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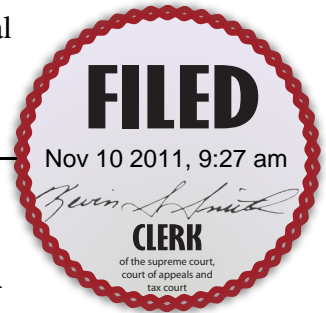
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**IN THE
COURT OF APPEALS OF INDIANA**

WAYNE NEAL CAVANAUGH,)

Appellant-Defendant,)

vs.)

No. 05A05-1105-CR-236

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE BLACKFORD CIRCUIT COURT
The Honorable Dean A. Young, Judge
Cause No. 05C01-0908-FD-40

November 10, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Wayne Cavanaugh appeals the trial court's finding that he violated the terms of his probation and the sentence imposed by the trial court after revoking his probation. We affirm.

Issues

Cavanaugh raises two issues, which we restate as:

- I. whether the trial court properly found that he violated his probation; and
- II. whether the trial court abused its discretion when it ordered him to serve the remainder of his suspended sentence in the Department of Correction ("DOC").

Facts

On February 22, 2010, Cavanaugh pled guilty to Class D felony nonsupport of a dependent child. Pursuant to the terms of his plea agreement, the trial court sentenced Cavanaugh to three years suspended to probation. On November 8, 2010, the State filed a petition to revoke Cavanaugh's probation alleging that he had failed to pay child support, failed to perform community service, and failed to pay the \$400 supervision fee as required by the terms of his probation.

On December 6, 2010, the trial court conducted an initial hearing at which Cavanaugh was present and represented by counsel, and Cavanaugh was informed that a fact-finding hearing would be held on January 10, 2010. Pursuant to Cavanaugh's request, the fact-finding hearing was continued until January 24, 2011. Although Cavanaugh failed to appear at January 24, 2010 fact-finding hearing, his attorney was

present. The hearing was conducted, and Cavanaugh's attorney's request for a two-week continuance was denied. The trial court found that Cavanaugh failed to pay child support and failed to report that he had performed community service. The trial court also found that, because there was evidence that Cavanaugh was employed, the State had demonstrated a sufficient ability to pay support.¹ The trial court concluded that Cavanaugh violated the terms of his probation.

On May 9, 2011, the trial court conducted a dispositional hearing. At that hearing, Cavanaugh testified that he had been employed at Poor Jack's Amusements, that he paid child support for two months, and that he could not pay the community service fee. The trial court revoked Cavanaugh's probation and ordered him to serve the remainder of his sentence in the DOC. The trial court explained:

We did have the initial hearing in this case on the Petition to Revoke, Modify, or Continue Probation on December 6th. Mr. Cavanaugh was present, in person, at that time. He was advised of the fact-finding hearing on January 10, 2011, at 11:15. Also advised that if he did not appear that fact-finding would take place in his absence. He did not appear, and the fact-finding took place in his absence. And that's consistent with the fact that he hasn't, uh, communicated with his probation officer, he hasn't paid support, he hasn't taken seriously any of the reasons for, uh, the original placement on probation, and the Court's not inclined to commit another meaningless act of putting him on probation or giving him any further breaks. He's had plenty of those since the beginning of this case.

Tr. pp. 19-20. Cavanaugh now appeals.

¹ In its May 10, 2011 written dispositional order, the trial court found that Cavanaugh had a history of failing to meet with his probation officer and failing to keep her informed of his activities. The order also stated that Cavanaugh paid no support while on probation even though he was gainfully employed. Although Cavanaugh refers to the written dispositional order in the fact section of his brief, his arguments appear to be based on the trial court's oral findings.

Analysis

I. Probation Violation

Cavanaugh argues the trial court improperly found that he violated his probation. Because a probation revocation hearing is civil in nature, an alleged violation of probation only has to be proven by a preponderance of the evidence. Whatley v. State, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006). “When we review the determination that a probation violation has occurred, we neither reweigh the evidence nor reassess witness credibility.” Id. Instead, we look at the evidence most favorable to the trial court’s judgment and determine whether there is substantial evidence of probative value supporting revocation. Id.

Cavanaugh argues that his inability to meet with his probation officer, to perform his community service, and to pay child support were all due to a lack of income and that the State did not present any evidence that his failure to pay was reckless, knowing, or intentional. Cavanaugh relies on Indiana Code Section 35-38-2-3(f), which provides, “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.” He also cites Snowberger v. State, 938 N.E.2d 294, 298 (Ind. Ct. App. 2010), in which Snowberger’s plea agreement specifically provided that his probation would not be revoked unless his failure to pay child support was willful and he had the ability to make payments. At the probation revocation hearing, Snowberger testified that he had not been employed since he sustained a work-related injury, that he had been denied disability, that he had submitted a hundred employment applications

over the past four years, that he did not have any assets, and that he lived off the land in a house owned by his wife's family. Snowberger, 938 N.E.2d at 297. We concluded there was insufficient evidence that Snowberger's failure to pay child support during the relevant time period was willful or that he had the ability to make the payments. Id. at 298.

Here, unlike in Snowberger, Cavanaugh does not direct us to a term of his plea agreement requiring the willful, as opposed to reckless, non-payment of support. Further, Cavanaugh did not appear at the fact-finding hearing and offered no evidence regarding his non-payment of support and fees until the dispositional hearing. To the extent he relies on his testimony from the dispositional hearing to support his assertion, the trial court had already found Cavanaugh violated his probation at the conclusion of the fact-finding hearing after rejecting Cavanaugh's attorney's request that the fact-finding hearing be continued.² Finally, Cavanaugh's probation officer testified at the fact-finding hearing that Cavanaugh had reported employment at Arby's. Based on this testimony, the trial court found that Cavanaugh's employment demonstrated sufficient ability to pay. Cavanaugh's argument regarding his ability to pay is unavailing.

Notwithstanding Cavanaugh's failure to pay support or the community corrections fees, "[t]he violation of a single condition of probation is sufficient to revoke probation." Wilkerson v. State, 918 N.E.2d 458, 461, (Ind. Ct. App. 2009). The State alleged that Cavanaugh failed to perform community service, his probation officer testified that she had talked to community corrections within the last month and that to her knowledge he

² Cavanaugh makes no argument regarding the denial of the continuance.

had not turned in any community service hours, and the trial court found that no community service hours had been reported by Cavanaugh. This basis alone is sufficient to support the trial court's finding that Cavanaugh violated the terms of his probation.

II. Sentence

Cavanaugh also argues that the trial court improperly revoked his probation and ordered him to serve the remainder of sentence in the DOC. "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). "The trial court determines the conditions of probation and may revoke probation if the conditions are violated." Id. (citing Ind. Code § 35-38-2-3). A trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. Id. "An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances." Id. Upon the revocation of probation, the trial court may: (1) continue the person on probation, with or without modifying or enlarging the conditions; (2) extend the person's probationary period for not more than one year beyond the original probationary period; and (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing. I.C. § 35-38-2-3(g).

Cavanaugh contends that a minor violation of probation may not warrant the execution of the entire remaining sentence. See Podlusky v. State, 839 N.E.2d 198, 203 (Ind. Ct. App. 2005) (observing that there may be instances where the nature of probation violation is not so great as to warrant the imposition of a lengthy sentence). He does not, however, provide us with any authority requiring a trial court to continue one's probation

under certain circumstances. Here, the trial court based its decision on its belief that Cavanaugh had not taken his probation seriously and that it would have been futile to offer him another chance at probation. This was not an abuse of discretion.

Conclusion

The evidence was sufficient to support the trial court's finding that Cavanaugh violated the terms of his probation, and the trial court did not abuse its discretion when it ordered him to serve the remainder of his sentence. We affirm.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.