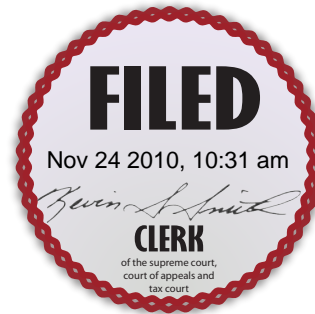


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTOPHER BRINKER,)

Appellant-Defendant,)

vs.)

No. 33A04-1007-CR-433)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE HENRY CIRCUIT COURT
The Honorable Mary G. Willis, Judge
Cause No. 33C01-0901-FA-2

November 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Christopher Brinker appeals the trial court's revocation of his probation. Brinker raises a single issue for our review, namely, whether the trial court denied him his right to due process.

We affirm.

FACTS AND PROCEDURAL HISTORY

On May 8, 2009, Brinker pleaded guilty to possession of a destructive device, as a Class C felony. Pursuant to his plea agreement, the trial court sentenced Brinker to four years in the Department of Correction, with three years suspended and two years on formal probation.

On December 21, 2009, the State filed a petition to revoke Brinker's suspended sentence. Among other things, the State alleged that Brinker violated the conditions of his probation by testing positive on a drug screen and failing to complete 150 hours of community service. The trial court held an evidentiary hearing on the State's petition on February 15, 2010, at which Brinker admitted that he had "violat[ed] his probation by having a positive drug screen for marijuana; . . . fail[ed] to complete community service hours; and . . . fail[ed] to pay fees."¹ Appellant's App. at 25. As a result of Brinker's admissions, the court found that Brinker was "in violation of his Terms and Conditions of Probation." *Id.* However, the court postponed the dispositional hearing for sixty days so that Brinker could "obtain a substance abuse evaluation and commence any

¹ Brinker has not included a copy of the transcript in the record on appeal. Nonetheless, the parties do not dispute that the trial court's order from which he appeals accurately describes the events of the evidentiary hearing.

recommendations deemed necessary . . . [and] complete a substantial portion of his 150 hours of community service.” Id. at 26.

On April 12, the court held its dispositional hearing to review any progress Brinker had made in addressing his admitted violations. No action was taken, however,² and the court ordered an additional hearing to be held on June 14. After the hearing on that day, the court determined that Brinker had not substantially complied with the opportunity the court provided him after its February 15 determinations. Thus, “after having considered the Defendant’s admission[s] as well as the evidence presented at disposition,” the court revoked Brinker’s probation and ordered him to serve two years in the Department of Correction. Id. at 29. This appeal ensued.

DISCUSSION AND DECISION

Brinker appeals the revocation of his probation. The due process requirements of a probation revocation proceeding, and our standard of review, are well-established:

When reviewing an appeal from the revocation of probation, we consider only the evidence most favorable to the judgment, and we will not reweigh the evidence or judge the credibility of the witnesses. Piper v. State, 770 N.E.2d 880, 882 (Ind. Ct. App. 2002), trans. denied. Probation is a favor granted by the State, not a right to which a criminal defendant is entitled. Parker v. State, 676 N.E.2d 1083, 1085 (Ind. Ct. App. 1997). However, once the State grants that favor, it cannot simply revoke the privilege at its discretion. Id. Probation revocation implicates a defendant’s liberty interest, which entitles him to some procedural due process. Id. (citing Morrissey v. Brewer, 408 U.S. 471, 482, 92 S.Ct. 2593, 2600-2601, 33 L.Ed.2d 484 (1972)). Because probation revocation does not deprive a defendant of his absolute liberty, but only his conditional liberty, he is not entitled to the full due process rights afforded a defendant in a criminal proceeding. Id.

² Again, the transcript of this hearing is not included in the record on appeal. And while the chronological case summary of this hearing states, “Defendant in compliance. Further review set for 6-14-10,” without the benefit of the transcript we cannot determine the context or meaning of that entry. See Appellant’s App. at 6.

The minimum requirements of due process include: (a) written notice of the claimed violations of probation; (b) disclosure to the probationer of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a written statement by the factfinder as to the evidence relied on and reasons for revoking probation. Id. (citing Morrissey, 408 U.S. at 489, 92 S.Ct. at 2604).

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 has occurred. Id. If a violation is proven, then the trial court must determine if the violation warrants revocation of the probation. Id. Indiana has codified the due process requirements at 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 and representation by counsel. Id.; see also Ind. Code § 35-38-2-3(d), (e). When a probationer admits to the violations, the procedural due process safeguards and an evidentiary hearing are not necessary. Parker, 676 N.E.2d at 1085 [citing Morrissey, 408 U.S. at 490, 92 S.Ct. 2593; United States v. Holland, 850 F.2d 1048, 1050-51 (5th Cir. 1988)]. Instead, the court can proceed to the second step of the inquiry and determine whether the violation warrants revocation. Id. In making the determination of whether the violation warrants revocation, the probationer must be given an opportunity to present evidence that explains and mitigates his violation. Id. at 1086[] n. 4.

Cox v. State, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006).

Here, Brinker argues that the trial court erred when it revoked his probation because the June 14 hearing “evolved into a probation revocation hearing” for which “Brinker had received no written Notice of the claimed violations of probation.” Appellant’s Br. at 10. More specifically, Brinker asserts that “[t]he failure to obtain a substance abuse evaluation was not alleged in the December 21, 2009[,] Notice of Violation of Suspended Sentence.” Id.

Brinker misconstrues the proceedings before the trial court. On December 21, the State alleged that Brinker violated the conditions of his probation by testing positive on a drug screen and failing to complete 150 hours of community service. On February 15, Brinker admitted as much to the trial court. The court then found Brinker in violation of the conditions of his probation but generously gave him an opportunity to obtain and comply with a substance abuse evaluation. He did not do so, and on June 14 the court revoked two years of Brinker's suspended sentence.

Nothing about that sequence of events denied Brinker his due process rights. Indeed, having admitted to the violations of his probation as alleged by the State, "the procedural due process safeguards" normally afforded probationers were "not necessary." See Cox, 850 N.E.2d at 488. As such, the trial court did not abuse its discretion in revoking Brinker's suspended sentence, and we affirm the court's judgment.

Affirmed.

BAKER, C.J., and MATHIAS, J., concur.