



## **Case Summary**

Ronald D. Luthe (“Luthe”) appeals the revocation of his probation. We reverse.

### **Issue**

Luthe raises the issue of whether the State presented sufficient evidence that he violated the terms of his probation.

### **Facts and Procedural History**

Pursuant to a plea agreement, Luthe pled guilty to Nonsupport of a Dependent Child, as a Class D felony.<sup>1</sup> The trial court sentenced Luthe to the maximum three-year term of imprisonment, suspended entirely to probation. The terms of Luthe’s probation included paying \$10,216.10 in arrearage as restitution “before the defendant is to be released from Probation” and making his child support payments. Appendix at 50.

On July 1, 2004, the State filed a Violation of Probation Petition (“Petition”), alleging that Luthe paid no child support between April 12, 2004 and June 23, 2004.<sup>2</sup> On May 27, 2005, the trial court held a status hearing with Luthe in attendance. The trial court set a cash bond of \$7000 and scheduled an additional status hearing for July 21, 2005. Luthe’s mother posted the bond. During the July 21 hearing, which Luthe attended, the trial court ordered the bond to be applied to Luthe’s child support obligation. Also, the trial court scheduled an evidentiary hearing for September 22, 2005.

Luthe failed to appear for the evidentiary hearing. The State admitted one exhibit, but

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<sup>1</sup> Ind. Code § 35-46-1-5(a).

<sup>2</sup> “While the State alleged four violations, it went forward with only one allegation: Luthe’s failure to pay child support.” Appellee’s Brief at 4.

no witnesses. The trial court found that Luthe had violated the terms of his probation. On August 7, 2007, the trial court revoked Luthe's probation and ordered the entirety of the previously suspended sentence to be executed at the Indiana Department of Correction.<sup>3</sup> Luthe now appeals.

## **Discussion and Decision**

### **I. Standard of Review**

If the State proves, by a preponderance of the evidence, that a person violated a term of his probation, the trial court may order the execution of the previously suspended sentence. Ind. Code § 35-38-2-3. This Court owes no deference to the trial court's factual determinations where they are based upon a paper record. Moshenek v. State, 868 N.E.2d 419, 424 (Ind. 2007) (citing Houser v. State, 678 N.E.2d 95, 98 (Ind. 1997)), reh'g denied.

### **II. Analysis**

Luthe was sentenced for Nonsupport on January 10, 2003, but began serving probation on June 6, 2003 due to an unrelated conviction. In an Affidavit of Arrears submitted at the probation revocation hearing, an employee of the prosecutor's office stated as follows:

3. The Defendant is currently ordered to pay \$99.00 per week in current child support . . . .

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<sup>3</sup> The trial court issued a bench warrant when Luthe failed to appear at a hearing on November 4, 2005. The State subsequently determined that Luthe was incarcerated on that date. On April 25, 2006, Luthe was arrested. The next day, the State moved "to recall [the] warrant" and advised as follows: "The Adams County Sheriff has requested that the Court release the Defendant on his own recognizance because of the County's liability for Defendant's medical costs." Appendix at 92. Luthe was diabetic and had degenerative cardiovascular disease.

Luthe failed to appear at a sentencing hearing on March 2, 2007. We make no comment whether this was contemptuous or itself constituted a violation of probation.

4. Since the date of Sentencing, January 10, 2003, in this cause of action, the Defendant has paid an additional \$876.00 to go towards his arrearage balance. This brings the total arrearage in this case to \$19,089.01 as of September 19, 2005.

Exhibit 1. An attached Support Payment Worksheet indicated that Luthe made payments in 2003, 2004, and 2005; that he paid too little in 2003 and 2004; and that the application of the \$7000 bond in 2005 brought Luthe's balance for the probationary period to \$876, as referenced in the affidavit.

Restitution of \$10,216.10 was to be paid "on or before release from probation."<sup>4</sup> App. at 54. Accordingly, restitution was not yet due; Luthe still had time to pay. Meanwhile, as to the probationary term that Luthe "must contribute to the support of [his] spouse and minor children," the undisputed evidence was that, while on probation, he paid more than was required. The fact that almost half of it came from a cash bond is of no significance.<sup>5</sup> Therefore, the State failed to prove that Luthe violated the terms of his probation.

### **Conclusion**

The State failed to prove by a preponderance of the evidence that Luthe violated the terms of his probation.

Reversed.

NAJAM, J., and CRONE, J., concur.

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<sup>4</sup> The State does not explain the discrepancy between the trial court's finding an arrearage of \$10,216.10 at the time of sentencing, while the Affidavit identified an arrearage of \$19,089.01.

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<sup>5</sup> Luthe paid \$2275.00 in 2003, \$3379.03 in 2004, and \$9181.57 through September 19, 2005 for a total of \$14,835.60.