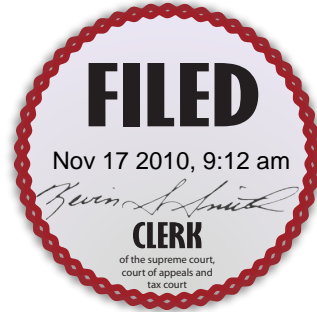


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

PATRICIA CARESS MCMATH
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

JAMES B. MARTIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

KYLE E. BEALS,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

)
)
)
)
)
)
)
)
)
)
)

No. 49A02-1004-CR-453

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-9907-PC-117951

November 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Kyle Beals's probation was revoked and he was ordered to serve his previously-suspended sentence of ten years. For our review, Beals raises two issues: 1) whether the trial court committed fundamental error by revoking his probation without holding an evidentiary hearing; and 2) whether the trial court abused its discretion in imposing the entirety of his previously-suspended sentence. Concluding there was no fundamental error in conducting the probation revocation proceedings and the trial court did not abuse its discretion in sentencing Beals, we affirm.

Facts and Procedural History

On July 10, 2000, Beals was convicted of four counts of robbery, all Class B felonies, following a plea of guilty. The trial court sentenced Beals to twenty years on each count, all to be served concurrently, with ten years suspended. The trial court also ordered Beals to serve two years on probation. Beals was released from prison in October 2008 and began serving his two-year term of probation. On January 2, 2009, the State filed a notice of probation violation, alleging Beals violated his probation by being charged in December 2008 with two counts of robbery, four counts of criminal confinement, and resisting law enforcement. The notice also alleged Beals failed to enter a residential treatment facility as directed and failed to make any payments toward a court-ordered obligation. Beals's new criminal case was consolidated with this case.

In March 2010, Beals was found guilty by a jury of the pending criminal charges and admitted to being an habitual offender.¹ On April 1, 2010, Beals appeared for a consolidated sentencing and probation violation hearing. The parties discussed the

¹ In a separate appeal now pending before this court, Beals appeals his criminal conviction.

content and accuracy of the pre-sentence investigation report, with the trial court noting Beals disputed the narrative regarding his new offenses. Information regarding his prior offense and probation status was also included in the pre-sentence investigation report and accepted by both parties as accurate. Beals presented testimony from his aunt and a chaplain from the Marion County Jail. Beals's aunt testified he was treated harshly by his father as a child and moved around a lot because his father was in the military. She also testified Beals was intelligent and helpful, having undertaken odd jobs for her after his most recent incarceration. The chaplain testified Beals helped him teach GED courses to other inmates and had behaved well while he was incarcerated.

The trial court found the jury's verdict that Beals was guilty of the new criminal charges served as proof that Beals violated his probation in this case. The trial court revoked Beals's probation, and ordered that he serve the full ten years of his previously-suspended sentence consecutive to the sentence for his new convictions. Beals now appeals the conduct of his probation revocation hearing and the sentence imposed by the trial court.

Discussion and Decision

I. Probation Revocation Hearing

Beals contends the trial court committed fundamental error in finding he had violated the terms of his probation without holding an evidentiary hearing. Indiana Code section 35-38-2-3, regarding when a trial court may revoke a person's probation, provides that:

(d) The court shall conduct a hearing concerning the alleged violation. . . .

(e) The state must prove the violation by a preponderance of the evidence. The evidence shall be presented in open court. The person is entitled to confrontation, cross-examination, and representation by counsel.

Although probationers are not entitled to the full array of constitutional rights afforded defendants at trial, there are procedural and substantive limits on the revocation of probation imposed by the Due Process Clause of the Fourteenth Amendment. Woods v. State, 892 N.E.2d 637, 640 (Ind. 2008). The minimum requirements of due process to be afforded 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; (e) a neutral and detached hearing body; and (f) a written statement by the fact finder as to the evidence relied on and reasons for revoking probation. Cox v. State, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006). Probation can be revoked upon a showing by a preponderance of the evidence that the probationer committed an additional crime. Ind. Code § 35-38-2-1(b).

Initially, we note Beals concedes he did not object to the procedure employed by the trial court. To avoid waiver, he argues the trial court committed fundamental error. Fundamental error is “defined as error so prejudicial to the rights of a defendant that a fair trial is rendered impossible.” Wilson v. State, 931 N.E.2d 914, 919 (Ind. Ct. App. 2010), trans. denied. The fundamental error rule is extremely narrow and “applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due

process.” Id. Fundamental error requires the defendant to show greater prejudice than ordinary reversible error. Id.

Beals cites Eckes v. State, 562 N.E.2d 443 (Ind. Ct. App. 1990), to support his argument that the trial court erred in revoking his probation without conducting the necessary evidentiary hearing. In Eckes, the defendant was on probation for arson when he allegedly committed a new crime. In a separate proceeding prior to the probation revocation hearing, the defendant pled guilty to the new charge. The trial court then granted a motion to consolidate the sentencing hearing for the new charge and the probation revocation hearing. At the start of the combined hearing and before the State had presented any evidence, the trial court took judicial notice of the defendant’s conviction, determined the defendant had violated his probation, and stated the case was ready for disposition. The State presented no evidence about the alleged violation but called three witnesses who testified it was their recommendation the defendant be required to serve the remainder of his arson sentence. Thus, prior to the State introducing its first witness or offering the defendant an opportunity to present evidence, the trial court had already adjudicated the defendant in violation of the terms of his probation and the ensuing hearing concerned only the proper punishment for the violation. The defendant appealed, contending the trial court did not conduct a proper evidentiary hearing in violation of his due process rights. We reversed the probation revocation, finding fundamental error in the procedure followed by the trial court because it “obviously failed to comply with the mandatory requirements of due process afforded probationers by both statutory and constitutional law.” Id. at 445.

We, however, find the case before us to be more akin to Bane v. State, 579 N.E.2d 1339 (Ind. Ct. App. 1991), trans. denied. In Bane, the defendant was on probation for a robbery conviction when he was charged with murder and voluntary manslaughter. A notice of probation revocation was filed in the robbery case because of these new charges. A jury found the defendant guilty of murder, and the sentencing hearing for the murder conviction was consolidated with the probation revocation hearing. During the sentencing phase of the consolidated hearing, the trial court listed the violation of probation as one of many aggravating factors and sentenced the defendant to the maximum of sixty years. Immediately after completing the sentencing phase and advising the defendant of his right to appeal, the trial court held the probation revocation hearing. The State presented two witnesses, the arresting officer in the robbery case and the defendant's probation officer. The defendant asked only that revocation be deferred until the appeal of his murder sentence was completed. The trial court denied the request, revoked the defendant's probation "based on the evidence [the trial court] heard that day," and sentenced him to serve the remainder of his robbery sentence consecutive to his murder sentence. Id. at 1340 (quotation omitted). The defendant appealed, contending the evidence was lacking because the State had not introduced any evidence during the probation revocation phase regarding his murder conviction. We held otherwise, noting the consolidated proceeding allowed a joint hearing and joint evidence, and thus, the evidence taken in the sentencing phase was equally applicable to the probation revocation phase. Id. at 1341. We also noted the defendant did not suffer any prejudice to his due process rights by the consolidated hearing. Id. Due process was satisfied by the State

presenting evidence over the course of the consolidated hearing that the defendant was convicted of murder and was on probation at the time he committed the crime and by giving the defendant a full and fair opportunity to cross-examine witnesses and present his own case. Id. at 1342.

Here, unlike in Eckes, the trial court did not make a determination regarding Beals's violation of probation until after evidence was presented. Rather, as in Bane, evidence was presented during a consolidated hearing regarding Beals's convictions of seven new felony counts and that he was on probation at the time he committed those offenses. See Bane, 579 N.E.2d at 1341 ("The evidence that [defendant] was convicted of murder was admitted in the sentencing phase of the hearing, and conclusively established that he committed a crime for purposes of the immediately subsequent probation revocation phase."); Appellant's Appendix at 76-77 (Pre-Sentence Investigation report, stating Beals was released to probation on October 16, 2008, with a projected end date of October 16, 2010). Beals had an opportunity to contest the issue of whether he had violated probation during the consolidated hearing, and in fact disputed the evidence regarding his new convictions by maintaining his innocence. See Transcript at 3, 20. Following the presentation of evidence, the trial court sentenced Beals for his new convictions, found the State had proved by a preponderance of the evidence that he had committed new criminal offenses and therefore violated his probation, and sentenced him for the probation violation. The procedure employed at this hearing was sufficient because this was much more than "[a]n informal conversation between the judge and the parties present." Tillberry v. State, 895 N.E.2d 411, 417 (Ind. Ct. App. 2008) (quoting

Weatherly v. State, 564 N.E.2d 350, 352 (Ind. Ct. App. 1990)). Although the consolidated hearing held by the trial court could have more clearly delineated the two phases, it was sufficient to comport with due process and Beals has failed to show fundamental error.

II. Sentence

Indiana Code section 35-38-2-3(g) provides that if the trial court finds a person has violated probation, the trial court may continue the person on probation, extend the person's probationary period, or order execution of all or part of the previously-suspended sentence. This court will review the trial court's decision regarding what punishment to impose for a probation violation only for an abuse of discretion. Figures v. State, 920 N.E.2d 267, 273 (Ind. Ct. App. 2010). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. Id.

Beals contends the trial court abused its discretion by imposing the entirety of his suspended ten-year sentence. He argues the evidence he presented at the consolidated hearing shows he is "making efforts to be a better person." Appellant's Brief at 6. His aunt and a Marion County chaplain testified on his behalf, specifically regarding his good behavior and efforts to help other inmates while incarcerated. However, we agree with the State that Beals's new convictions for seven felonies while on probation are more than sufficient to support the trial court's sentence in this case. Good behavior is expected from someone who is incarcerated; if Beals had truly benefitted from his efforts to be a better person, he would not have committed criminal acts similar to those requiring incarceration in the first place within weeks of being released on probation.

Notwithstanding the availability of less severe sentencing options, we cannot say the trial court abused its discretion in ordering Beals to serve the entirety of his previously-suspended sentence.

Conclusion

The trial court did not commit fundamental error in conducting a consolidated hearing and finding Beals in violation of the conditions of his probation, nor did the trial court abuse its discretion in ordering that Beals serve his ten-year suspended sentence.

Affirmed.

MAY, J., and VAIDIK, J., concur.