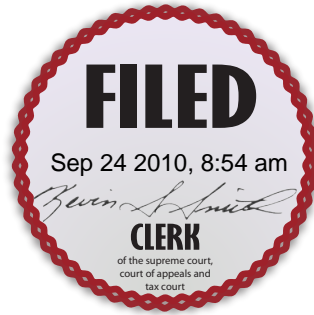


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

KENNETH R. MARTIN
Goshen, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JANINE STECK HUFFMAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

SHERMAN E. FULLER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)

No. 20A03-1001-CR-73

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Stephen R. Bowers, Judge
Cause No. 20D02-0601-FD-37

September 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Sherman E. Fuller's probation was revoked due to his failure to pay court costs and certain fees. Because the State did not prove that he recklessly, knowingly, or intentionally failed to pay, we reverse.

Facts and Procedural History

On June 1, 2005, Fuller was charged with domestic battery, criminal confinement, and resisting law enforcement. The State later added a count of failure to register as a sex offender. On May 1, 2006, pursuant to a plea agreement, Fuller pled guilty to criminal confinement and resisting law enforcement, and the State dismissed the other charges. His agreement called for a fixed sentence of one year for resisting law enforcement consecutive to two years for criminal confinement, with one year suspended. The court accepted the agreement, sentenced Fuller accordingly, and assessed court costs of \$156.00 and a "DAPIC fee" of \$200.00. Fuller was ordered to undergo an anger and addictions assessment upon release from the Department of Correction and to follow all recommendations.

Fuller began serving his term of probation on April 22, 2008. He participated in a batterer's intervention program through the Center for Problem Resolution. On March 2, 2009, the probation department filed a "Violation of Probation Petition." Appellant's App. at 153. The petition alleged that Fuller had not paid his court costs, DAPIC fee, or probation user's fees. The petition also alleged that he had been unsatisfactorily discharged from the Center for Problem Resolution. Attached to the petition was a discharge summary completed by the facilitator. The facilitator stated his opinion that Fuller had acted inappropriately

during a role-playing exercise and recommended that Fuller complete sex offender treatment before participating in a batterer's intervention program.

On May 18, 2009, Fuller and the State reached an agreement on the probation violation, which the trial court accepted. Fuller was ordered to obtain a new assessment through Lincoln Therapeutic Center ("LTC") and to comply with any recommended sex offender treatment. His term of probation was extended for one year, and the State's petition was stayed.

On August 7, 2009, a second Violation of Probation Petition was filed. The petition again alleged that Fuller had not paid court costs, the DAPIC fee, or probation user's fees. The petition also alleged that Fuller was not participating in treatment through LTC: "On July 9, 2009 and July 23, 2009, Mr. Fuller met with Kevin Molloy at LTC, but did not provide payment for the services. Mr. Fuller was provided a reduced rate to accommodate his status of being unemployed. Mr. Fuller is not attending treatment at LTC as ordered." Appellant's App. at 158.

An evidentiary hearing was held on December 9, 2009. Jodi Cruickshank, Fuller's probation officer, was the only witness for the State. Cruickshank acknowledged that Fuller showed up for appointments with her as required, completed an addictions assessment and treatment through the Center for Problem Resolution, and had not failed any drug screens while on probation. She also acknowledged that Fuller had reported to LTC and had obtained an assessment. Her goal was to have Fuller participate in individual sessions to focus on the issue of accepting responsibility for his offenses. However, Fuller claimed to be

unable to pay, even when LTC offered him a reduced rate of \$30.00 to \$60.00 per session; therefore, he was not participating in treatment at LTC. Based on her experience with LTC, Cruickshank opined, “If Mr. Fuller would have showed up there with ten dollars (\$10.00) it would have been better than nothing and he probably would have seen [the therapist].” Tr. at 22-23. Cruickshank testified that Fuller had reported “several times that he was working cash remodeling jobs, but nothing that would require him to report any type of earnings to the IRS.” *Id.* at 9. Cruickshank did not “see any benefit” to keeping Fuller on probation because he had not paid his fees or court costs and seemed unwilling to accept responsibility for his behavior. *Id.* at 10. Therefore, she suggested that Fuller be returned to the Department of Correction with a recommendation to receive sex offender treatment.

Fuller testified in his own behalf. He testified that he had completed an addictions assessment and classes at the Center for Problem Resolution. He also attended twenty-five out of forty sessions of the batterer’s intervention program at the Center for Problem Resolution. He denied any intention to act inappropriately during the role-play, but acknowledged that he and others in the group were laughing, and he stated that he felt embarrassed and uncomfortable because it was the first time that he had participated in that type of exercise.

Fuller testified that he first went to LTC on July 9, 2009, and he filled out financial paperwork. When he went back to LTC, he was informed that his fees would be \$60.00. He spoke to Molloy about his case and how he felt about it. Fuller made another appointment for July 23, 2009, but he was unable to pay and was told that he could not see the therapist.

Fuller told Cruickshank that he had been turned away for his inability to pay, and she told him that she was going to file a Violation of Probation Petition.

Fuller testified that for the first couple months of his probation, he worked for a general contractor. Fuller stated that he was laid off because of the economic downturn and because his employer moved to Louisiana. He claimed that he had completed over 100 job applications and listed several examples of places that he had applied. He felt that he was not having success in finding a job because of the economy and because of his criminal record. He had heard on the news that the unemployment rate in Elkhart County was around twenty percent in the summer of 2009.

Fuller testified that in the past year and a half, he had earned about \$100.00 doing odd jobs. He stated that he was primarily supported by his girlfriend, but she had told him that she could not afford to pay for his sessions at LTC. He had been able to take classes at the Center for Problem Resolution because he received a grant “through the State through Goodwill,” but the grant would not cover his sessions at LTC. *Id.* at 30. Fuller testified that he did not have a car or other assets of value. He acknowledged that he had been physically and mentally capable of working throughout his time on probation.

The trial court found that Fuller had violated the terms of his probation:

We have a bad economy and we are all very much aware of that. But this gentlemen [sic] was in fact on his probation since May 30, 2006.^[1] During that period of time he’s managed to raise funds indirectly to address other matters and even claimed a grant but when advised, apparently advised that Lincoln Therapeutic is not eligible for that grant rather than addressing how to apply

¹ The court misspoke here. May 30, 2006 was the date that Fuller was sentenced; he did not begin his probationary period until April 22, 2008.

those funds to some other ... to some other provider so that the intent of the court's order could be resolved, he didn't do that.

....

Now, you can't be expected necessarily to have all the skills you think you'd have at the conclusion of the counseling program before he's ever been.... But there's a fundamental level of responsibility here to address orders that were very clear.

....

You have not successfully completed the Batterer's Intervention Program. You have not paid the fines and costs as ordered when you had, I believe, the ability to do so. At least at some level. And you have not completed the evaluation and treatment that was ordered with respect to Lincoln Therapeutic.

Id. at 53-54. The trial court revoked Fuller's probation and ordered him to serve the balance of his sentence with credit for time already served. Fuller now appeals the trial court's order.

Discussion and Decision

"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). Probation revocation is a two-step process. "First, the court must make a factual determination that a violation of a condition of probation actually occurred." *Woods v. State*, 892 N.E.2d 637, 640 (Ind. 2008). "If a violation is proven, then the trial court must determine if the violation warrants revocation of the probation." *Id.* "A probation revocation hearing is in the nature of a civil proceeding and, therefore, a violation need only be proven by a preponderance of the evidence." *Washington v. State*, 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001). "If there is substantial evidence of probative value to support the trial court's decision that the probationer is guilty of a violation, revocation is appropriate." *Id.* "This Court will neither reweigh the evidence nor judge the credibility of the witnesses." *Id.* "Rather, we look to the evidence most favorable to the State." *Id.*

In *Szpunar v. State*, the defendant's probation was revoked based solely on the State's evidence that he had paid only a small portion of his restitution. 914 N.E.2d 773 (Ind. Ct. App. 2009). The defendant presented evidence that health problems had interfered with his ability to work. We reversed the revocation of his probation. *Id.* at 779. We first noted that 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." *Id.* at 777 (quoting Ind. Code § 35-38-2-3(f)). We also discussed the Supreme Court's holding in *Bearden v. Georgia*:

[I]n revocation proceedings for failure to pay a fine or restitution, *a sentencing court must inquire into the reasons for the failure to pay*. If the probationer willfully refused to pay or *failed to make sufficient bona fide efforts legally to acquire the resources to pay*, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Id. at 778 (quoting *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983)) (emphases in *Szpunar*). Factors relating to the defendant's ability pay include his financial information, health, and employment history. *Id.* at 779. The State presented no evidence of Szpunar's ability to pay and did not address the evidence of Szpunar's health problems; therefore, we reversed the revocation of his probation. *Id.*

In Fuller's case, the State's evidence regarding his ability to pay consisted solely of vague evidence from his probation officer, Cruickshank, that he had had a job at some point in time, and even her testimony suggested that it was a very low-paying job. Cruickshank also offered her opinion that Fuller could have continued seeing the therapist if he had offered to pay as little as ten dollars. Her testimony is speculative, and there was no evidence that Fuller was ever informed that partial payments would be accepted. In addition, the State presented no evidence to controvert Fuller's claims that he had been unemployed for most of his probationary period despite having completed a substantial number of job applications. We conclude that the State has not met its burden of showing that Fuller was able to pay the court costs, the DAPIC fee, or the fees for his treatment.

The trial court's statement suggests that it relied, in part, on the fact that Fuller had been able to "raise funds indirectly to address other matters," such as the grant he received for his classes at the Center for Problem Resolution. Tr. at 53. The State argues that Fuller's claim to be unable to pay the fees and court costs is insincere because Fuller "clearly has access to resources when he so chooses." Appellee's Br. at 9. Fuller, however, has no control over the extent to which other people are willing to pay his expenses. We cannot agree that Fuller's failure to convince others to pay his expenses amounts to a reckless, knowing, or intentional failure to pay.

The State also notes that in a motion for modification of sentence that Fuller filed on March 22, 2007, he alleged that he would be able to find employment if released. Fuller, however, did not begin probation until April 22, 2008, more than a year later. The State has

not shown that Fuller's belief that he could get a job in 2007 is relevant to his ability to get a job over a year later, especially in light of the economic downturn that occurred during the time that Fuller was on probation.

Finally, both the trial court and the State pointed to Fuller's failure to take responsibility for his offenses. However, the State did not allege in its "Violation of Probation Petition" that failure to take responsibility was a violation of the conditions of Fuller's probation. *See Woods*, 892 N.E.2d at 640 (due process requires that the probationer receive written notice of the claimed probation violations). Furthermore, his trouble accepting responsibility appears to be the primary reason that Fuller was referred to sex offender treatment through LTC. Fuller, however, was unable to obtain treatment there due to his inability to pay. To the extent that the trial court based its decision to revoke on Fuller's failure to complete the batterer's intervention program at the Center for Problem Resolution, the State appears to concede that that condition of Fuller's probation was modified. *See Appellee's Br.* at 4. The State does not appear to contest that the sole reason that Fuller did not complete treatment at LTC was because he did not pay. In the absence of evidence that he was able to pay, Fuller's failure to make progress toward paying off his fees, even over a substantial period of time, is not a sufficient basis to revoke his probation. *See Szpunar*, 914 N.E.2d at 779. Therefore, we reverse the revocation of his probation.

Reversed.

FRIEDLANDER, J., and BARNES, J., concur.