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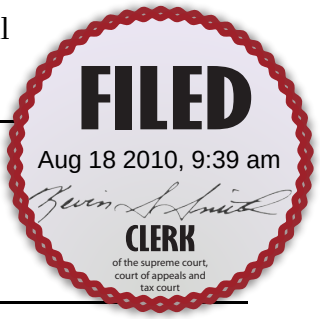

IN THE COURT OF APPEALS OF INDIANA

TERRY L. DUCKWORTH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-1001-CR-84
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Rudolph Pyle, III, Judge
Cause No. 48C01-0707-FD-339

August 18, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Terry L. Duckworth appeals the revocation of his probation and the execution of his previously suspended sentence. He presents the following consolidated and restated issues for review:

1. Did the trial court properly revoke Duckworth's probation?

2. Did the trial court abuse its discretion in sanctioning Duckworth?

We affirm.

On July 12, 2007, the State charged Duckworth with one count of class D felony intimidation and two counts of class A misdemeanor resisting law enforcement. The State also filed an information alleging that he was a habitual offender. On January 14, 2008, pursuant to a plea agreement, Duckworth pleaded guilty to intimidation and one count of resisting law enforcement. In exchange, the State dismissed the remaining charge and the habitual offender allegation and agreed to recommend a sentence of three years for intimidation and one year for resisting law enforcement, to run consecutively. The trial court sentenced Duckworth accordingly. Duckworth received credit for time served and the balance of his sentence was suspended to formal probation.

On December 4, 2009, the State filed a notice of probation violation, alleging in relevant part as follows:

> a) Failure to behave well in society, to wit: On/about 11/25/09, you are alleged to have issued verbal threats against the safety of Stella Duckworth, specifically including threats to kill Stella Duckworth;
> b) On/about 11/12/09, you are alleged to have issued verbal threats against the safety of Dan Whitehead and/or Maryella Workman.

Appellant's Appendix at 28. At the conclusion of the evidentiary hearing on January 4, 2010, the trial court found that a probation violation had occurred and revoked the remaining 1226

days of Duckworth's suspended sentence. Duckworth now appeals both the finding of a violation and the sanction imposed. Additional facts will be provided below as necessary.

1.

Probation is a matter of grace and is a conditional liberty that is a favor, not a right. *See Kincaid v. State*, 736 N.E.2d 1257 (Ind. Ct. App. 2000). The trial court determines the conditions of probation and may revoke probation if the probationer violates a condition of probation. *Id*. A trial court's order regarding revocation of probation is reviewed for an abuse of discretion. *Johnson v. State*, 692 N.E.2d 485 (Ind. Ct. App. 1998). Further, a probation hearing is civil in nature, and the State must prove the alleged violation of probation by a preponderance of the evidence. *Braxton v. State*, 651 N.E.2d 268 (Ind. 1995). On review, we neither reweigh the evidence nor judge the credibility of witnesses, and we look only to the evidence most favorable to the State. *Id*. We look to the evidence most favorable to the court's judgment and determine whether there is substantial evidence of probative value supporting revocation. *Marsh v. State*, 818 N.E.2d 143 (Ind. Ct. App. 2004). If so, we will affirm. *Id*.

In this case, the State alleged Duckworth failed to "behave well in society." *Appellant's Appendix* at 28. Our courts have long held that this term or condition of probation is equivalent to "lawful conduct." *State v. Schlechty*, 926 N.E.2d 1 (Ind. 2010). *See also Justice v. State*, 550 N.E.2d 809 (Ind. Ct. App. 1990) ("[i]n proving that a defendant has violated the condition of 'good behavior,' the State must prove by a preponderance of the evidence that the defendant has engaged in unlawful activity"). Relying upon this authority, Duckworth contends the State failed to establish by a preponderance of the evidence that he

engaged in any unlawful conduct, specifically intimidation.

The evidence presented at the hearing established that on the morning of November 12, 2009, Duckworth went to the office of Dan Whitehead, an attorney who had previously represented him in the underlying action. Secretary Mariella Worthman was alone in the office at the time. Duckworth, whom Worthman immediately recognized, asked multiple times if Whitehead was there. Each time Worthman indicated that he was out of the office in hearings and that she would be happy to leave him a message. Duckworth seemed to disbelieve Worthman and kept pacing and looking in the direction of Whitehead's office in the back. Duckworth eventually stated that he wanted to apologize for the way he had acted during Whitehead's representation of him. "[N]ot even a split second" later, however, Duckworth turned around and indicated that "he still had access to knives and guns and he knew who [Worthman] was." *Transcript* at 36. Duckworth also stated, "I haven't forgotten what [Whitehead's] done." *Id*. at 38. He explained that he could "make anything happen just like that and he snapped his fingers." *Id*. Duckworth stated that he always has "cameras on people" and "kept referring to he could make anything happen." *Id*. at 37. Before leaving, Duckworth once again indicated his desire to talk with Whitehead (while still looking toward the back) and said he might be back later that day. Worthman was fearful and took Duckworth's statements as threats against her and Whitehead. She immediately called Whitehead after Duckworth left.

To prove intimidation, the State was required to establish that Duckworth communicated a threat to another person with the intent that the other person engage in conduct against the person's will or that the other person be placed in fear of retaliation for a

prior lawful act. Ind. Code Ann. § 35-45-2-1(a) (West, Westlaw through 2010 2nd Regular Sess.). On appeal, Duckworth claims that he did not make a direct threat to Worthman's or Whitehead's safety. Further, he argues that there is no evidence that his comments were intended to cause either party to engage in conduct against their will or to be in fear of retaliation for a prior lawful act. We cannot agree.

The facts presented at the hearing established by a preponderance of the evidence that Duckworth committed the crime of intimidation against Worthman and Whitehead. There is simply no merit to Duckworth's claim that he did not communicate a threat to their safety.[1] Moreover, one could reasonably infer that the threats were intended either to cause Worthman and/or Whitehead to engage in conduct against their will or to be in fear of retaliation for a prior lawful act. Specifically, Duckworth seemed to believe Whitehead was in the office and, therefore, the threat could be seen as an attempt to make Worthman get Whitehead from his office or to put Worthman in fear of retaliation for her failure to do so. His threats were also likely to place Whitehead and Worthman in fear of retaliation for Whitehead's prior representation of him, of which Duckworth disapproved. In sum, this evidence sufficiently supports the revocation of probation based upon Duckworth's unlawful conduct.[2]

2.

Duckworth further argues that the court abused its discretion by ordering him to serve

[1] "'Threat' means an expression, by words or action, of an intention to: (1) unlawfully injure the person threatened or another person…." I.C. § 35-45-2-1(c).

[2] Because we conclude that the evidence sufficiently established that Duckworth intimidated Whitehead and Worthman, we need not address the threats made against his ex-wife, Stella, in which he stated to his

his entire suspended sentence in prison. He claims his character and the nature of his conduct do not warrant such a lengthy sentence, noting that no criminal charges have been filed and that he has "mental health issues that, when left untreated, possibly lead to the type of behavior exhibited on November 12 and 25, 2009." *Appellant's Brief* at 9.

Indiana Code Ann. § 35-38-2-3(g) (West, Westlaw through 2010 2nd Regular Sess.) provides that upon finding a violation of probation, a trial court may "order execution of all or part of the sentence that was suspended at the time of initial sentencing." We review the trial court's decision for an abuse of discretion. *Goonen v. State*, 705 N.E.2d 209 (Ind. Ct. App. 1999).

While on probation for intimidation, Duckworth went out and committed that very offense again. The record reveals that he had a history of making threats against others and being a "real dark individual" when he is not taking his medication.[3] *Transcript* at 12. Further, despite his ex-wife having an active protective order against him, she testified that Duckworth continued to harass her[4] and that she was afraid of him.

Probation gives a defendant, such as Duckworth, an opportunity to show that he is able to rehabilitate himself and become a useful member of society without serving his time

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longtime friend that he was "gonna cut [Stella's] f***ing head off". *Transcript* at 14. We note, however, that the friend took him seriously and went to the police.

[3] It is not clear what medication Duckworth should be taking. Further, the record is vague regarding Duckworth's alleged mental health issues. In a psychiatric evaluation performed in September 2007, the examiner noted the possibility that Duckworth has a personality disorder with antisocial and possibly paranoid features. The examiner, however, did not recommend psychiatric hospitalization or specific psychiatric treatment as far as therapy or medication.

[4] Stella explained:

> He will…he will come by where I'm at. Like I say, circle around two, three, four times at the same place. Stop on the road. He'll slow down if he's in front of me at red lights. He caught me in Straw Town and he didn't walk on. He stood there. He followed me into a building. He…just anything he can to intimidate and scare me, he'll do.

in prison, as well as gives the sentencing court an opportunity to observe the defendant's conduct during this period. *Hart v. State*, 889 N.E.2d 1266 (Ind. Ct. App. 2008). In this case, Duckworth received the benefit of a highly favorable plea agreement. He did not take advantage of this opportunity. In light of Duckworth's refusal or inability to reform, the trial court found that "we just need to protect people in this community from you." *Transcript* at 47. Therefore, the court revoked his entire suspended sentence. We find no abuse of discretion in this regard.

Judgment affirmed.

BARNES, J., and CRONE, J., concur.

Transcript at 23-24.