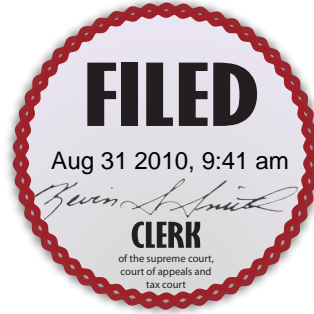


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TIMOTHY TREACY,)
)
Appellant-Defendant,)
)
vs.) No. 49A05-0911-CR-647
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Richard E. Sallee, Senior Judge
Cause Nos. 49F18-0511-CM-194610, 49F18-0703-FD-36313,
49F18-0704-FD-69176, 49F18-0711-FD-238170

August 31, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Timothy Treacy appeals the revocation of his probation. Treacy raises one issue, which we revise and restate as whether the trial court violated due process requirements by failing to follow the proper procedure in revoking Treacy's probation. We affirm.¹

The relevant facts follow. On November 10, 2005, the State charged Treacy with Count I, operating while intoxicated as a class A misdemeanor, and Count II, operating at or above 0.15 as a class A misdemeanor under cause number 49-F18-0511-CM-194610 ("Cause No. 610"). Treacy pled guilty to Count I, operating while intoxicated as a class A misdemeanor, and the State agreed to dismiss Count II. On March 23, 2006, the trial court accepted the plea agreement and sentenced Treacy to 365 days with 363 days suspended to probation. As a part of Treacy's probation, he was not to commit a criminal offense.

On September 1, 2006, a Notice of Probation Violation was filed alleging that Treacy was arrested on August 25, 2006 for "Operating a Vehicle While Intoxicated/MA, Operating a Vehicle with BAC .08-.15%, Schedule I, II/MC, Public Intoxication/MB, Operating a Vehicle with Prior, with Passenger Under 18/FD and Operating a Vehicle while Intoxicated, with Prior, with/Passenger Under 18/FD under cause number 49F180608FD159623" ("Cause No. 623"). Appellant's Appendix at 43. On March 16, 2007, an Amended Notice of Probation Violation was filed alleging that Treacy had been

¹ We remind Treacy that Ind. Appellate Rule 46 provides that "[t]he appellant's brief shall contain the following sections under separate headings and in the following order: (1) Table of Contents. The table of contents shall list each section of the brief, including the headings and subheadings of each section and the page on which they begin. (2) Table of Authorities. The table of authorities shall list each case, statute, rule, and other authority cited in the brief, with references to each page on which it is cited. The authorities shall be listed alphabetically or numerically, as applicable."

charged on March 3, 2007, with “Operating Vehicle While Intoxicated (MA), Operating Vehicle BAC .08-.15 Sch, I, II (MC), Operating Vehicle While Intoxicated With Prior, With Passenger under 18 (FD), Operating Vehicle While Intoxicated BAC. GT .08 W/Prior, W/Passenger under 18 (FD) under cause number 49F180703FD036313” (“Cause No. 313”). Id. at 44.

On April 25, 2007, an Amended Notice of Probation Violation was filed alleging that Treacy had been charged on April 21, 2007, with “Operating Vehicle While Intoxicated (MA), Possession of Marijuana or Hash (MA), Public Intoxication (MB), Operating Vehicle While Intoxicated with BAC GT.08 with Prior, with Passenger under 18 (FD) under cause number 49F180704FD069176” (“Cause No. 176”). Id. at 46. On November 9, 2007, and November 15, 2007, an Amended Notice of Probation Violation was filed alleging that Treacy had been charged on November 8, 2007 with “Operating a Vehicle W/ Intox. W/ Pass. U/18 (FD), Operating Vehicle While Intoxicated (MA), and Public Intoxication (MB) . . . under cause number 49F180711FD238170” (“Cause No. 170”).² Id. at 48-49.

On March 10, 2009, an Amended Notice of Probation Violation was filed alleging that Treacy submitted a urine drug screen that tested positive for THC on February 17, 2009. On April 9, 2009, an Amended Notice of Probation Violation was filed alleging that Treacy submitted a urine sample that “tested dilute” on March 24, 2009, and on April

² The offenses alleged in Cause No. 176 and Cause No. 170 appear to have occurred after the expiration of Treacy’s period of probation. Treacy does not raise this as an issue, and we therefore do not address it.

21, 2009, an Amended Notice of Probation Violation was filed which made the same allegation. Id. at 85.

At some point, Treacy was found guilty of the offenses under Cause No. 623. Under Cause No. 610, the chronological case summary reveals the following entry for August 27, 2009: “Court sets next action for HPRO 09/08/09 A INTO COURT ROOM F18 REQUEST TO SET VOP ON SAME DATE AS SENTENCING ON 06159623.” Id. at 35.

On September 8, 2009, the court held a consolidated hearing on the State’s allegation that Treacy violated his probation as well as on the State’s charges under Cause No. 623, Cause No. 313, Cause No. 176, and Cause No. 170. The court entered a conviction of operating a vehicle while intoxicated as a class D felony under Cause No. 623 and sentenced Treacy to 545 days with 455 days suspended. Treacy pled guilty as charged in Cause No. 313, Cause No. 176, and Cause No. 170. The court then informed Treacy of his right to a hearing on the probation violation and that the court was finding a violation of his probation based upon his convictions. Treacy agreed with the court’s procedure, and the court entered an order finding Treacy in violation of his conditions of probation, revoked his probation, and sentenced him to time served.³

The issue is whether the trial court violated due process requirements by failing to follow the proper procedure in revoking Treacy’s probation. Generally, if an issue is not objected to at trial, it may not be raised on appeal. Townsend v. State, 632 N.E.2d 727,

³ Specifically, the court sentenced Treacy to 152 days in the Department of Correction and awarded Treacy seventy-six days for time served plus seventy-six days good time credit.

730 (Ind. 1994). “However, we may bypass an error that a party procedurally defaults when we believe that the error is plain or fundamental. To qualify as ‘fundamental error,’ the error must be a substantial blatant violation of basic principles rendering the trial unfair to the defendant.” Id. (quoting Hart v. State, 578 N.E.2d 336, 337 (Ind. 1991)). We also observe that the deprivation of due process is fundamental error. See Goodwin v. State, 783 N.E.2d 686, 687 (Ind. 2003); Wilson v. State, 514 N.E.2d 282, 284 (Ind. 1987).

Although probationers are not entitled to the full array of constitutional rights afforded defendants at trial, the Due Process Clause of the Fourteenth Amendment does impose procedural and substantive limits on the revocation of the conditional liberty created by probation. Woods v. State, 892 N.E.2d 637, 640 (Ind. 2008). The minimum requirements of due process that inure to a probationer at a revocation hearing include: (a) written notice of the claimed violations of probation; (b) disclosure of the evidence against him; (c) an opportunity to be heard and present evidence; (d) the right to confront and cross-examine adverse witnesses; and (e) a neutral and detached hearing body. Id.

Probation revocation is a two-step process. Id. First, the court must make a factual determination that a violation of a condition of probation actually occurred. Id. If a violation is proven, then the trial court must determine if the violation warrants revocation of the probation. Id. (citing Morrissey v. Brewer, 408 U.S. 471, 479-480, 92 S. Ct. 2593 (1972)). Indiana has codified the due process requirements of Morrissey in 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 by the probationer. Id. When a probationer admits to the violations, the procedural safeguards of Morrissey and the evidentiary hearing are unnecessary. Id. Instead, the court can proceed to the second step of the inquiry and determine whether the violation warrants revocation. Id. However, even a probationer who admits the allegations against him must still be given an opportunity to offer mitigating evidence suggesting that the violation does not warrant revocation. Id.

Treacy argues that the trial court violated the requirements of Ind. Code § 35-38-2-3 and denied him the right to due process guaranteed under the Fourteenth Amendment when it failed to conduct a hearing on his probation revocation. Treacy also argues that the trial court failed to provide him with an opportunity to explain why he was deserving of further consideration and that it failed to provide him with the right to confront and cross-examine witnesses.

The record reveals that on September 8, 2009, the court held a hearing on the State's allegation that Treacy violated his probation as well as on the State's charges under Cause No. 313, Cause No. 176, and Cause No. 170. At the beginning of the hearing, the court stated: "I am inclined to handle the probation violation today also, unless somebody objects." Transcript at 454. Treacy did not object. Indeed, Treacy's counsel stated: "No, Your Honor, we would like to do that also." Id. Also, at one point during the hearing, the following exchange occurred:

MR. TREACY: Can I tell you why? Why all this occurred? Because . . .

JUDGE: Check with your lawyer to make sure it is not going to hurt you.

MR. TREACY: This is why. I got raided in my house in '05 cause I made an enemy of a former person that I worked for and he told the narcotics task force to come bust in my house. And they told me that if I would work for them as a C.I. they were going to make my life hell. So every time I left my house . . .

JUDGE: They told you this?

MR. TREACY: Yes.

JUDGE: Okay.

MR. TREACY: Yes, Jeff Krider and Officer Kincaid.

JUDGE: But you suspected that's the reason that . . .

MR. TREACY: I was told. It's a fact.

JUDGE: Okay.

[Treacy's Attorney]: Your Honor, that would have been our case had we moved forward. That there was a vendetta by police to . . . every time he would walk out the door they would nail him.

Id. at 477.

During the hearing, Treacy pled guilty as charged in Cause No. 313, which related to events that occurred on March 3, 2007. The court entered two convictions as class D

felonies as a result of Treacy's guilty plea. Treacy also pled guilty as charged in Cause No. 176 and Cause No. 170.⁴ The following exchange then occurred:

JUDGE: Okay on the probation violation I am inclined to find him . . . revoke his probation because he has three convictions and . . .

* * * * *

JUDGE: Four is it? And I am going to give him a 152 days credit for 76 time served on the probation violation. It is a revocation, it is not a termination.

* * * * *

JUDGE: So it is 76 times two is 152 days and that is what I have giving [sic] him for the probation violation and credit for 76 which means time served, indigent on any fees that are left. That sound good? Now we got to get back to the appeal question on the . . . the jury trial. Did you make your mind up?

[Treacy's Attorney]: Well Judge is that something we have to decide today or . . . he's got thirty days.

* * * * *

JUDGE: You have a right to have a hearing on the probation violation. And the only thing that I am violating you for . . . I don't know anything about this drug testing . . . I'm not going to violate you for that. It is because you have three, four convictions that occurred while you were on probation and the convictions hadn't occurred but they were committed while you were still on probation. And that is the only thing I am revoking your probation for. There may be other alleged violations but I finding [sic] the revocation is for the new charges that you plead guilty to. Did you object to that or did you want . . . to have a fair hearing?

⁴ Treacy does not challenge his guilty pleas on appeal.

MR. TREACY: That is fine.

JUDGE: Okay then I am going to go ahead and revoke you and I gave you time served.

MR. TREACY: Yeah.

JUDGE: Okay, good enough.

[Treacy's Attorney]: Thanks Judge.

Id. at 554-557.

Based upon the record, Treacy did not object to the proceedings and explicitly approved the trial court's procedure. Further, there is no indication in the record that the trial court prevented Treacy from presenting evidence with respect to either the court's determination that a violation of a condition of probation had occurred or the court's determination of whether the violation warranted the revocation of probation. While Treacy argues that the trial court failed to provide him with an opportunity to explain why he was deserving of further consideration, we observe that at least at one point Treacy did argue that the police had a vendetta against him. We also observe that the trial court relied upon Treacy's convictions and not upon any drug tests. Treacy does not make any argument on appeal to explain why he violated the terms of his probation. Under the circumstances, we cannot say that Treacy was denied his due process rights to a probation violation hearing or to present evidence.⁵ See Vernon v. State, 903 N.E.2d

⁵ Treacy also argues that "the trial court simply neglected to conduct an evidentiary hearing" and cites Tillberry v. State, 895 N.E.2d 411 (Ind. Ct. App. 2008). Appellant's Brief at 7. In Tillberry, the trial court conducted two hearings and revoked the defendant's probation. 895 N.E.2d at 413-415. On

533, 536-538 (Ind. Ct. App. 2009) (holding that the defendant was given an opportunity to be heard and to present evidence that suggested the violation did not warrant revocation), trans. denied; Sanders v. State, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005) (holding that the trial court followed the proper procedure when revoking the defendant's probation and did not violate her procedural due process rights where the court gave the defendant an opportunity to present evidence and arguments prior to an entry on disposition), trans. denied; see also Woods, 892 N.E.2d at 642 (affirming the trial court's revocation of the defendant's probation and holding that "[n]either on direct appeal nor on transfer to this Court does [the defendant] make any attempt to explain why he violated the terms of his probation" and "did not make an offer of proof to the trial court").

For the foregoing reasons, we affirm the trial court's revocation of Treacy's probation.

Affirmed.

appeal, we held that the informal conversation between the judge and the parties at a hearing not only failed to comport with Tillberry's right to due process at a probation revocation, it also failed to elicit evidence to support by a preponderance of the evidence the finding that there had been two violations. Id. at 417. Specifically, we held that there was no evidence regarding the circumstances leading to the defendant's arrest, and, thus, there was no evidence from which the trial court could have found probable cause to believe the defendant committed a crime while on probation. Id. We also held that the trial court had to assume facts that were not in evidence if it were to revoke the defendant's probation based upon the defendant's failure to show up for probation appointments. Id.

Here, unlike in Tillberry, the trial court asked Treacy if he wanted a separate hearing, and Treacy indicated that he did not. Moreover, Treacy had previously been found guilty of the offenses under Cause No. 623. At the September 8, 2009 hearing, the court sentenced Treacy under Cause No. 623. Treacy also pled guilty under Cause No. 313, Cause No. 176, and Cause No. 170. The trial court heard a factual basis for each of the guilty pleas, and Treacy admitted to the factual basis for each offense. Accordingly, we do not find Tillberry instructive.

NAJAM, J., and VAIDIK, J., concur.