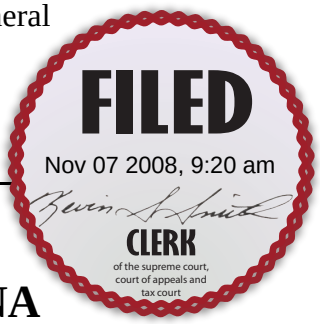
ATTORNEY FOR APPELLANT:

JAY RODIA
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana



IN THE COURT OF APPEALS OF INDIANA

ANTHONY WHITE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0804-CR-196
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause Nos. 49F24-0610-FD-209779 and 49F15-0710-FD-209074

November 7, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

In this appeal from a revocation of placement in community corrections, Anthony White attempts to challenge his plea agreement. We affirm.

Issues

We consolidate and reframe the issues as follows:

I. Whether White may challenge his modified plea agreement and placement on direct appeal; and

II. Whether sufficient evidence supports the revocation of White's community corrections placement.

Facts and Procedural History

On October 30, 2006, the State charged White with two class A misdemeanors and two class D felonies, specifically: possession of paraphernalia,[1] possession of marijuana,[2] possession of cocaine,[3] and possession of a controlled substance.[4] App. at 23-27 (original cause number 49F24-0610-FD-209779, hereinafter "FD-79"). On October 3, 2007, the State charged White with class D theft.[5] *Id*. at 67, 81 (originally 49F15-0710-FD-209074, hereinafter "FD-74").

On October 19, 2007, White and the State entered into a plea agreement. Its terms

---

[1] Ind. Code § 35-48-4-8.3(b).

[2] Ind. Code § 35-48-4-11.

[3] Ind. Code § 35-48-4-6.

[4] Ind. Code § 35-48-4-7.

[5] Ind. Code § 35-43-4-2.

provided that White would plead guilty to class D felony theft under FD-74, class D felony possession of cocaine under FD-79, class D felony theft under cause number 06-245084 ("FD-84"), and class D felony theft under 06-172004 ("FD-04"). *Id*. at 43. The plea agreement indicated that the sentences were to be served consecutively as follows:

	FD-04	FD-79	FD-84	FD-74
Total Days	730	365	910	910
Credit	9+9=18	18	0	17+17=34
Executed	180	180	180	180
Suspended	550	185	730	730
Placement	DOC	DOC	C.C.Ho.Det.[6]	C.C.Ho.Det.

Id.

At a December 28, 2007 hearing, the parties modified the sentencing provisions of the plea agreement such that White would be credited with seventy-nine days for time served and seventy-nine days of good time credit under FD-04; White would serve the FD-79 sentence on work release; White would receive one additional day of time served and good time credit under FD-74; and White would agree to "full back up time on all cases for any violations of release conditions and or probation." *Id*. at 91. At that hearing, defense counsel clarified that by agreeing to the full back-up, White's "suspended time accumulates to just a little over six years of back-up time that is actually hanging over his head. It's 2,195 days." Tr. at 51. The court accepted the modified plea agreement and sentenced White per its terms.

On March 4, 2008, Beverly Mason, the center director of Riverside Community Corrections Residential Facility ("Facility"), was exiting a meeting when she heard someone down the hall say, "Go into your room" and "Come in the room." *Id*. at 95-96. Mason

proceeded down to the area from where she believed the voices were emanating and heard thumping in a room. She observed Jackson Taylor, a Facility resident, retreat from White's room. Taylor covered his face with his hands and repeatedly said, "He split me." *Id*. at 96. Mason examined Taylor's face and saw that the "top part of his eye was cut and he had some bruises in the cheek area." *Id*. at 97. Mason entered White's room, asked why he had struck Taylor, and was eventually told by White, "He came in my room." *Id*. at 98. Mason contacted police, who interviewed witnesses and then arrested White for battery. *Id*. White had no injuries; Taylor received stitches. *Id*. at 97.

Shortly thereafter, the probation department filed a notice of violation, which alleged White's arrest for, and charge of, battery. App. at 58. On March 5, 2008, the court held a hearing, found that White had committed battery, revoked his placement in community corrections, and ordered him to serve his previously suspended sentence of 2,195 days. Tr. at 89, 115.

Discussion and Decision

I. Challenging a Plea Agreement

White contends that the court erred by approving a modification to the plea agreement on December 28, 2007, after previously accepting his guilty pleas on October 19, 2007. He argues that the court abused its discretion by accepting the new "punitive provision" (that White serve 2,195 days), which had not appeared in the October 19, 2007 agreement. Appellant's Br. at 7. White further complains that even if the modified plea agreement was valid, he was improperly sent to jail (rather than work release) for approximately one month

[6] This stands for Community Corrections Home Detention.

after December 28, 2007. He posits that this deviation from the terms of the modified agreement should invalidate the agreement and should be grounds for resentencing. *Id*. at 9-11.

By way of background, at the beginning of the December 28, 2007 hearing, the court and the parties reviewed the history of White's case and confirmed its current status:

> Court: Okay. All right, so we went through the plea. Everybody's notes are the same on that and we're here today just for sentencing.
>
> Defense counsel: Yes, Your Honor. Just to make things even more fun, we're actually going to modify the plea and I'm typing up a motion as we speak.
>
> Court: Oh, my God. Okay, because all the paperwork has been –
>
> Defense counsel: Would it be easier to –
>
> Court: All the paperwork's been done and I've accepted his plea, so that's a petition to modify the plea?
>
> Defense counsel: Right.
>
> Court: So we have to do it all over again anyway.
>
> Defense counsel: The only terms that are changing is the placement for the executed sentence will be at work release rather than DOC and an agreement that he will serve his full suspended sentence for any violation.
>
> Court: I think I have to go over the whole plea all over again in order to change those terms because his agreement was to other terms.
>
> Defense counsel: Okay.
>
> Court: So if you're going to redo the plea, I think you have to start over.
>
> Defense counsel: Okay.
>
> Court: So you're asking me, even though I've accepted it, to reject the previous plea and the parties are together requesting –

Defense counsel: Yeah.

Court: -- that that be rescinded?

Defense counsel: Yes, Ma'am.

Court: Okay, I'll grant that and we'll start all over when you get a plea.

….

Okay. We have to start completely over. This is just a horrible precedent to set.

Defense counsel: I apologize, Your Honor. Umm, I apologize.

Court: I'm trying to figure out what's the best way to enter this because once I've accepted it, it's over, you know. But you're modifying the terms, so I guess it would be that I'm going to accept a modified plea agreement, a plea agreement modifying the terms (indiscernible) of arrest to go over all the terms with your client to make sure that that is exactly what he's agreeing to.

Tr. at 35-38, 40.

The court then permitted defense counsel to make a record regarding what the parties were agreeing to modify. *Id*. at 41. Defense counsel summarized as follows:

> Thank you, Your Honor. Originally Mr. White was to do 180 days at the DOC on [FD-04] and 180 days at the DOC on [FD-79] and that was pursuant to a plea from October 19, 2007, and we set out sentencing until today and he wanted to try to do as much of his time in the county as opposed to DOC as possible and that's why we set it out so far. [In the meantime White made positive progress by completing various classes, which prompted defense counsel to approach the State and ask] if we could modify the terms so that he would serve his executed portion of the DOC placement at work release and the State asked me to provide documentation.
>
> [White] also, on his own, contacted some rehabilitation facilities to try to get that in the works and get that going. Based on his efforts that he's taken while he's been at CCA, the State did agree to modify on [FD-79] the placement of the executed sentence from DOC to work release. But they did add an additional condition which Mr. White has agreed to that he will receive his full back-up time on all of the cases for any violation of his release conditions or his probation.

Id. at 44-45. Thereafter, the State explained that its agreement to the modifications showed its willingness to give White a chance to continue his positive changes. The court then questioned White to make absolutely certain he agreed with all terms, and defense counsel confirmed that the full amount of back-up days was 2,195. *Id*. at 45-47, 51.

As should be abundantly clear from the lengthy excerpts above, the modified plea agreement, which contains what White now refers to as the "punitive provision," was requested by White. Therefore, any error was invited by him and is unavailable for our review. *See Ratliff v. State*, 596 N.E.2d 241, 243 (Ind. Ct. App. 1992) ("First, Ratliff and Heavrin chose the term in their plea agreements they now challenge. Both reached agreements with the State in which they agreed to make donations to a charity of their choice, and both asked the court to accept their agreements. Even if the terms were improper, which we do not find them to be, we will not now hear Ratliff and Heavrin complain about the error they invited."), *trans. denied*.

Furthermore, to the extent White is challenging the validity of the modified plea agreement, i.e., whether it was not knowingly, intelligently, or voluntarily entered, the remedy has long been exclusively through post-conviction procedures – not direct appeals. *See Walton v. State*, 866 N.E.2d 820, 821 (Ind. Ct. App. 2007); *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996). Indeed, post-conviction proceedings would provide the opportunity to offer evidence regarding whether White was actually in jail for too long in violation of the agreement. *See Witt v. State*, 867 N.E.2d 1279, 1280 n.8 (Ind. 2007) ("Witt also contends that his due process rights were violated when the trial court deviated from the terms of the

plea agreement and reduced his Robbery conviction from a Class A felony to a Class C felony. Having pled guilty, such a claim is available to Witt, if at all, in post-conviction proceedings[.]").

II. Sufficiency

White also challenges the sufficiency of the evidence to support a violation of probation. White's version of the relevant event is as follows. While outside White's second floor Facility room, third floor Facility resident Taylor accused White of being a "snitch," i.e., informing authorities about cocaine use occurring at the Facility. Taylor and White entered White's room – despite Facility rules that residents not visit floors other than their own and not enter rooms belonging to other residents. Taylor threw a punch at White, and "White landed blows to Taylor's face in defense." *Id*. at 12. In sum, White asserts that Taylor was violating Facility rules, and White acted in self-defense.

"Probation is a favor granted by the State, not a right to which a criminal defendant is entitled." *Sanders v. State*, 825 N.E.2d 952, 955 (Ind. Ct. App. 2005), *trans. denied*. A probationer faced with a petition to revoke his probation is not entitled to the full panoply of rights he enjoyed prior to the conviction. *Rosa v. State*, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005). For instance, the rules of evidence do not apply in a revocation proceeding. *Id*. Moreover, when, as here, the alleged probation violation is the commission of a new crime, the State does not need to show that the probationer was *convicted* of that crime. *See Whatley v. State*, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006). Rather, as with any other allegation of violation of probation, the State must prove the new crime by only a preponderance of the evidence, that is, the greater weight of evidence. *See id*. Similar to our

review of other sufficiency questions, we neither reweigh the evidence nor judge the credibility of witnesses when we examine such challenges. *Id*.

Regarding the incident that led to the battery charge, the lower court heard testimony from various witnesses, including Mason and White. Ultimately, the court did not believe White's self-defense argument. Instead, the court found that the State had met its burden to show by a preponderance of evidence that White battered Taylor. Given the evidence most favorable to the revocation, as set out in our Facts and Procedural History *supra*, we conclude that the State demonstrated sufficient evidence of a violation. Therefore, revocation of White's placement in community corrections was proper. To reach the opposite conclusion would require us to reweigh evidence and judge credibility, tasks we are not at liberty to perform on appeal.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.