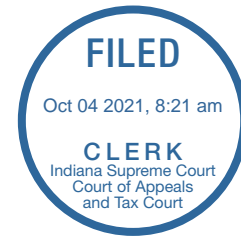


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Heather D. Knott,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 4, 2021

Court of Appeals Case No.
21A-CR-198

Appeal from the Floyd Superior
Court

The Honorable Carrie K. Stiller,
Judge

Trial Court Cause No.
22D01-0306-FC-374

Sharpnack, Senior Judge.

Statement of the Case

[1] Appellant Heather D. Knott appeals the revocation of her probation and the sanction the trial court imposed. We affirm.

Issues

- [2] Knott presents two issues for our review, which we restate as:
- I. Whether her right to due process was violated; and
 - II. Whether the trial court erred in determining the sanction to impose for her violations of probation.

Facts and Procedural History

- [3] On June 16, 2003, the State charged Knott with forgery, a Class C felony,¹ and theft, a Class D felony.² Pursuant to a plea agreement, in July 2008 Knott pleaded guilty to the forgery charge and was to be sentenced to four years, with one year executed and three years suspended to probation. At the sentencing hearing the following month, the parties, by agreement, amended Knott's sentence to six years, with one year executed and five years suspended to probation, giving her additional time to pay the substantial amount of restitution.
- [4] One year later, in August 2009, the State filed a Notice of Probation Violation and a Petition to Revoke Probation. In July 2014, Knott notified the court she was incarcerated in Kentucky. Upon Knott's release from incarceration in Kentucky, the court held an initial hearing on the probation violation in April 2016. A revocation hearing was held the following month, and the parties

¹ Ind. Code § 35-43-5-2 (1977).

² Ind. Code § 35-43-4-2 (1985).

entered an agreement in which Knott admitted to violating her probation, and her probation was reinstated and transferred to Kentucky.

[5] On June 20, 2019, the State filed a Notice of Probation Violation alleging that Knott had failed to maintain good behavior, report to probation as directed, notify probation of a change of address, remain within the jurisdiction of the court, submit to a drug screen, comply with the interstate compact, pay restitution, and pay probation fees. The court issued a warrant for Knott on June 28. The warrant was served on July 9, an initial hearing was held the next day, and, after numerous review hearings and continuances, a revocation hearing was set for March 2, 2020. Knott failed to appear for the hearing, and the court issued a warrant. The warrant was served on Knott on May 18, and, at a hearing the next day, the court appointed counsel for Knott and scheduled a revocation hearing for June 17.

[6] On June 17, the State filed an Amended Notice of Probation Violation, and the hearing for that date was vacated. On June 23, the State filed an Amended Petition to Revoke Probation. The court held an initial hearing on the amended petition to revoke on July 15 and set a revocation hearing for August 12, 2020. After numerous continuances, a revocation hearing was held on January 4, 2021. Knott admitted to violating her probation, and the court imposed the remainder of her previously suspended sentence. Knott now appeals.

Discussion and Decision

I. Due Process

A. Written Notice

- [7] Knott first contends the State deprived her of due process by not giving her proper written notice of the alleged probation violations. Although a probationer is not entitled to the full due process rights afforded a defendant in a criminal proceeding, probation revocation proceedings implicate a probationer's liberty interests such that she is entitled to some procedural due process. *Utley v. State*, 167 N.E.3d 777, 781 (Ind. Ct. App. 2021), *trans. denied*. The minimum requirements of due process that apply to a probationer include: (a) written notice of the claimed violations of probation; (b) disclosure of the evidence against her; (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. *Id.* Due process rights are subject to waiver, and such claims are generally waived if raised for the first time on appeal. *Terpstra v. State*, 138 N.E.3d 278, 285-86 (Ind. Ct. App. 2019), *trans. denied* (2020).
- [8] Here, Knott concedes that she did not raise a due process objection in the trial court but suggests the alleged violation of her due process rights constitutes fundamental error. Fundamental error is an error that makes a fair trial impossible or constitutes a clearly blatant violation of basic and elementary principles of due process resulting in an undeniable and substantial potential for

harm. *Morgan v. State*, 87 N.E.3d 506, 508 (Ind. Ct. App. 2017), *trans denied* (2018).

[9] Knott claims that the June 20, 2019 Notice of Probation Violation “lacks any specificity” as to how she violated the conditions of her probation. Appellant’s Br. p. 16. Due process mandates that the written notice “disclose the grounds supporting revocation,” *Washington v. State*, 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001), in sufficient detail so as to allow the probationer to prepare an adequate defense. *J.H. v. State*, 857 N.E.2d 429, 432 (Ind. Ct. App. 2006), *trans. denied* (2007).

[10] The June 20, 2019 Notice provides, in pertinent part:

3. That you have violated those certain conditions of probation to wit:

#1 – Good Behavior

#2 – Failure to report to your probation officer as directed.

#5 – Failure to notify probation of change in address.

#12 – Failure to remain within jurisdiction of this court.

#15 – Failure to submit for drug screen.

Failure to comply with Interstate Compact

Failure to pay restitution.....Owes \$6,612.97

Failure to pay probation fees.....Owes \$200.00

Appellant’s App. Vol. II, p. 172. The Notice clearly lists eight different violations and even references the specific probation rules related thereto. The Notice satisfies the due process requirement of written notice, and Knott was

not deprived of notice of the grounds supporting the revocation of her probation. *See Washington*, 758 N.E.2d 1014 (holding that probation department’s notice/petition satisfied written notice requirement and supplied defendant notice of grounds supporting revocation of his probation where notice/petition alleged that he failed to report to probation officer, comply with substance abuse treatment, complete community service, and make good faith effort toward court ordered financial obligation). Accordingly, there is no fundamental error, and this claim fails.

B. Probationary Period

[11] Next, Knott asserts that the probation department violated her due process rights by improperly extending the period of her probation. Specifically, she claims the probation department “extended [her] probation by tolling her probationary period beyond its original end date, with the filing of its defective June 20, 2019 notice of probation violation.” Appellant’s Br. p. 18.

[12] In support of her argument, Knott cites *Gilreath v. State*, 748 N.E.2d 919 (Ind. Ct. App. 2001), but that case is distinguishable. In *Gilreath*, a motion to extend probation was filed by the probation office one day after the original probationary term had expired and was granted by the trial court four days after such expiration. The probation office subsequently filed a petition alleging Gilreath had violated the terms of his probation during the period of the extension. Gilreath moved to dismiss the petition, arguing that the extension of his probationary period had been without statutory authority. The trial court

denied Gilreath’s motion, heard evidence on the petition to revoke, and revoked his probation. Gilreath appealed, and we held that his due process rights were violated by the revocation of his probation pursuant to a motion to extend probation instead of the statutory prerequisite of a petition to revoke probation and by the absence of a hearing.

[13] Knott confuses two different concepts—extension of the probationary period and tolling of the probationary period. With regard to extending the probationary period, Indiana Code section 35-38-2-3(h) (2015) offers the trial court three options when it finds a defendant has violated the terms of her probation, one of which is to extend the person’s probationary period for not more than one year. On the other hand, Subsection 35-38-2-3(c) states that “[t]he issuance of a summons or warrant tolls the period of probation until the final determination of the charge.”

[14] Here, the probation department filed a Notice of Probation Violation on June 20, 2019, alleging Knott violated her probation. As we have already concluded in this case, that Notice is not defective and comports with due process requirements for probation revocations. Following the filing of the June 20 Notice, the trial court issued a warrant for Knott on June 28, 2019. Knott’s probation was not extended; rather, her probationary period was tolled by the issuance of the warrant from June 28, 2019 until the final resolution of the revocation proceeding in January 2021, pursuant to Subsection 35-38-2-3(c). *See Hilligoss v. State*, 45 N.E.3d 1228, 1230 (Ind. Ct. App. 2015) (finding that, pursuant to Ind. Code § 35-38-2-3(c), defendant’s probationary period was

tolled for two periods of time for two separate petitions to revoke probation and their corresponding dates of final determination). Thus, Knott's due process rights were not violated by an improper extension of her probationary period; instead, her probationary period was properly tolled pursuant to statute.

II. Sanction

[15] Probation is a matter of grace and a conditional liberty that is a favor, not a right. *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999). That is to say, probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment. *Bratcher v. State*, 999 N.E.2d 864, 873 (Ind. Ct. App. 2013), *trans. denied* (2014). These restrictions are designed to ensure that the probation serves as a period of genuine rehabilitation and that the public is not harmed by a probationer living within the community. *Jones v. State*, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005). “Once a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed.” *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). Accordingly, a trial court's sentencing decisions for probation violations are reviewed for an abuse of discretion. *Wilkerson v. State*, 918 N.E.2d 458, 464 (Ind. Ct. App. 2009). An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

[16] Indiana Code section 35-38-2-3(h) offers the trial court the following options when it finds a defendant has violated the terms of his probation: (1) continue

the person on probation, with or without modifying the conditions; (2) extend the person's probationary period for not more than one year; and/or (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing.

[17] Here, the trial court revoked Knott's probation and ordered her to serve the entirety of her previously suspended sentence. Knott first claims the trial court abused its discretion because "none of the violations discussed in the trial court's sentencing statement were properly before the court" because, as she alleged in Issue I., A., above, the written notice was defective. Appellant's Br. p. 20. However, having found waiver and no fundamental error in Issue I., A., we need not address Knott's allegations in this regard.

[18] Knott also alleges the trial court's comments constitute an abuse of discretion because they show the court desired to "send a personal philosophical message . . . rather than focusing upon facts that are peculiar to the particular defendant and offense." *Id.* The statement with which Knott takes umbrage is: "And so the problem is, we can't enter into these agreements and then not do what we're supposed to do, because then everybody will just sign the agreement and then they won't do it." Tr. Vol. 1, pp. 39-40. In support of her argument, Knott cites *Puckett v. State*, 956 N.E.2d 1182 (Ind. Ct. App. 2011) where the trial judge engaged in an extended discussion of his personal beliefs regarding the importance of the sex offender registry, including noting his personal use of the registry.

[19] In the present case, when the court made the statement it was explaining to Knott that it did not believe she had put forth a sincere effort to comply with the plea agreement to which she assented and which gave her several years to fully complete her obligations. The court addressed Knott, stating:

There – there’s been no – no follow through here. And so the problem is, we can’t enter into these agreements and then not do what we’re supposed to do, because then everybody will just sign the agreement and then they won’t do it. And – and then the Probation and the Prosecutor is not even gonna want to do the agreement. So the fact of the matter is that you seem to me to have been presented multiple opportunities. It wasn’t just one (1). It wasn’t just two (2). It was multiple opportunities. Um, and so perhaps it – it seems to me that maybe the thing that will make the most impact is serving out your time.

Tr. Vol. 1, pp. 39-40. The facts of this case are clearly inapposite to those in *Puckett*; we discern no personal, philosophical message in these comments, and, thus, we find no abuse of discretion.

[20] Finally, Knott asserts the trial court’s comments constitute an abuse of discretion because they show the court failed to consider a disposition other than revocation and imposition of her suspended sentence. Specifically, Knott points to the trial court’s statement that its “hands [were] tied” in this situation and that it was only “following through with what [Knott] agreed to do.” Tr. Vol. 1, p. 41.

[21] The transcript shows that the court made these comments *after* it had determined the sanction to be imposed and in direct response to Knott’s

pleading that she not be sent back to jail and promising that she would not let the court down. Prior to the court imposing the sanction, Knott admitted to failing to maintain good behavior, failing to report to her probation officer as directed, testing positive for drugs, and failing to pay restitution and probation fees. In its sentencing statement, the court questioned Knott's actual effort to comply with her obligations in the plea agreement, noting her continued drug use and large restitution balance, which was \$6,612.97 at the time of the hearing. The court then summarized its reasoning for the sanction it imposed as Knott's ability to make promises and inability to follow through on those promises, as well as her failure to take advantage of the opportunities with which she was presented. Again, we find no abuse of discretion.

Conclusion

[22] For the reasons stated, we conclude Knott's due process rights were not violated, and the trial court did not abuse its discretion in determining the sanction for Knott's probation violations.

[23] Affirmed.

Tavitas, J., and Weissmann, J., concur.