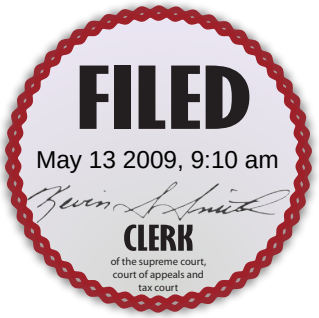

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IN THE
COURT OF APPEALS OF INDIANA

STEVEN L. CLAIR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A04-0807-CR-404
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Karen M. Love, Judge
Cause No. 32D03-0709-FD-155

May 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Steven Clair appeals the revocation of his probation.

We affirm.

ISSUE

Whether the evidence was sufficient to support the revocation of Clair's probation.

FACTS

On October 22, 2007, Clair pleaded guilty to battery, resulting in bodily injury to a person less than fourteen years of age, a class D felony.[1] That same day, the trial court entered a judgment of conviction and sentenced him to 545 days in the Hendricks County Jail, with 447 days suspended to probation. The terms of Clair's probation required him, among other things, to "permit the Probation Officer and any Law Enforcement Officer assisting the Probation Officer to enter [his] residence and to make reasonable inquiry into [his] activities"; "to submit to alcohol and drug tests when requested by the Probation Department or any Law Enforcement Officer."; and "not consume, or possess on [his] person or in [his] residence, any alcoholic beverages . . . ." (App. 29) (Emphasis added).[2]

On March 14, 2008, the State filed a notice of probation, alleging that Clair had possessed and consumed alcohol; failed to complete counseling; and failed to complete a substance abuse program. The trial court held a probation revocation hearing on April 21, 2008. Clair admitted to violating his probation by possessing and consuming alcohol.

[1] Ind. Code § 35-42-2-1(a)(2)(B).

[2] Clair has filed two appendices. All citations are to the appendix filed on February 10, 2009.

Finding that Clair had violated his probation, the trial court sentenced him "to seventy-eight (78) days at the county jail"; gave him "credit for thirty-nine (39) days plus thirty-nine (39) days of good time credit"; and returned him "to probation under the original terms and conditions." (Tr. 53).

On May 7, 2008, Cheryl Koch, Clair's probation officer, received an anonymous telephone call, informing her that Clair was consuming alcohol in his apartment. Officer Koch and Probation Officer Andrew Lillpop went to Clair's residence, where they knocked and announced their presence. Although they heard voices and music coming from inside the apartment, no one responded. Officer Koch then telephoned Clair's cell phone and left a "voice mail instructing him to report to the Probation Department by 4:00 pm to submit to a urine screen." (App. 49). After several more attempts, Officer Koch finally contacted Clair on his cell phone at approximately 2:55 p.m.; he agreed to "immediately submit to a urine screen." *Id.* Clair, however, failed to report to the Probation Department as instructed. He also failed to contact Officer Koch that day or the next day.

On May 9, 2008, the State filed a notice of probation violation, alleging that Clair had "failed to permit Probation to enter [his] residence and make reasonable inquiry into [his] activities" and "failed to report to submit to a urine screen as directed." (App. 48). The trial court held a probation revocation hearing on June 2, 2008.

During the hearing, Clair admitted that he had failed to report for a urine test as directed. He, however, offered mitigating circumstances. Namely, he testified that he was not at home when Officers Koch and Lillpop went to his residence, which he shared

with his son and his son's girlfriend. According to Clair, he had walked to an industrial park earlier that day to find a job and was there when Officer Koch telephoned him. He further testified that he spoke with Officer Koch at 2:55 p.m. and was instructed to "come to her office and be there before 4:00 that afternoon" in order to submit to a urine screen. (Tr. 68). He testified that he told Officer Koch that he "didn't have a vehicle but [he] would try to get there" by 4:00 p.m. *Id.* at 71. According to Clair, he failed to arrive at Officer Koch's at the appointed time because he did not "have a vehicle and [he] couldn't find a ride there within an hour." *Id.* at 68. He also testified that there was no way to get a ride.

Officer Koch testified that when she spoke with Clair, he said he would be at her office that afternoon; "[h]e didn't say anything about trying" to get there. *Id.* at 77. He just "said okay." *Id.* She further testified that she waited for Clair until 6:00 p.m., but he never arrived or telephoned her. He also failed to return her telephone calls the next day.

At the conclusion of the hearing, the trial court found "that the defendant violated the terms and conditions of his probation, by failing to report to a urine screen as directed[.]"[3] *Id.* at 83. The trial court imposed a sentence of 300 days in the Hendricks County Jail with credit.

DECISION

Clair asserts that the evidence was insufficient to support the trial court's revocation of his probation. Specifically, he argues that the requirement that he submit to

[3] We note that in the written order on probation violation, the trial court also found that Clair failed to permit probation officers to enter his residence. We find there was sufficient evidence to prove that Clair violated the terms of his probation by failing to submit to an alcohol test to be dispositive.

"alcohol and drug tests when requested," (App. 29), "lacked sufficient clarity to provide [him] with fair notice that his inability to present himself within an hour would constitute a violation of his probation." Clair's Br. at 9.

Whether to revoke probation is within the trial court's discretion. *Hubbard v. State*, 683 N.E.2d 618, 620 (Ind. Ct. App. 1997). When reviewing a revocation, we will neither weigh the evidence nor assess witness credibility. *Id.* We will affirm revocation if, considering only the probative evidence and reasonable inferences therefrom, there is sufficient evidence supporting the conclusion that the probationer is guilty of violating any condition of his probation. Ind. Code § 35-38-2-3; *Hubbard*, 683 N.E.2d at 620.

In *Hunter v. State*, 883 N.E.2d 1161 (Ind. 2008), the trial court sentenced Hunter to eight years imprisonment with four years suspended to probation for class C felony child molesting. The conditions of his probation included that he "must never be alone with or have contact with any person under the age of 18." 883 N.E.2d at 1162. The State filed a notice of probation violation after Hunter's probation officer learned that Hunter "had been present on multiple occasions in the mobile home" of his half-sister when her three children had arrived home from school. *Id.* During the probation revocation hearing, Hunter testified that he never interacted with the children and would leave the mobile home as soon as they arrived home. The trial court revoked his probation.

Hunter argued that the State failed to present sufficient evidence to prove that he violated a condition of probation. He argued that "he understood the word 'contact' as set forth in the terms of his probation to mean 'interaction' and that the State failed to

prove that there was any interaction between the children and the defendant." *Id.* at 1163. The State, however, "construe[d] the term 'contact' much more broadly, arguing that merely being in the presence of persons under the age of eighteen" to be sufficient evidence that Hunter violated his probation. *Id.*

Our Supreme Court stated that the language delineating the conduct that must be avoided by a probationer "must be such that it describes with clarity and particularity the misconduct that will result in penal consequences." *Id.* Determining that the conditions imposed did "not reasonably communicate to a probationer that the plain meaning of 'contact' is altered to include mere presence," our Supreme Court found that the "probation condition in this case lacked sufficient clarity to provide the defendant with fair notice that the conduct at issue would constitute a violation of probation." *Id.* at 1164.

Here, the language "when requested," clearly means "in the event that[.]" http://www.merriam-webster.com/dictionary/when[2] (last visited Apr. 9, 2009). Thus, under the conditions of his probation, Clair was required to submit to a urine test in the event that his probation officer requested him to do so.

It is clear from the record that Clair understood that the conditions of his probation required him to submit to urine tests upon Officer Koch's request. We cannot say that the probation condition in this case "lacked sufficient clarity to provide" him "with fair notice that the conduct at issue," namely failing to report for a drug test, would constitute a violation of probation. *See Hunter*, 883 N.E.2d at 1164.

The evidence shows that on May 7, 2008, Officer Koch received an anonymous tip that Clair was drinking alcohol in his apartment. Upon investigating, she heard voices and music coming from Clair's apartment; however, the occupants of the apartment did not grant her entry into the apartment. Accordingly, Officer Koch telephoned Clair and left several messages for him, informing him that he needed to submit to a urine test that afternoon. Clair finally answered his telephone at 2:55 p.m. and agreed to submit to a urine test as instructed. He, however, failed to show up for the test. Furthermore, he failed to telephone Officer Koch to explain his absence or to request an alternate time or transportation within the subsequent 24-hour period. We therefore find there is sufficient evidence to support the conclusion that Clair was guilty of violating a condition of his probation.

Affirmed.

BAILEY, J., and ROBB, J., concur.