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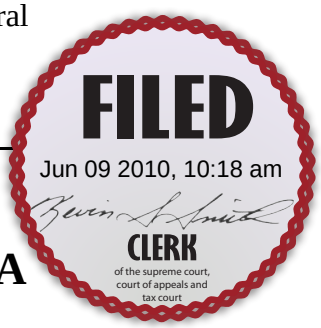

IN THE COURT OF APPEALS OF INDIANA

ANTHONY L. BEERY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 01A02-1002-CR-108
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ADAMS CIRCUIT COURT
The Honorable Frederick A. Schurger, Judge
Cause No. 01C01-0705-FC-13

June 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Anthony L. Beery challenges the sufficiency of evidence to support the trial court's finding that he violated his probation and was thereby subject to probation revocation. We affirm.

Beery is the father of four children by four different women. When he is not incarcerated, he lives at his mother's home with his mother and his eleven-year-old son. He is on Medicaid and food stamps. On May 25, 2007, in cause number 01C01-0705-FC-13 ("cause 13"), the State charged him with class C felony nonsupport of a dependent child in conjunction with one of his other children. On March 11, 2008, in cause number 01C01-0705-FC-14 ("cause 14"), the State charged him with class C felony nonsupport of a different dependent child. On March 14, 2008, he pled guilty via plea agreement in both causes. On April 15, 2008, the trial court sentenced him to consecutive eight-year suspended sentences and placed him on probation. His probation terms required him to pay his support arrearages and to procure and maintain employment.

On June 27, 2008, the State filed a notice of probation violation, alleging that Beery had been unemployed since April 29, 2008, when he was fired from his last place of employment, and that he had failed to pay his support arrearage. On November 24, 2008, the trial court found Beery to be in violation of probation and ordered the execution of one year of his remaining suspended sentence. He was released from prison on May 25, 2009.

On September 8, 2009, the State filed a second notice of probation violation, alleging

that Beery was unemployed and remained in arrears on his child support obligation.[1] At a January 8, 2010 hearing, Beery admitted that he was unemployed and had not paid support. He asserted that his failure to pay child support was not willful but was based on his inability to obtain employment, due primarily to a September 2008 leg injury that prevented him from standing for long periods of time, but also due in part to his status as a convicted felon and his lack of a driver's license. Tr. at 5-9. He testified that he had sought and been denied disability for his leg injury and that he was seeking to appeal that decision and undergo surgery. *Id*. at 9, 13-14. Beery submitted a letter from his doctor explaining his leg injury and stating that his "ability to work [was] probably somewhat compromised." Def. Ex. A. The trial court found probation violations on the grounds of nonsupport and unemployment. The court revoked his probation in cause 13, ordering execution of the remaining six years and 331 days of his eight-year sentence.

On appeal, Beery challenges the trial court's finding that he violated his probation in cause 13. "Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled." *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). The trial court sets the conditions of probation; thus, the trial court may revoke probation if the defendant violates those conditions. *Id*. The State must prove a violation by a preponderance of evidence. *Wilkerson v. State*, 918 N.E.2d 458, 461 (Ind. Ct. App. 2009). We review

[1] In cause 14, Beery owed an $87.00 weekly support obligation; State's Exhibit 1 indicates that as of the end of 2009, he had a total arrearage of $28,232.30. In cause 13, Beery owed an $86.00 weekly support obligation; State's Exhibit 2 indicates that as of the end of 2009, he had a total arrearage of $27,592.72.

probation revocation decisions for an abuse of discretion. *Woods v. State*, 892 N.E.2d 637, 639 (Ind. 2008). In doing so, we consider only the evidence most favorable to the judgment without reweighing that evidence or judging witness credibility. *Szpunar v. State*, 914 N.E.2d 773, 777 (Ind. Ct. App. 2009). If substantial evidence of probative value exists to support the trial court's decision that a defendant has violated a term of probation, we will affirm its decision to revoke probation. *Id*.

> Probation revocation is a two-step process. First, the court must make a factual determination that a violation of a condition of probation actually has occurred. If a violation is proven, then the trial court must determine if the violation warrants revocation of the probation. Indiana has codified the due process requirements at Ind. Code § 35-38-2-3 by requiring that an evidentiary hearing be held on the revocation and providing for confrontation and cross-examination of witnesses and representation by counsel. When a probationer admits to the violations, the procedural due process safeguards and an evidentiary hearing are not necessary. Instead, the court can proceed to the second step of the inquiry and determine whether the violation warrants revocation. In making the determination of whether the violation warrants revocation, the probationer must be given an opportunity to present evidence that explains and mitigates his violation.

Cox v. State, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006) (citations and quotation marks omitted).

"Probation may not be revoked for failure to comply with conditions of a sentence that imposes financial obligations on the person unless the person recklessly, knowingly, or intentionally fails to pay." Ind. Code § 35-38-2-3(f). In *Szpunar*, we concluded that the State bears the burden of proof on the issue of a defendant's ability to pay restitution to his or her victim. 914 N.E.2d at 779. However, in *Runyon v. State*, 923 N.E.2d 440 (Ind. Ct. App. 2010), *trans. pending*, we specifically declined to extend this rule to cases where the

probation revocation is based on the failure to pay child support, instead holding that the burden rests on the defendant to demonstrate his or her *inability* to pay child support. *Id*. at 447; *see also* Ind. Code § 35-46-1-5(d) (stating that defendant's inability to pay is affirmative defense). In so holding, we recognized that revoking probation for failure to pay child support is unique because a person can also be convicted for failing to support his or her dependents.[2] *Id*. at 446. We further stated,

> Because in a prosecution for nonsupport of a dependent a defendant bears the burden of proving that he was unable to provide support, it likewise follows that when revoking a defendant's probation for failing to support his or her dependents, the defendant also bears the burden of proving that he or she was unable to provide support. To hold otherwise would create an undesirable inconsistency; that is, a defendant would have to prove his or her inability to pay in criminal proceedings for nonsupport of a dependent, but the State would have to prove the defendant's ability to pay in probation revocation proceedings for failure to pay child support. This inconsistency could result in the State strategically choosing either to file a new criminal charge for nonsupport of a dependent (based on the increased amount of unpaid child support) or to institute a probation revocation proceeding, depending on what burden it believed could be proven based on the evidence it possessed.

Id. at 446-47. Thus, pursuant to *Runyon*, Beery bore the burden of proving his inability to pay.

Beery admitted that he had not obtained employment and had not paid child support. However, he asserts that his failure to pay was not reckless, knowing, or intentional; rather, he claims that despite his efforts to secure employment, he was unable to pay support because he was ultimately unsuccessful in his employment search. Further, he claims that his lack of

[2] *See* Ind. Code § 35-46-1-5(a) (stating that knowing or intentional failure to support one's own child is a class D or class C felony, depending on the amount owed).

success in securing employment was primarily due to his leg injury and secondarily due to his status as a convicted felon. However, the evidence most favorable to the judgment indicates a pattern of nonpayment that undercuts Beery's cited excuses. First, Laura Gerber, the mother of Beery's child in cause 13, testified that she could not remember the last time Beery had a full-time job and that he had provided "very little help" in supporting their now seventeen-year-old child. Tr. at 17. Moreover, State's Exhibits 1 and 2 indicate that Beery has consistently been in arrears since 2003.[3]

Beery's probation officer, Rhonda McIntosh, testified that Beery told her that he had applied for a job with temporary agencies but that he had not provided her with any paperwork. *Id*. at 18. She also testified that she supervised other convicted felons who had procured employment. *Id*. Regarding Beery's leg injury, she testified that in August 2009, Beery asked her for permission to take his children to an engine show in Jay County over the weekend. *Id*. She concluded that his request to go to the engine show was inconsistent with someone who has significant pain and therefore cannot work. *Id*. She went on to explain that she based this conclusion on her understanding that the show was one of the largest in the world and that attendance would involve quite a bit of walking. *Id*. at 19. To the extent Beery argues that his leg injury prevented him from being able to stand for eight hours and therefore prevented him from obtaining employment, we note that he did not call his doctor

[3] Notably, in 2006, Beery paid no child support at all in causes 13 and 14; in 2007, he paid no child support in cause 14 and paid only $364.00 in cause 13. St. Ex. 1, 2. His support payments increased to $838.15 and $1,179.70 respectively in 2008; however, his overall arrearages increased by nearly $7000.00 that year. *Id*. In 2009, he paid only $23.00 in cause 14 and only $205.79 in cause 13, resulting in a total increase in arrearages of nearly $8800.00 that year. *Id*.

as a witness; instead, he produced only his doctor's letter stating that "[a]t this point, his ability to work is probably somewhat compromised. However, I do not know exactly what kind of work he does. So, I cannot completely answer that question." Def. Ex. A. He produced no evidence that prospective employers refused to hire him due to his injury, and he offered no evidence of any effort on his part to obtain a position that did not require standing for such extended periods.

In sum, Beery's pattern of unwillingness to pay child support undercuts his proffered excuses regarding his 2008 leg injury and his status as a felon, and we decline his invitation to reweigh evidence regarding the effect of these factors on his failure to obtain employment. Thus, the evidence is sufficient to support the trial court's decision that he recklessly, knowingly, or intentionally failed to pay child support and thereby violated his probation.[4] Accordingly, we affirm.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.

[4] We note that Beery does not challenge the trial court's execution of the remainder of his suspended sentence. Ind. Code § 35-38-2-3(g)(3).