two-year sentence, the entirety of which was suspended to probation after credit for time served. On October 4, 2019, the State filed a petition to revoke Cooper's probation alleging that he failed to meet with his probation officer as required. Two weeks later, the State charged Cooper with level 3 felony burglary and level 5 felony battery by means of a deadly weapon in cause number 82D03-1910-F3-7303 (Cause 7303). The State subsequently alleged that Cooper was a habitual offender. A second petition to revoke Cooper's probation in Cause 3874 was filed on October 17, 2019, based upon his alleged commission of the crimes charged in Cause 7303.
- [3] Attorney Jacklyn Buente was appointed to represent Cooper in both Cause 3874 and Cause 7303. At a November 2019 hearing, the trial court consolidated Cooper's probation revocation in Cause 3874 with his trial in

Cause 7303.¹ In light of Cooper’s wishes, Buente adopted his “request for an Early Trial by Jury and request[ed] the Court do the same.” Appellant’s App. Vol. 2 at 37. Accordingly, the trial court set Cooper’s trial in Cause 7303 for January 16, 2020. Cooper’s representation was subsequently reassigned to attorney Nick Dossett, and the trial in Cause 7303 was reset several times due to court congestion and requested continuances.

[4] On March 16, 2020, the trial court held a hearing to address a previous indication by Cooper that he wished to proceed pro se.² During the hearing, Cooper complained, among other things, that his early-trial rights had been violated and that he believed his trial was delayed because of his appointed counsel. He argued that he wished to represent himself because it appeared to him that “they ain’t got time to deal with me.” Tr. Vol. 2 at 14. The trial court repeatedly advised Cooper that his trial had been continued to May 7, 2020, because of another trial with priority and that, contrary to Cooper’s erroneous belief, representing himself would not result in an earlier trial date. Cooper continued to insist that he wanted an earlier trial date. At the conclusion of the hearing, the trial court advised Cooper that his trial date remained set for May 7, 2020.

¹ As noted by the State, Indiana Appellate Rule 38(A) provides that “[w]hen two (2) or more actions have been consolidated for trial or hearing in the trial court ... they shall remain consolidated on appeal.”

² Cooper stated this desire during a hearing before a magistrate on March 11, 2020. The magistrate determined that the matter would be revisited on March 16, 2020, during a hearing before the regular trial judge. Tr. Vol. 2 at 8-9.

[5] In light of our supreme court's subsequent order barring all jury trials until at least June 2020 due to COVID-19, the trial court held a hearing on April 28, 2020, during which it reset Cooper's trial date for June 22, 2020. During that hearing, Cooper informed the court that he did not want Dossett representing him, but rather than requesting to proceed pro se, Cooper requested to have another attorney appointed to represent him. The trial court denied that request, explaining, "You're not getting a different lawyer sir. You can ... represent yourself, you can hire a lawyer to represent you[,] or you can accept the services of the Public Defender's Office. Those are your three options." *Id.* Vol. 2 at 19. Cooper then asked Dossett if he could help him get a change of judge and/or a change of venue because he was being treated unfairly. Dossett told Cooper that they should instead concentrate on the fact that there was a new plea deal to discuss, and he assured Cooper that he would provide requested discovery to Cooper as soon as possible. Cooper replied, "All right." *Id.* at 20.

[6] Cooper's trial was subsequently continued past June 22, 2020, due to an "Emergency Declaration concerning COVID-19." Appellant's App. Vol. 2 at 42. In the interim, Cooper filed several pro se items with the trial court that were ordered to be forwarded to Dossett. Cooper's jury trial in Cause 7303 was

held on August 17 and 18, 2020.³ The jury found Cooper not guilty of level 5 felony battery with a deadly weapon, but guilty of class A misdemeanor battery as a lesser included offense of level 6 felony battery resulting in moderate bodily injury. The trial court sentenced Cooper to one year in the Vanderburgh County Jail, to be served consecutive to his sentence in Cause 3874. During the sentencing hearing, the trial court addressed Cooper's probation revocation in Cause 3874 and revoked his two-year suspended sentence.⁴ This consolidated appeal ensued.

Discussion and Decision

Section 1 – The trial court did not violate Cooper's constitutional right to self-representation.

[7] Cooper first asserts that the trial court violated his constitutional right to represent himself at his jury trial in Cause 7303. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to counsel. *Jones v. State*, 783 N.E.2d 1132, 1138 (Ind. 2003). Implicit in the right to counsel is the right to self-representation. *Drake v. State*, 895 N.E.2d 389, 392 (Ind. Ct. App. 2008). Our supreme court has explained,

³ On March 30, 2020, the State added another charge of level 3 felony burglary to Cause 7303. The State also amended the charging information on August 5, 2020, to add a count of level 6 felony battery resulting in moderate bodily injury. After various dismissals, Cooper was ultimately tried on two counts: level 5 felony battery by means of a deadly weapon and level 6 felony battery resulting in moderate bodily injury.

⁴ The trial court informed Cooper, "You've already served the year on this charge so you're actually done with this sentence but you have two years to go on the [probation revocation] with some credit time." Tr. Vol. 2 at 108.

In *Faretta v. California*, 422 U.S. 806, 821 (1975), [the United States Supreme Court] held that the right of self-representation is implicit in the Sixth Amendment to the United States Constitution, and Article 1, § 13, of the Indiana Constitution also guarantees this right. A request to proceed pro se is a waiver of the right to counsel, and consequently, there are several requirements to invoking the right of self-representation successfully. A defendant's request must be clear and unequivocal, and it must be [made] within a reasonable time prior to the first day of trial.

Stroud v. State, 809 N.E.2d 274, 279 (Ind. 2004) (emphasis added) (some citations and quotation marks omitted). “[H]alf-hearted expressions of dissatisfaction with counsel fail to meet the requisite clear and unequivocal assertion for the right of self-representation.” *Hotep-El v. State*, 113 N.E.3d 795, 809 (Ind. Ct. App. 2018) (quoting *Dobbins v. State*, 721 N.E.2d 867, 872 (Ind. 1999)). Moreover, even after a defendant has asserted his right to self-representation, the right may be waived through conduct indicating that he is vacillating on the issue or has abandoned the request altogether. *Wheeler v. State*, 15 N.E.3d 1126, 1130 (Ind. Ct. App. 2014).

[8] Cooper claims that he clearly and unequivocally asserted his right to self-representation at least “five times at three separate hearings[.]” Appellant’s Br.

at 14.⁵ But Cooper overstates the clarity and unequivocal nature of his alleged assertions. The vast majority of Cooper's statements to the trial court expressing dissatisfaction with counsel and his desire to proceed pro se were made in the context of his efforts to speed up his trial date. Indeed, after his first alleged invocation of his right, when explicitly asked by his attorney, "You want to represent yourself or do you want to keep me[?]," Cooper evaded the question and simply answered, "And I'm not sitting in here for no more months." Tr. Vol. 2 at 7. Again, during the hearing on March 16, 2020, Cooper specifically tied his statements requesting self-representation to his erroneous assumption that he could get an earlier trial date without counsel.

[9] On April 28, 2020, although Cooper did clearly state to the trial court that he did not want to be represented by his current appointed counsel, rather than requesting to proceed pro se, he requested to have another attorney appointed to represent him. The trial court denied that request, explaining, "You're not getting a different lawyer sir. You can ... represent yourself, you can hire a lawyer to represent you[,] or you can accept the services of the Public Defender's Office. Those are your three options." *Id.* at 19. After his counsel was able to calm him down and told him that they had pretrial legal issues to

⁵ Cooper characterizes numerous pro se motions he filed with the trial court as continually "renew[ing]" his alleged oral assertions of his right to self-representation. Reply Br. at 8; Appellant's App. Vol. 2 at 183-206. By and large, the filings are rambling and nonsensical, and they hardly evince a clear and unequivocal invocation of the right to self-representation. Indeed, although a limited few of the filings indicate that Cooper thought he represented himself, many of the filings specifically request that information be forwarded to his public defender, which indicates to us that Cooper very much understood he was represented by counsel.

work through and discuss, Cooper replied, “All right,” apparently accepting the services of counsel. *Id.* at 20.

[10] Under the circumstances, we cannot say that Cooper clearly and unequivocally asserted his right to self-representation. Moreover, even assuming that Cooper did assert his right to self-representation, the record indicates that each time he did so, he conditioned his assertion on an erroneous assumption, quickly equivocated on the issue, or acquiesced to accepting the aid of counsel. In other words, Cooper repeatedly waived his right to self-representation through conduct indicating that he was vacillating on the issue or had abandoned the request altogether.⁶ The trial court did not violate Cooper’s constitutional rights.

Section 2 – Sufficient evidence supports the trial court’s finding that Cooper violated his probation.

[11] Cooper briefly asserts that the trial court did not have sufficient evidence before it to support a finding that he violated his probation in Cause 3874. Probation is a matter of grace left to a trial court’s discretion, not a right to which a criminal defendant is entitled. *Murdock v. State*, 10 N.E.3d 1265, 1267 (Ind. 2014). A probation violation hearing is a civil proceeding, and the State must prove the alleged probation violation by a preponderance of the evidence. *Id.*

⁶ Two appointed attorneys appeared on Cooper’s behalf during his August 2020 trial. Although it would have been untimely, there is no indication in the record that Cooper attempted to assert his right to self-representation during trial. *See Moore v. State*, 557 N.E.2d 665, 669 (Ind. 1990) (“[M]orning-of-trial requests are per se untimely.”). There is also no mention in his appellate brief that he had any dissatisfaction with the representation he ultimately received.

Our standard of review of the sufficiency of the evidence supporting the revocation of probation is similar to our standard of review for other matters: “[W]e consider only the evidence most favorable to the judgment—without regard to weight or credibility—and will affirm if there is substantial evidence of probative value to support the trial court’s conclusion that a probationer has violated any condition of probation.” *Id.* (citation and quotation marks omitted).

[12] Here, the trial court that was determining whether Cooper violated his probation by committing a new crime was the very same court that had just sentenced him for committing class A misdemeanor battery based upon a jury verdict. Cooper complains that because neither party presented additional evidence during the consolidated sentencing and revocation hearing, “[a]t a minimum, the Court needed to take judicial notice of the conviction on which the revocation was based.” Appellant’s Br. at 16.

[13] It is well understood that the ultimate purpose of judicial notice is efficient consideration of uncontroversial facts. *Horton v. State*, 51 N.E.3d 1154, 1161 (Ind. 2016). To that end, Indiana Evidence Rule 201 explicitly permits courts to take judicial notice of their own records. A trial court may take judicial notice “on its own” and “at any stage of the proceeding.” Ind. Evidence Rule 201(c), -(d). Although the trial court here did not explicitly declare that it was taking judicial notice of the proceedings and evidence presented in Cause 7303, we have little difficulty concluding that both parties were well aware that this was precisely what the trial court intended to do, and did do, during the

consolidated hearing, and thus there was no need for the trial court to orally belabor that point.

[14] Indeed, if Cooper wished to challenge the trial court’s intent to take judicial notice of the evidence supporting his commission of a new crime, he could have objected. Evidence Rule 201(e) states that if a party wishes to challenge the “propriety of taking judicial notice and the nature of the fact to be noticed[,]” the party need make a “timely request.” Cooper made no such timely request. Instead, his counsel simply asked the court for leniency as it decided the sanction for the probation violation.⁷ Accordingly, any objection to the court taking judicial notice of Cooper’s new conviction is waived for appeal. *Moore v. State*, 102 N.E.3d 304, 309-10 (Ind. Ct. App. 2018). We conclude that sufficient evidence supports the trial court’s revocation of Cooper’s probation.

[15] Affirmed.

Riley, J., and Mathias, J., concur.

⁷ Cooper does not challenge the sanction imposed.