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IN THE COURT OF APPEALS OF INDIANA

Rick Lane Utley,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

April 7, 2021

Court of Appeals Case No.
20A-CR-1741

Appeal from the
Posey Circuit Court

The Honorable
Craig S. Goedde, Judge

Trial Court Cause Nos.
65C01-1905-F5-256
65C01-1910-F6-499

Vaidik, Judge.

Case Summary

[1] Indiana Code section 35-38-2-3(d) provides that a probationer facing a petition to revoke "may not be held in jail for more than fifteen (15) days without a

hearing on the alleged violation of probation." Here, Rick Lane Utley was arrested on September 2 for allegedly violating probation. A hearing was held on September 17. Utley argues September 2 should be counted as the first day he was in jail, September 16 should be counted as the fifteenth day, and therefore he was in jail for over fifteen days before the hearing was held, in violation of Section 35-38-2-3(d). However, we find the fifteen-day time frame does not include the day of his arrest, so his hearing occurred on the fifteenth day in conformance with the statute. We affirm the trial court in this and all other respects.

Facts and Procedural History

[2] In May 2019, the State charged Utley with Level 5 felony carrying a handgun without a license with a prior felony conviction (Ind. Code § 35-47-2-1(e)(2)(B)) and Level 6 felony operating a vehicle while intoxicated endangering a person under Cause No. 65C01-1905-F5-256 ("F5-256"). He was arrested and released on bond but in October was arrested and charged with Level 6 felony operating a vehicle while intoxicated under Cause No. 65C01-1910-F6-499 ("F6-499"). In February 2020, while both cases were still pending, Utley began participating in ACCEPT, a probation-department program providing substance-abuse treatment and supervision to offenders.

[3] In July 2020, Utley pled guilty as charged in both cases. At sentencing, the State asked for an executed sentence, noting Utley had an "extensive criminal history" consisting of seventeen prior felony convictions and nine prior

misdemeanor convictions, most of which were alcohol related. Tr. Vol. II p. 14. Utley argued he was "doing exceedingly well" in the ACCEPT program and asked for his sentence to be suspended to probation. *Id.* at 11. The trial court, noting it was "pleased" with Utley's progress in the ACCEPT program, sentenced Utley to four years, with ten days executed and the remaining three years and 355 days suspended to probation, in F5-256, and one year, with ten days executed and the remaining 355 days suspended to probation, in F6-499, to be served consecutively to the sentence in F5-256. *Id.* at 16. As Utley had already served the required executed time—twenty days—he was immediately released to begin his roughly five years of probation. As conditions of probation, Utley was required to "successfully complete the ACCEPT Program" and not consume alcohol. Appellant's App. Vol. II p. 82.

[4] Two months later, on September 2, the State filed a petition to revoke Utley's probation in both F5-256 and F6-499, alleging he violated by testing positive for alcohol on August 30 and being "terminated unsatisfactorily from the ACCEPT program." *Id.* at 90. That same day, Utley was arrested and appeared in court. The court ordered he be held without bond and set a hearing for September 10. On September 10, before the hearing time, the State notified the court and Utley's counsel that the prosecutor assigned to the case was experiencing COVID-19 symptoms and had been instructed by his doctor to quarantine. The court, over Utley's objection, reset the hearing for October. On September 16, Utley moved for release, arguing he was being held without bond and without a hearing for more than fifteen days in violation of his right to due process and

Section 35-38-2-3(d). A telephonic hearing on the motion was held the following morning, September 17. The court believed holding an evidentiary hearing that same day would satisfy the statutory requirements. Utley objected, arguing that—using the Indiana credit-time calculator—September 17 was his sixteenth day in custody. The court overruled the objection and set a hearing for that afternoon.

[5] Also on the morning of September 17, the State moved to amend its petition to allege Utley was facing new criminal charges in Kentucky, explaining it had just been made aware of the new charges that morning. At the hearing that afternoon, Utley objected to the amended petition, arguing the State informed him of their intent to amend "an hour and a half" ago, which was not enough time for him to prepare a defense. Tr. Vol. II p. 36. The court sustained the objection, and the evidentiary hearing proceeded on the original petition to revoke (alleging Utley tested positive for alcohol and was terminated from the ACCEPT program). Utley admitted violating, and the court revoked probation in both cases.

[6] The trial court then proceeded to disposition. During the testimony of Jason Simmons, Utley's probation officer, the State asked if he "at some point today receive[d] a document from Henderson County, [Kentucky,]" regarding the new criminal charges Utley was facing. *Id.* at 53. Utley objected, stating he was "not ready to proceed with the [Kentucky] allegations[.]" *Id.* The State responded it could use evidence of "other contacts with law enforcement, any other criminal history, any other charges pending" in the context of disposition.

Id. at 54. The court overruled the objection, and Simmons testified Utley was facing two misdemeanor criminal charges in Kentucky based on an incident that occurred on August 30, the same night as his positive alcohol test.

[7] Courtney Price, a staff member at ACCEPT, testified that since Utley had been placed on probation, he had a "poor attitude" and was "internally sanctioned" by the program twice. *Id.* at 66, 68. She testified that in August 2020 she received a report from local law enforcement that Utley was driving with a suspended license. Because this was "a new criminal offense" he was internally sanctioned and asked to repeat a section of the program. *Id.* at 66. Price also testified that, a few days later, Utley had an "outburst" during a group meeting, wherein he stated he could not wait to get his license back and drive "circles around the Courthouse and burn[] black smoke." *Id.* Price stated group leaders confronted Utley about this statement, telling him he was essentially saying "f*ck the Court," to which Utley replied "damn right." *Id.* at 67. Price testified Utley then "yell[ed]" at another member and stated he wanted to "slit his throat and watch the blood pour down his body." *Id*. Because of this outburst, Utley was asked to repeat the program from the beginning. However, after his positive alcohol test, Utley was terminated from the ACCEPT program.

[8] The court found Utley had "ample opportunities" to correct his behavior and failed to take "responsibility" for his actions. *Id.* at 81. The court also stated Utley's outburst, in which he was "ranting and raving" and saying "f the Court," "trouble[d] [it] the most." *Id*. Finally, the court noted it had previously told Utley that a sentence in the Department of Correction was his "only

option" aside from the ACCEPT program. *Id.* at 82. The court ordered Utley to serve the entirety of his suspended sentence—three years and 355 days in F5-256 and 355 days in F6-499, consecutive—in the DOC.

[9] Utley now appeals.

Discussion and Decision

I. Due Process

[10] Utley first argues the trial court violated his right to due process. A probationer is not entitled to the full due-process rights afforded a defendant in a criminal proceeding. *Parker v. State*, 676 N.E.2d 1083, 1085 (Ind. Ct. App. 1997). However, "[p]robation revocation implicates the defendant's liberty interests which entitles him to some procedural due process." *Id*.

> The minimum requirements of due process that inure to a probationer at a revocation hearing include: (a) written notice of the claimed violations of probation; (b) disclosure of the evidence against him; (c) an opportunity to be heard and present evidence; (d) the right to confront and cross-examine adverse witnesses; and (e) a neutral and detached hearing body.

Woods v. State, 892 N.E.2d 637, 640 (Ind. 2008); *see also* Ind. Code § 35-38-2-3 (providing that, absent waiver, a probationer is entitled to a revocation hearing in open court, confrontation, cross-examination, and representation by counsel).

A. Hearing

[11] Utley first argues the trial court deprived him of due process by "failing to hold an evidentiary hearing within fifteen (15) days of [Utley's] arrest as required by Indiana Code [section] 35-38-2-3." Appellant's Br. p. 12. We disagree.

[12] As an initial matter, although Utley frames this as a due-process violation, due process is not implicated here. Utley cites *Parker* for his contention he has a due-process right to an evidentiary hearing within fifteen days. In *Parker*, this Court noted "Indiana has codified the due process requirements" for probation revocation in Section 35-38-2-3 "by requiring that an evidentiary hearing be held on the revocation and providing for confrontation and cross-examination of witnesses by the probationer." 676 N.E.2d at 1085. It is true Section 35-38-2-3 does require these procedural due-process safeguards. However, *Parker* does not stand for the proposition that all the requirements in Section 35-38-2-3 are required by due process. Nor does Utley cite any case law suggesting a hearing within fifteen days is a due-process right. In fact, as the State points out, the United States Supreme Court has held, in the context of parole-revocation hearings, that while due process requires a hearing be held within a reasonable time, two months is not unreasonable. *See Morrissey v. Brewer*, 408 U.S. 471 (1972). To be sure, Utley has a statutory right to a hearing with fifteen days, but he has not convinced us that violating this right amounts to a due-process violation.

[13] In any event, the statute was not violated here. Utley's argument requires us to address, for the first time, the means of counting days under Section 35-38-2-3(d), which provides,

> (d) Except as provided in subsection (e), the court shall conduct a hearing concerning the alleged violation. The court may admit the person to bail pending the hearing. A person who is not admitted to bail pending the hearing may not be held in jail for more than fifteen (15) days without a hearing on the alleged violation of probation.

We review a matter of statutory interpretation de novo. *Treece v. State*, 10 N.E.3d 52, 57 (Ind. Ct. App. 2014), *trans. denied*. When faced with a question of statutory interpretation, we first examine whether the language of the statute is clear and unambiguous. *Taylor v. State*, 7 N.E.3d 362, 365 (Ind. Ct. App. 2014). If it is, we give its words their plain, ordinary, and usual meanings. *Id.* Our primary goal in interpreting a statute is to ascertain and give effect to the legislature's intent, and the best evidence of that intent is the statute itself. *Prewitt v. State*, 878 N.E.2d 184, 186 (Ind. 2007). We presume "the legislature intended for the statutory language to be applied in a logical manner consistent with the statute's underlying policy and goals." *Id.*

[14] Utley was arrested on September 2 and held until September 17 without bond or a hearing. He contends this, when including his September 2 arrest date, amounted to sixteen days in violation of Section 35-38-2-3(d). In so arguing, Utley uses the method of computation that determines credit time, although he offers no support for why this method should be used here. Because credit-time

computation includes the date of arrest, this method would include his September 2 arrest date and total sixteen days. *See French v. State*, 754 N.E.2d 9, 17 (Ind. Ct. App. 2001) ("Credit is calculated from the date of arrest to the date of sentencing for that same offense.").

[15] While Utley argues his arrest date should be included in the computation, the State argues we should exclude Utley's arrest date, citing *Dobeski v. State*, 64 N.E.3d 1257 (Ind. Ct. App. 2016). In *Dobeski*, the statute at issue required a defendant to register as a sex offender "not more than seven (7) days" after his release from a penal facility. *Id.* at 1261 (citing Ind. Code § 11-8-8-7(g)). This Court was asked to determine how this time should be computed. We held the proper method for computing "days" was laid out in Trial Rule 6(A), which provides in part, "In computing any period of time prescribed or allowed by these rules, by order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included." We noted Trial Rule 6(A) gives the "general rule in Indiana that when computing the time for performance of an act which must take place within a certain number of days of some triggering event, the day of the triggering event is not included." *Dobeski,* 64 N.E.3d at 1261; *see also Ward v. Ind. Parole Bd.*, 805 N.E.2d 893, 894 (Ind. Ct. App. 2004) (analyzing statute requiring parole revocation hearing within sixty days of extradition and holding the "clock did not begin to run until the day after [defendant's] extradition"), *trans. denied*. Accordingly, we held the day of the "triggering event"—there the

day of the defendant's release from a penal facility—was not included in the statutory time frame.

[16] The same can be said here. Section 35-38-2-3(d)'s language is similar to the statute in *Dobeski*—requiring an event occur "not . . . more than" a certain number of days after a triggering event. And the statute does not indicate a method of computation. As such, we see no reason—nor does Utley offer one—to depart from the method laid out in Trial Rule 6(A) and *Dobeski*. This means the day of the "triggering event"—Utley's arrest—is not included in the fifteen-day time frame, which began on September 3. The September 17 hearing was held on the fifteenth day and within the statutory time frame.

[17] The trial court did not violate Utley's statutory right to have a hearing no more than fifteen days after his arrest.

B. Notice

[18] Utley also argues the trial court violated his due-process rights because he "was not given notice of the claimed violations that were against him at sentencing until the day of the hearing[.]" Appellant's Br. p. 14. While Utley does not specify what "violations" he is referring to, presumably he means the evidence of his Kentucky criminal charges.

[19] Initially, we note Utley's argument mischaracterizes the record. He claims he was not given notice of the "claimed violations." But the petition to revoke filed on September 2 gave notice of the claimed violations—testing positive for alcohol and being terminated from the ACCEPT program. The evidence Utley

objected to—that regarding his Kentucky criminal charges—was not alleged in the original petition. While the State attempted to add an alleged violation regarding the Kentucky criminal charges on the day of the hearing, the court denied that amendment. The proceedings went forward only on the alleged violations stated in the original petition. Therefore, Utley was not deprived of his due-process right to written notice of the claimed violations of probation.

[20] However, after Utley admitted violating probation and the court moved on to the disposition, the trial court admitted testimony about the Kentucky criminal charges. To the extent Utley is challenging the admission of this evidence, any error in its admission was harmless because the court did not rely on this evidence in making its decisions. Utley admitted to violating probation by testing positive for alcohol and being terminated from the ACCEPT program, and the court revoked probation based on these violations.[1] Nor did the court, in its explanation for imposing Utley's suspended sentence, make any mention of the Kentucky charges.

[21] Because the evidence of the Kentucky charges was not the basis for the court's decision to revoke or for its decision to impose Utley's suspended sentence, any error in its admission was harmless.

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[1] We note the trial court was correct in not basing its revocation on the new charges, as merely being arrested or charged is not evidence of a probation violation. *See Jackson v. State*, 6 N.E.3d 1040, 1042 (Ind. Ct. App. 2014).

II. Disposition

[22] Utley next argues the trial court should not have ordered him to serve the entirety of his suspended sentence in the DOC. Once the trial court has determined a violation occurred, it may do the following: (1) continue the person on probation, with or without modifying or enlarging the conditions; (2) extend the person's probationary period for not more than one year beyond the original probationary period; or (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing. I.C. § 35-38-2-3(h). We review a trial court's sentencing decision for probation violations for abuse of discretion. *Prewitt*, 878 N.E.2d at 188.

[23] Utley contends the court erred in ordering him to serve such a "harsh penalty" because of a "relapse." Appellant's Br. pp. 16, 17. We disagree. Utley violated probation by testing positive for alcohol, and this infraction plus several prior incidents led to his termination from the ACCEPT program. And his successful completion of the ACCEPT program was a condition of probation. These violations occurred within two months of his placement on probation. *See Knecht v. State*, 85 N.E.3d 829, 840 (Ind. Ct. App. 2017) (finding trial court did not abuse its discretion in revoking probation and ordering defendant to serve suspended sentence where the violation occurred "within months" of his placement on probation). Additionally, Utley has an extensive criminal history—seventeen felonies and nine misdemeanors—most of which are alcohol related. And his poor attitude and inability to complete the ACCEPT program understandably led the court to conclude an executed sentence was the

"only option." *See Prewitt*, 878 N.E.2d at 188 (court did not abuse its discretion in ordering defendant to serve suspended sentence where he had multiple probation violations, a past criminal history, and was unable to complete a halfway-house program).

[24] We cannot say the trial court abused its discretion in ordering Utley to serve the entirety of his suspended sentence in the DOC.

[25] Affirmed.

Bradford, C.J., and Brown, J., concur.