

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.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

BRIAN J. MAY
South Bend, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

BRYAN DOUGLAS,)
)
Appellant-Defendant,)
)
vs.) No. 71A03-0902-CR-47
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0705-FD-522

May 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Bryan Douglas appeals the trial court's revocation of his probation. Specifically, he contends that the evidence is insufficient to support the revocation of his probation. Because the evidence most favorable to the judgment shows that Douglas violated conditions of his probation, including missing probation appointments and committing new offenses while awaiting disposition in this case, we affirm the revocation of his probation.

Facts and Procedural History

On November 14, 2007, Douglas pled guilty to possession of cocaine. That same day, the trial court sentenced him to eighteen months, all suspended to probation. Douglas's probation included the following conditions:

I will submit to a mental health examination and/or substance abuse evaluation at an agency approved by my probation officer and successfully complete any and all treatment recommendation(s).

I will report to the Probation Department at the times and in the manner as instructed by the Court or my probation officer.

I will notify my probation officer of any change of address in St. Joseph County within three working days, and I must obtain prior written permission from my probation officer to move my residency outside St. Joseph County.

Violation of any law may be considered a violation of probation. Failure to comply with the *Terms of Probation* may result in the revocation of probation and imposition of part or all of the suspended sentence.

Appellant's App. p. 58 (formatting altered).

On March 28, 2008, the State filed a petition to revoke Douglas's probation.¹ Then, on July 12, 2008, Douglas was arrested for resisting law enforcement and battery.² On July 21, 2008, the State filed an addendum to the petition to revoke Douglas's probation.³

On September 26, 2008, a hearing was held at which evidence was presented regarding the alleged violations. Following the hearing, the trial court made the following statement:

So here's what we'll do: I find that you've violated the terms of your probation by failing to report to the probation department as ordered and as indicated on the Record; that you violated your probation by failing to notify the probation officer of a change of address within the time required; and that you violated your probation by failing to complete counseling as ordered.

I will take under advisement as to whether you further violated your probation by the commission of a new criminal act, namely, resisting law enforcement.

Tr. p. 101-02. The court scheduled a disposition hearing for November 26, 2008. In the meantime, the court ordered Douglas to continue on probation with the same conditions. The court warned Douglas that if he had one slip-up, it would revoke his probation.

A little over two weeks later, on October 14, 2008, Douglas was charged with resisting law enforcement and possession of cocaine.⁴ On November 26, 2008, the trial

¹ Douglas includes the State's Petition to Revoke Probation and/or Placement in his appendix. According to the petition, the State listed the reasons it wanted to revoke Douglas's probation in a separate document, Exhibit A; however, Douglas does not include Exhibit A in his appendix. *See* Appellant's App. p. 52.

² According to the State, these charges were eventually dropped.

³ Douglas's petition does not contain the addendum; rather, it only contains the minute entry showing that an addendum was filed on this date. Presumably, the addendum was based on Douglas's commission of the criminal offenses.

court held the disposition hearing as scheduled. At the beginning of the hearing, the State said that it wanted to supplement the petition to revoke Douglas's probation to allege his commission of the new criminal offenses. The court indicated that it did not think that was necessary because it had already found Douglas in violation of his probation; rather, the question was whether it was going to revoke his probation.⁵

Douglas then testified that the week following his September 26, 2008, evidentiary hearing, he did everything the trial court and probation department ordered him to do; however, problems arose when he was arrested because he could no longer comply. The trial court, however, was not impressed with his early efforts:

Well, it's the new incarceration that concerns me. You know, that's not really part of this thing, but you're incarcerated because you got arrested for a new charge, and some judge found probable cause in that case, and apparently it involved . . . and the Cause No. is 08-FC-319, Resisting Law Enforcement and Possession of Cocaine, as a C Felony, at this point and time. Now that case is completely separate from this case. But you know, that really I think is a concern, quite honestly. *It sort of tips the balance.* So . . . [o]n the Court's finding that the defendant has violated terms of probation, the Court now imposes the 18 month sentence which was originally imposed as a suspended sentence, on November 14, 2007.

Id. at 106-07 (emphasis added). Douglas now appeals the revocation of his probation.

Discussion and Decision

Douglas contends that the State presented insufficient evidence to support the trial court's revocation of his probation. Probation is a matter of grace, and whether probation is granted is within the trial court's discretion. *Morgan v. State*, 691 N.E.2d 466, 468

⁴ According to the State, these charges remain pending as of March 2009.

⁵ In fact, the record shows that on October 30, 2008, the State filed an addendum to the petition to revoke Douglas's probation based upon his arrest for resisting law enforcement and possession of cocaine. *See* Appellant's App. p. 11-13.

(Ind. Ct. App. 1998). Probation revocation is governed by Indiana Code § 35-38-2-3. A probation revocation hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999), *reh'g denied*. The sole question at a probation revocation hearing is whether the probationer should be allowed to remain conditionally free or whether he should be required to serve the previously-imposed sentence in prison. *Morgan*, 691 N.E.2d at 468. It is well settled that violation of a single condition of probation is sufficient to revoke probation. *Wilson v. State*, 708 N.E.2d 32, 34 (Ind. Ct. App. 1999). If the court finds that the probationer has violated a condition of his probation at any time before the termination of the probationary period and the petition to revoke is filed within the probationary period, then the court may order execution of the sentence that had been suspended. *Wilburn v. State*, 671 N.E.2d 143, 147 (Ind. Ct. App. 1996), *trans. denied*; *see also* Ind. Code § 35-38-2-3.

In addition, when reviewing the sufficiency of the evidence to revoke probation, we consider only the evidence most favorable to the judgment without reweighing that evidence or judging the credibility of the witnesses. *Woods v. State*, 892 N.E.2d 637, 639 (Ind. 2008). If there is substantial evidence of probative value to support the trial court's decision that a probationer has violated any terms of probation, the reviewing court will affirm its decision to revoke probation. *Id.* at 639-40.

Here, witnesses testified at the evidentiary hearing that Douglas missed probation appointments, failed to update his address, and did not complete or sufficiently follow up with his drug treatment program. On appeal, Douglas does not contest that he violated

these terms of his probation but instead argues that he made a “good faith” effort to comply. Appellant’s Br. p. 6. However, in between the evidentiary and disposition hearings, when he had a chance to prove himself, Douglas was arrested and charged with two new offenses, which belies any claim of a good faith effort. We therefore decline Douglas’s invitation to reweigh the evidence and judge the credibility of the witnesses and affirm the revocation of his probation.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.