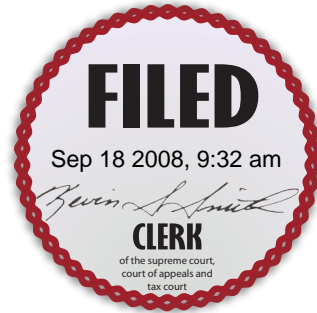


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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PAUL JOHN KOCIELKO, JR., )

Appellant-Defendant, )

vs. )

No. 20A03-0805-CR-254

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable Stephen R. Bowers, Judge  
Cause No. 20D02-0412-FB-296

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**September 18, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BROWN, Judge**

Paul John Kocielko, Jr. appeals the trial court's revocation of his probation. He raises two issues, which we revise and restate as:

- I. Whether the evidence is sufficient to support the revocation of his probation; and
- II. Whether the trial court abused its discretion by ordering Kocielko to serve his suspended sentence.

We reverse and remand.

The relevant facts follow. On December 29, 2004, Kocielko was charged with burglary as a class B felony and receiving stolen property as a class D felony. On December 4, 2006, Kocielko pled guilty to burglary as a class C felony. On December 11, 2006, the trial court sentenced Kocielko to eight years in the Indiana Department of Correction and suspended the entire sentence to probation "for purposes of collecting restitution." Appellant's Appendix at 223. The Victim Offender Reconciliation Program ("VORP") was to determine the appropriate amount of restitution.

On June 20, 2007, the Center for Community Justice filed a VORP progress report suggesting lack of compliance by Kocielko. On July 13, 2007, the State filed a violation of probation petition alleging that Kocielko had violated the terms of his probation by being in "non-compliance" with the VORP program "by failing to appear for several appointments and several re-scheduled follow-up appointments with their program." *Id.* at 219. The petition also alleged that Kocielko had not "verbalized whether he would

agree to the restitution amount being requested and he ha[d] failed to respond to the victim's request to retrieve a piece of jewelry that belonged to the victim's daughter." Id.

On July 16, 2007, the trial court held a hearing and ordered Kocielko to pay fifty dollars of restitution per week.<sup>1</sup> On August 9, 2007, Kocielko filed a "minute sheet" in which Kocielko requested "to be placed on non-reporting probation" and agreed "to pay \$15,000.00 restitution." Id. at 229.

On August 28, 2007, the State filed another violation of probation petition alleging that Kocielko was arrested on August 23, 2007, for one count of sexual misconduct with a minor as a class B felony and two counts of sexual misconduct with a minor as class C felonies. Kocielko was tried on these charges and was found not guilty on one charge, and the jury could not reach a verdict on the other two charges.

On November 26, 2007, the trial court held a hearing on whether Kocielko violated his probation and also addressed the proper amount of restitution. At this hearing, Marlane Huber, an employee of the Center for Community Justice, testified that Kocielko paid two hundred dollars in restitution consisting of four payments of fifty dollars each. The trial court asked Kocielko, "[A]t this point, do you have any assets or resources that you could use to pay restitution?" Transcript at 14. Kocielko answered

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<sup>1</sup> An official copy of the transcript for this hearing does not appear in the record. Kocielko included what appears to be the transcript for this hearing in his Appellant's Appendix, which is stamped "ORIGINAL NOT PREPARED FOR APPEAL." See Appellant's Appendix at 267-277,

that he had just gone \$26,000 in debt in attorney fees and “[i]t’s taken all of my resources.” Id. at 14-15. No evidence was presented regarding the sexual misconduct charges.

The trial court found that Kocielko had violated his probation and sentenced him to the Indiana Department of Correction for a period of eight years. The trial court found that Kocielko owed the victim \$24,000 in restitution, but that Kocielko was indigent and was not to be incarcerated for his failure to pay.

#### I.

The first issue is whether the evidence is sufficient to support the revocation of Kocielko’s probation. Probation revocation is governed by Ind. Code § 35-38-2-3. A probation revocation hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. Cox v. State, 706 N.E.2d 547, 551 (Ind. 1999), reh’g denied. We will consider all the evidence most favorable to supporting the judgment of the trial court without reweighing that evidence or judging the credibility of witnesses. Id. If there is substantial evidence of probative value to support the trial court’s conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation. Id. The violation of a single condition of probation is sufficient to revoke probation. Wilson v. State, 708 N.E.2d 32, 34 (Ind. Ct. App. 1999).

Kocielko argues that his arrests for sexual misconduct with a minor cannot form the basis for the revocation of his probation because there was no evidence other than the

fact that Kocielko had been arrested. The State concedes and we agree that his arrests alone, without proof of probable cause to support the arrests, cannot support revocation, and no evidence regarding the charges was presented at the probation revocation hearing. See Martin v. State, 813 N.E.2d 388, 390 (Ind. Ct. App. 2004) (holding that an arrest alone does not warrant the revocation of probation and that the State could not rely on Martin's admission that he was arrested and charges had been filed to prove by a preponderance of the evidence that Martin had violated his probation by committing another criminal offense).

The State next argues that Kocielko's "willful disregard of the court order that he pay \$50.00 per week toward restitution" supports revocation. Appellee's Brief at 6. After the hearing, the trial court told Kocielko, "I determined that the amount of restitution is twenty-four thousand dollars. You can't be held in jail longer because you don't have it, because it's not a debtor's prison." Transcript at 15. The trial court's order stated, in part, "The Court finds that [Kocielko] has violated probation. . . . Court finds there is \$24,000.00 owing to victim in restitution. [Kocielko] found to be indigent and is not to be incarcerated for his failure to pay." Appellant's Appendix at 234. The trial court's comments and revocation order specifically stated that Kocielko should not be incarcerated for his failure to pay restitution. Therefore, Kocielko's failure to pay restitution could not have been the basis for revocation. We conclude that there was no basis for the revocation.

For the foregoing reasons, we reverse and remand this case to the trial court to order Kocielko's release from custody and reinstate the original terms of probation.<sup>2</sup>

Reversed and remanded.

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

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<sup>2</sup> Because we remand on this issue, we need not address whether the trial court abused its discretion by ordering Kocielko to serve his suspended sentence.