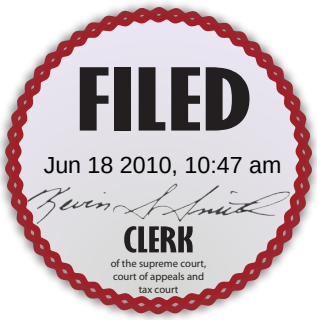


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellant-Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 57A03-0910-CR-462 |
| | ) | |
| JOHN W. HOLLER, | ) | |
| | ) | |
| Appellee-Defendant. | ) | |

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Robert E. Kirsch, Judge
Cause No. 57D01-9909-CF-6

**June 18, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

The State appeals the denial of its motion to correct error, which sought correction of the trial court's order revoking John W. Holler's ("Holler") probation and directing him to serve a one-year executed sentence in the Indiana Department of Correction ("DOC"). We address the following three restated issues:

I. Whether the State has the right to initiate an appeal of the trial court's revocation of Holler's probation;

II. Whether the trial court properly conducted Holler's probation revocation hearing; and

III. Whether the trial court's one-year executed sentence was in violation of Holler's plea agreement.

We affirm.

## FACTS AND PROCEDURAL HISTORY

In September 1999, Holler was charged with three counts of child molesting,[1] each as a Class A felony. A proposed plea agreement between Holler and the State was filed with the trial court on April 19, 2001, and in pertinent part provided as follows:

> [4] The Parties agree to the following sentence to be imposed by the Court:
>
> Upon Defendant's plea of guilty as charged to COUNT I: CHILD MOLESTING, Class A felony, he shall receive a sentence of thirty (30) years at [DOC]. Twenty (20) years of the sentence shall be executed, followed by five (5) years on probation. Defendant shall comply with the Sexual Offender Registry laws, and refrain from making any contact, either directly or indirectly, with the victim or her immediate family. The State further agrees to dismiss Count II and Count III. Any fine imposed shall be left to the Court's discretion.

*Appellant's App.* at 15. The trial court held a guilty plea hearing and, on October 10, 2001, accepted Holler's plea agreement, entered judgment of conviction for one count of

[1] *See* Ind. Code § 35-42-4-3(a)(1).

Class A felony child molesting, and pursuant to the plea agreement, dismissed the remaining two counts. The trial court committed Holler to DOC for a period of thirty years, with twenty years executed and ten years suspended, five of which were ordered to be served on probation.

Holler served the executed portion of his sentence and, after being released from prison on March 5, 2009, was returned to Noble County and placed on probation for a period of five years. At the time of Holler's release, DOC gave him a debit card with a balance of $106; he had no other funds. *Tr*. at 65. Holler spent the first night of his release at a local hotel because he had no place to live; he had no family or friends who either could house him (given the sex offender residential restrictions) or would do so. *Id.* at 65-66. The following day Noble County transferred Holler's probation to Allen County to allow him to live at a rescue mission/homeless shelter in that county while searching for a job and a place to live. *Id*. at 66.

In Allen County, Holler made efforts to get a job and met a few people who offered him a place to stay. However, he was unable to secure a job, and Allen County Probation did not approve any of the housing options that Holler proposed. *Id*. at 67. While living at the rescue mission, Holler attended an initial consultation with a counseling center, Phoenix Associates, in an effort to obtain his required sex offender counseling. *Id*. at 70. That facility indicated it would put Holler "on hold" until he found a way of paying for counseling, but asked that he keep in touch. *Id*. Holler reported weekly to Phoenix regarding his lack of employment. During that time, he also requested to have his probation transferred to Oregon, where his sister lived.

The rescue mission had a policy of allowing residents to stay for thirty days, but allowed Holler to stay for sixty days. On June 16, 2009, a probation officer of Noble County filed a report with the trial court, which noted as follows:

> On June 12, 2009, a report was received from the Allen County Probation Department advising that they are closing interest in Mr. Holler's case and sending him back to Noble County because he does not have suitable housing, not gained employment, does not have any identification, and has not begun his sex offender counseling. As of this date, Mr. Holler's transfer to Oregon is still pending.
>
> The [Noble County] Probation Department respectfully recommends that a warrant be issued and Mr. Holler held without bond until his transfer to Oregon is approved or suitable housing can be found in Noble County that abides by the sex offender restrictions.

*Appellant's App.* at 25.

On June 17, a warrant was issued for Holler's arrest. On June 22, 2009, the trial court held an initial hearing to inform Holler of his rights in connection with a probation violation hearing. Holler requested appointed counsel, and the trial court set the matter for a probation violation status hearing. *Tr*. at 43.

Thereafter, a second probation report was filed notifying the trial court that "an Interstate Denial was received from Oregon advising that they would not accept supervision of Mr. Holler." *Appellant's App.* at 28. The report further contained a recommendation that "Holler's sentence be modified due to him not having a suitable residence and therefore being unable to comply with his terms of probation." *Id.* The trial court conducted a two-day hearing on this report.

During the hearing, defense counsel explained that Holler did not have any place to go, and as such, "[H]e would not be in disagreement to some term of imprisonment."

*Id*. at 50. Defense counsel suggested that the plea agreement be modified. While recognizing Holler's predicament concerning housing, the prosecutor noted:

> [I]f I release him and the Court from the plea agreement in a way that would indicate that he could end up with less than the 10 year suspension, . . . it would appear that I am sort of rewarding a child molester for being homeless and jobless and I don't have victim approval or even notification on such a thing. I feel comfortable asking for 10 years executed without having victim approval because that is the . . . maximum he could serve.

*Id*. at 52. The State offered in the alternative that it would agree to allow a modification if Holler served an executed sentence less than ten years and served the difference between ten years and the executed time on probation.

Thereafter, defense counsel stated that Holler was "willing to admit to a probation violation that he is not able to find housing as ordered by the Court." *Id*. at 79. The trial court informed Holler as to his rights regarding a hearing on the probation violation report, and asked if Holler understood that by admitting to a probation violation, he would waive those rights. *Id*. at 80. Holler stated that he understood. *Id*.

The trial court further inquired whether Holler understood that the trial court, upon finding a probation violation, had many options: keep Holler on probation; extend the terms of probation; change the terms and conditions of probation; or revoke probation and require him to serve up to the balance of the suspended portion of his sentence. *Id*. at 81. The trial court stated, "[T]he balance of the suspended portion of [Holler's] sentence is five years." *Id*. Holler admitted, of his "own free choice and decision," that he "did not find a location [where he] could reside as ordered by [the] court," and, as such, had violated one of the conditions of his probation. *Id*. at 81, 83.

In closing, defense counsel stated:

> Your honor, this case shows one of the striking problems we have. No doubt, and I understand there is a concern where sex offenders do reside and Mr. Holler has come forward, he has admitted his offense from day one. He served that portion of his sentence that he was supposed to in jail and then he got released. There are very limited places that he can find housing. He, Your honor, did attempt time and time [sic] to try to find something . . . .

*Id*. at 84. While admitting that Holler had violated his probation, defense counsel argued that Holler's sentence following revocation should reflect that the probation violation was not intentional.

The prosecutor, in turn, made the following statements:

> Well, Your Honor I don't disagree these are, this is kind of, I don't want to say new issue, but an issue that has come up with these types of cases because of all the residency restrictions that are placed upon persons convicted for these types of offenses. That being said I am not sure if this particular instance rises to a level of a situation where there was not a, uh, not physically a place that he could reside. . . .

*Id*. at 86. The trial court responded:

> I can tell you in consultation with the Probation Department at the time this issue arose frankly I think our Probation Department has gone above and beyond the call of duty. They have tried to work with Mr. Holler to try to find some place where he would could [sic] be, we, and when I say we meaning the system, ran out of options. We basically had nothing because of lack of finances on his part, where he could live, people who will take him, uh, this is one of those cases where we are between a rock and a hard place.

*Id*. at 86-87.

At the close of the hearing, the trial court accepted Holler's admission that he had violated his probation. The trial court noted that the violation was

> for lack of a better term, a technical violation of probation . . . . If he was a man of means and had his own place to go to I am sure he would be happy to comply with probation. The court does also note that throughout this whole situation I have found Mr. Holler to be amenable to working with us and so his attitude has been good . . . .
>
> . . . .
>
> So with that in mind I think that the best alternative I can come up with is I am going to show his probation revoked and I am going to sentence him to one year at the [DOC]. . . . Now it will be up to the [DOC] upon your release from incarceration, uh, you will be placed on parole and you will deal with them and there will be no probation afterwards.

*Id*. at 89-90.

The State filed a motion to correct error, and Holler filed a statement in opposition to the motion. Following a hearing, the trial court denied the motion to correct error. The State now appeals. Additional facts will be added as necessary.

## DISCUSSION AND DECISION

### I. State's Right to Appeal

The State contends that the sentence imposed following the revocation of Holler's probation was erroneous, *i.e.*, the trial court failed to follow the terms of the plea agreement as required by Indiana Code section 35-38-1-8(e).[2] Initially, Holler contends that the State has no authority to appeal Holler's erroneous sentence. Our legislature has enumerated several situations in which criminal appeals by the State may be taken. Ind.

[2] Indiana Code section 35-38-1-8(e) provides: "If the court accepts a plea agreement, it shall be bound by its terms."

Code § 35-48-4-2.[3] While the list does not include challenging an erroneous sentence, our Supreme Court recently recognized:

> [A] separate additional source of statutory authority empowers the State to challenge illegal sentences. As to erroneous sentences, the legislature has also specifically authorized:
>
> > If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.
>
> Ind. Code § 35-38-1-15. The plain language of this provision, with its requirement of notice to a defendant, is not limited only to defendants, but by clear implication is also available to the State.

*Hardley v. State*, 905 N.E.2d 399, 402 (Ind. 2009).

The *Hardley* court set forth the following rationale for allowing the State to appeal:

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[3] Indiana Code section 35-38-4-2 provides:

> Appeals to the supreme court or to the court of appeals, if the court rules so provide, may be taken by the state in the following cases:
>
> (1) From an order granting a motion to dismiss an indictment or information.
>
> (2) From an order or judgment for the defendant, upon his motion for discharge because of delay of his trial not caused by his act, or upon his plea of former jeopardy, presented and ruled upon prior to trial.
>
> (3) From an order granting a motion to correct errors.
>
> (4) Upon a question reserved by the state, if the defendant is acquitted.
>
> (5) From an order granting a motion to suppress evidence, if the ultimate effect of the order is to preclude further prosecution.
>
> (6) From any interlocutory order if the trial court certifies and the court on appeal or a judge thereof finds on petition that:
>
> > (A) the appellant will suffer substantial expense, damage, or injury if the order is erroneous and the determination thereof is withheld until after judgment;
> >
> > (B) the order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case; or
> >
> > (C) the remedy by appeal after judgment is otherwise inadequate.

> Considering the clear unacceptability of sentences that plainly exceed or otherwise violate statutory authority and the fact that the legislature has authorized the State to challenge erroneous sentences, we hold that sound policy and judicial economy favor permitting the State to present claims of illegal sentence on appeal when the issue is a pure question of law that does not require resort to any evidence outside the appellate record. Allowing the State to challenge an illegal sentence on appeal is within the legislative intendment of Indiana Code § 35-38-1-15, and such a challenge is the substantial equivalent of a statutory motion to correct erroneous sentence.

*Id*. (footnote omitted). While recognizing that the *Hardley* court was not, like here, addressing a sentence alleged to be in violation of Indiana Code section 35-38-1-8(e), we find the *Hardley* reasoning persuasive and address the State's appeal.

## II. Probation Revocation

The State contends that the trial court abused its discretion in revoking Holler's probation. When reviewing an appeal from the revocation of probation, we consider only the evidence most favorable to the judgment, and we will not reweigh the evidence or judge the credibility of the witnesses. *Vernon v. State*, 903 N.E.2d 533, 536 (Ind. Ct. App. 2009), *trans. denied*. Probation is a favor granted by the State, not a right to which a criminal defendant is entitled. *Id*. However, once the State grants that favor, it cannot simply revoke the privilege at its discretion. *Id*. Probation revocation implicates a defendant's liberty interest, which entitles him to some procedural due process. *Id*. (citing *Morrissey v. Brewer*, 408 U.S. 471, 482, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). Because probation revocation does not deprive a defendant of his absolute liberty, but only his conditional liberty, he is not entitled to the full due process rights afforded a defendant in a criminal proceeding. *Id*.

The State raises two contentions as to why Holler's probation should not have been revoked. First, the State contends that the trial court had no authority to revoke the probation when no petition to revoke had been filed. Second, the State contends that the trial court abused its discretion in revoking Holler's probation because Holler had not committed a probation violation. We find these two contentions are more appropriately characterized as claims that the trial court violated Holler's right to due process in finding that he violated the terms of his probation.

As previously stated, probation revocation implicates a defendant's liberty interest, which entitles him to some procedural due process. *Vernon*, 903 N.E.2d at 536. Citing to *Morrissey v. Brewer*, this court has held that the minimum requirements of due process in a probation revocation proceeding include: (a) written notice of the claimed violations of probation; (b) disclosure of evidence against him; (c) opportunity to be heard and present evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a written statement by the factfinder as to the evidence relied on and reasons for revoking probation. *Terrell v. State*, 886 N.E.2d 98, 100-01 (Ind. Ct. App. 2008) (citing *Morrissey*, 408 U.S. at 482), *trans. denied*. When a probationer admits to the violation, however, the procedural safeguards mentioned in *Morrissey* are not necessary. *Id.* Here, Holler had appointed counsel, had notice of the State's claim that he had violated probation, understood the alleged violation was his failure to obtain housing, knew of the potential consequences for violating his probation, and, yet, admitted to a probation violation. Finding no due process violation, we cannot

say that the trial court abused its discretion in finding that Holler violated a condition of his probation.

## III. Sentence Following Probation Revocation

The State finally contends that the trial court's one-year executed sentence was imposed in violation of Holler's plea agreement. Our courts have long held that plea agreements are in the nature of contracts entered into between the defendant and the State. *Lee v. State*, 816 N.E.2d 35, 38 (Ind. 2004); *Valenzuela v. State*, 898 N.E.2d 480, 482 (Ind. App. 2008), *trans. denied*. That is: "[a] plea agreement is contractual in nature, binding the defendant, the state, and the trial court. The prosecutor and the defendant are the contracting parties, and the trial court's role with respect to their agreement is described by statute . . . ." *Lee*, 816 N.E.2d at 38 (quoting *Pannarale v. State*, 638 N.E.2d 1247, 1248 (Ind. 1994)). Indiana Code section 35-38-1-8(e) provides: "If the court accepts a plea agreement, it shall be bound by its terms."

Here, the plea agreement provided:

> Upon Defendant's plea of guilty as charged to COUNT I: CHILD MOLESTING, Class A felony, he shall receive a sentence of thirty (30) years at [DOC]. Twenty (20) years of the sentence shall be executed, followed by five (5) years on probation. Defendant shall comply with the Sexual Offender Registry laws, and refrain from making any contact, either directly or indirectly, with the victim or her immediate family.

*Appellant's App.* at 15. The trial court accepted Holler's plea and, at the end of the October 10, 2001 sentencing hearing, sentenced Holler as follows:

> Based on the acceptance [of the plea agreement] the Court is bound to sentence you according to the terms of the plea agreement. Therefore, you are sentenced to a period of incarceration to the [DOC] of 30 years, 20 years of which shall be executed, followed by a suspended period of

> incarceration of ten years, five of which shall be on probation . . . . It is my preference counsel not to set the terms of probation today, because one does not know what the situation unique to Mr. Holler and the world will be when he is released. My preference would be to have him report back within 24 hours of his release for the purpose of having a hearing to set the terms of probation so they can be specifically crafted to meet his needs and whatever other requirements might be appropriate at the time.

*Tr*. at 36. With these comments, the trial court revealed its understanding of the contractual-nature of the plea agreement.

Following Holler's release from prison, the trial court placed him on probation for a period of five years. After Holler admitted to having violated a term of probation, the trial court revoked his probation and ordered an executed sentence of one year with no probation to follow. The State contends that the trial court had no discretion to negate the negotiated plea agreement by revoking the five years of probation.

Our court addressed a similar issue in *Cox v. State*, 850 N.E.2d 485 (Ind. Ct. App. 2006). Cox pleaded guilty to burglary, as a Class B felony, in exchange for other charges being dismissed and a cap of ten years on the amount of executed time he would serve. 850 N.E.2d at 487. The trial court accepted the plea and sentenced him to twelve years, with six years executed, six years suspended, and three years of probation. *Id*. During his term of probation, Cox admitted that he had been using drugs. The trial court revoked his probation and ordered that he serve his suspended six-year sentence in DOC. *Id*.

Cox appealed, arguing that the trial court abused its discretion by ordering that he serve the six-year suspended sentence, which resulted in an executed sentence of twelve years. *Id*. at 489. Cox claimed that the trial court was bound by the plea agreement's ten-year executed cap, and as such, that the trial court could not sentence him to more

than four years executed. This court noted the interrelationship between Indiana Code section 35-35-3-3(e) (by accepting plea agreement, court is bound by its terms) and Indiana Code section 35-38-2-3(g) (during probation revocation proceedings, trial court has authority to order defendant to serve all or part of suspended sentence). While recognizing that the trial court was bound by the terms of the plea agreement, the *Cox* court also understood that a defendant's acceptance of probation as part of the sentence, carried with it the defendant's implied agreement to comply with the terms of probation and to accept any punishment or consequences for violating such probation. *Id*. at 491. The trial court concluded that Indiana Code section 35-38-2-3(g)(3) gave the trial court authority to order execution of all or part of Cox's sentence that was suspended at the time of initial sentencing upon finding that Cox had violated a condition of his probation. *Id*. Thus, the *Cox* court determined that the trial court did not abuse its discretion in ordering Cox to serve his six-year suspended sentence, which resulted in an executed sentence of twelve years. *Id*.

Here, although this appeal is brought by the State, the reasoning is the same. All parties agreed that Holler would serve a term of probation. The agreement provided for a five-year term of probation, but the State failed to specify what would happen in the event that Holler violated his probation. Instead, upon finding a probation violation, the trial court's actions were guided by Indiana Code section 35-38-2-3(g)(3). As such, the trial court could keep Holler on probation; extend the probationary period for not more than one year beyond the original probationary period; or order execution of all or part of the previously suspended sentence. Ind. Code § 35-38-2-3(g)(3). The trial court decided

to order execution of *part* of Holler's previously suspended sentence. We find no error in the trial court's imposition of a one-year executed sentence.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.