



Appellant-defendant Marcus R. Berry appeals the revocation of his probation, challenging the sufficiency of the evidence. Specifically, Berry claims that the State failed to prove by a preponderance of the evidence that he abused alcohol— notwithstanding his arrest for driving while intoxicated. Concluding that the trial court properly revoked Berry’s probation, we affirm.

### FACTS

On February 20, 2009, Berry was charged with three counts of dealing in a controlled substance, a class B felony, and one count of possession of a controlled substance, a class D felony. Thereafter, Berry entered into a plea agreement with the State and pleaded guilty to the possession charge. Berry was then sentenced to the Indiana Department of Correction for a period of one-and-one-half years, with one year and sixty days suspended. Berry’s sentence was ordered to run consecutively to the sentences that were imposed in two other unrelated cases. The trial court also sentenced Berry to one year of probation, which required Berry to “not abuse alcohol or use drugs” and “behave well and report for supervision as instructed.” Appellee’s App. p. 1.

On November 30, 2009, the State filed a petition to revoke Berry’s probation, alleging that Berry did “not maintain good behavior” because he was arrested for battery on July 19, 2009, and driving while intoxicated on August 26, 2009. Appellant’s App. p. 10.

The circumstances surrounding the August 26 arrest revealed that Berry was driving his vehicle at a speed of fifty-seven miles per hour in a thirty-five-mile-per-hour

zone. When Highland Police Officer Steve Tomondi stopped Berry, he noticed that Berry smelled of alcohol, had bloodshot eyes, and slurred speech. Berry failed several field sobriety tests, the horizontal gaze nystagmus test, and he was unable to maintain his balance. Subsequent tests determined that Berry had a BAC of .13 percent.<sup>1</sup>

At the probation revocation hearing that commenced on February 12, 2010, the trial court determined that Berry did not “behave well” in light of his arrest for operating a vehicle while intoxicated endangering a person.<sup>2</sup> Tr. p. 22. The trial court also noted that Berry “was clocked doing 57 in a 35 mile per hour speed zone.” Id. After observing that Berry was not to abuse alcohol in accordance with the conditions of probation, the trial court revoked Berry’s probation and ordered him to serve the one-year-and-sixty-day sentence that was previously suspended. Berry now appeals.

### DISCUSSION AND DECISION

Berry claims that the evidence was insufficient to revoke his probation. Specifically, Berry argues that his arrest for driving while intoxicated failed to prove by a

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<sup>1</sup> The current version of Indiana Code section 9-30-5-1 provides that

- (a) A person who operates a vehicle with an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol but less than fifteen-hundredths (0.15) gram of alcohol per:

- (1) one hundred (100) milliliters of the person's blood; or
- (2) two hundred ten (210) liters of the person's breath;

commits a Class C misdemeanor.

<sup>2</sup> The battery arrest was not argued as a basis for revoking Berry’s probation.

preponderance of the evidence that he abused alcohol and had violated the conditions of his probation.

Indiana Code section 35-38-2-3 provides that a person's probation may be revoked if "the person has violated a condition of probation during the probationary period; and the petition to revoke probation is filed during the probationary period. . . ." Probation is a matter of grace left to the trial court's discretion rather than a right to which a criminal defendant is entitled. Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). The trial court determines the conditions of probation and may revoke probation if the conditions are violated. Ind. Code § 35-38-2-3; Prewitt, 878 N.E.2d at 188. And proof of just one probation violation is sufficient to revoke a defendant's probation. Jones v. State, 689 N.E.2d 759, 761 (Ind. Ct. App. 1997).

Because a probation revocation hearing is in the nature of a civil proceeding, the State only has to prove by a preponderance of the evidence that a defendant has violated his probation. Lightcap v. State, 863 N.E.2d 907, 911 (Ind. Ct. App. 2007). Moreover, when the alleged probation violation is bad behavior based on the commission of a new crime, the State need not show the probationer was convicted of the crime. Whatley v. State, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006). Instead, the State only needs to show by a preponderance of the evidence that the probationer has engaged in unlawful activity. Brown v. State, 458 N.E.2d 245, 249 (Ind. Ct. App. 1983). Put another way, while a mere arrest of the defendant is insufficient to support a revocation of probation, revocation is permitted if the trial court finds that the arrest was reasonable and that there

is probable cause for belief that the defendant violated a criminal law. Richeson v. State, 648 N.E.2d 384, 389 (Ind. Ct. App. 1995). Finally, it has been determined that “good behavior” as a term or condition of probation is equivalent to “lawful conduct.” See Ashley v. State, 717 N.E.2d 927, 928 (Ind. Ct. App. 1999) (declaring that the defendant violated the terms and conditions of his probation to behave well by “committing the new criminal offenses”).

In this case, while Berry maintains that the evidence was insufficient to support the conclusion that he had “abused alcohol,” appellant’s br. p. 5, the evidence established that Berry smelled of alcohol, had bloodshot eyes, and slurred speech, when Officer Tomondi stopped Berry’s vehicle that was traveling in excess of twenty miles per hour over the speed limit. Tr. p. 6. Moreover, Berry stumbled from his vehicle, his balance was unsteady, and he failed several field sobriety tests and the horizontal gaze nystagmus test. Id. at 7-9. Finally, the evidence established that Berry’s BAC was “.13 percent BAC on the certified Datamaster,” which was significantly above the legal limit of .08. Appellant’s App. p. 9, tr. p. 10-12.

In light of these circumstances, the State established by a preponderance of the evidence that Berry violated the terms of his probation by abusing alcohol and not behaving well by committing various criminal offenses<sup>3</sup> while on probation. As a result, the trial court properly revoked Berry’s probation.

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<sup>3</sup> Indiana Code section 9-30-5-2(b) provides that operating a vehicle while intoxicated “in a manner that endangers a person” is a class A misdemeanor. Also, a person who “operates a vehicle and who recklessly. . . . (1) drives . . . at such an unreasonably high rate of speed or at such an unreasonably low

The judgment of the trial court is affirmed.

DARDEN, J., and CRONE, J., concur.

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rate of speed under the circumstances as to: (A) endanger the safety or the property of others . . . commits a Class B misdemeanor.” Indiana Code 9-21-8-52 (a)(1) (emphasis added).