

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.

ATTORNEY FOR APPELLANT:

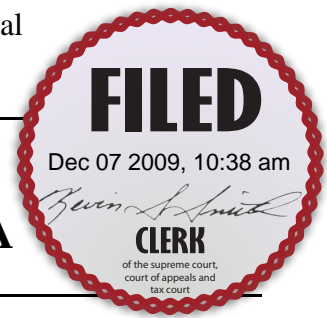
JEFFREY E. STRATMAN
Aurora, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



BLAZE DOWNEY,)
)
Appellant- Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee- Plaintiff,)

No. 15A05-0908-CR-459

APPEAL FROM THE DEARBORN CIRCUIT COURT
The Honorable James D. Humphrey, Judge
Cause No. 15C01-0511-FD-75

December 7, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Blaze Downey appeals the trial court's decision revoking his probation and ordering him to serve four previously-suspended years of his sentence for two counts of forgery, both Class C felonies. Downey raises one issue for our review: whether the trial court abused its discretion by addressing the probation violation in contravention of an alleged plea agreement. Concluding the trial court did not abuse its discretion because no plea agreement prevented the trial court from addressing the probation violation, we affirm.

Facts and Procedural History

The State charged Downey with two counts of forgery, both Class C felonies, and one count of theft, a Class D felony, in Dearborn Circuit Court ("Circuit Court"). Pursuant to a plea agreement filed with the Circuit Court on October 16, 2006, Downey pled guilty to the forgery counts and the State dismissed the theft count. The Circuit Court imposed a sentence of eight years with four years suspended to probation for each count, with the sentences to run concurrently with each other and with a sentence imposed in another court. The terms of probation required that Downey neither commit additional crimes nor consume any alcoholic beverages or illegal controlled substances. In 2007, Downey was charged with auto theft and escape, both Class D felonies, in two separate causes in Dearborn Superior Court ("Superior Court"). On the basis of these new charges, the State filed a request for a probation violation hearing in Circuit Court.

At a fact-finding hearing in Circuit Court on March 10, 2008, Downey admitted to the probation violation. The parties then jointly requested the Circuit Court withhold

sentencing on the probation violation pending Downey's participation in a drug court program through the Superior Court:

[STATE]: [T]he parties each request that you withhold sentencing in this probation violation pending completion of the Drug Court Program that Mr. Downey either has entered or is intending to enter in [Superior Court].

* * *

COURT: I will accept this recommendation and order that sentence will be withheld . . . and how long does this [drug court] program typically take . . . ?

[DEFENSE COUNSEL]: Judge, it takes at least twelve months and sometimes as long as twenty-four months.

COURT: Well, let's just say that sentence will be withheld pending further Order of the Court by agreement of the parties, and if it becomes appropriate, . . . notify me and I'll get this scheduled for sentencing. I am going to add a condition, once you're released from incarceration, that all drug test results from the Superior Court [drug court] program . . . by your waiver, will be submitted to the Probation Department.

[DOWNEY]: Yes, sir.

COURT: Do you understand, sir, that this is a separate probation status here, and that could be considered an additional probation violation in this Court and it could also be considered for purposes of sentencing?

[DOWNEY]: Yes, sir.

COURT: And, that sentencing can be scheduled at the request of any of the parties.

Transcript at 61 (emphasis added).

On February 12, 2009, the Circuit Court released Downey on his own recognizance to begin the Superior Court drug court program. Downey's release was

conditioned on Downey “enter[ing] into and successfully complet[ing] the Dearborn County Superior Court 1 Drug Court Program” and “comply[ing] with all conditions of probation in [Circuit] Court.” Appellant’s Appendix at 140. The order advised that “[f]ailure to successfully complete Drug Court or to comply with the conditions of probation in [Circuit] Court” would cause Downey’s release to be revoked. Id.

The State subsequently filed a motion to revoke Downey’s release and to schedule a sentencing hearing on his probation violation. At a hearing on March 16, 2009, the parties stipulated Downey had violated the curfew imposed by the drug court program and tested positive for alcohol and marijuana. Downey had not been terminated from the drug court program at that time, however. With regard to the Superior Court case, the State made the following disclosure:

[We] reviewed the Drug Court plea in Dearborn Superior Court I, and I just want to note for the record that it does contain a term that was agreed to by all the parties that [Downey] will admit to a probation violation in [the Circuit Court case], and the parties will request the . . . Circuit Court withhold sentencing on the probation violation until [Downey] completes or is terminated from [the drug court program].

Tr. at 75-76. The judge responded:

I believe that I made it very clear [on March 10, 2008] . . . that this Court was not going to be bound by the Drug Court’s decision regarding continuation, that this Court was going to consider violations as they occur or may not occur through conditions of probation in the Circuit Court

Id. at 79. The Circuit Court took the matter under advisement in order to review the prior proceedings. At a sentencing hearing held a few days later, the Circuit Court stated:

I made it very clear back on March the 10th [2008,] that this Court was going to be considering Mr. Downey’s action . . . and this is not just a Drug Court issue, folks, that’s in a different Court, and I made it clear at that hearing that this Court would be considering this as a separate probation

status and could be considered as an additional probation violation in this Court, and also be considered for purposes of sentencing. Those are my words that I used in March of 2008.

Id. at 96. The trial court revoked Downey's probation and ordered that he serve the previously-suspended four years of his eight-year sentence. Downey now appeals.

Discussion and Decision

I. Standard of Review

The trial court determines the conditions of probation and may revoke probation if the conditions are violated. Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007) (citing Ind. Code § 35-38-2-3). After exercising its grace by ordering probation rather than incarceration, the trial court has considerable leeway in deciding how to proceed when probation is violated. Id. We therefore review a trial court's decision revoking a defendant's probation for an abuse of discretion. Id. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances before the trial court. Id.

II. Violation of Alleged Plea Agreement

There is no dispute the State and Downey entered a plea agreement in 2006 concerning the disposition of two counts of forgery and one count of theft Downey was charged with in Circuit Court. This plea agreement was filed with the Circuit Court on October 16, 2008 and is not at issue on appeal. Downey contends, however, the parties entered a second "global" plea agreement that prevented the Circuit Court from addressing Downey's probation violations "until [Downey] complete[d] or [was] terminated from Dearborn Superior Drug Court." Appellant's Reply Brief at 2 n.2.

When the Circuit Court sentenced Downey for his probation violation on March 19, 2009, Downey had neither completed nor been formally terminated from the drug court program. Downey therefore claims the Circuit Court abused its discretion by addressing the probation violation in contravention of an alleged plea agreement. We disagree.

To the extent Downey's argument relies on the parties' joint request on March 10, 2008, to withhold sentence on the probation violation, the oral request was not a "plea agreement." A plea agreement is defined as "an agreement between a prosecuting attorney and a defendant concerning the disposition of a felony or misdemeanor charge." Ind. Code § 35-35-3-1. A plea agreement must be: (1) in writing; and (2) made before the defendant enters a plea of guilty. Ind. Code § 35-35-3-3(a). Here, the request did not dispose of a felony or misdemeanor charge, was not in writing, and was made after Downey admitted the probation violation. Although it is true "[i]f the court accepts a plea agreement, it shall be bound by its terms," Ind. Code § 35-35-3-3(e), there was no plea agreement for the Circuit Court to accept.¹

To the extent Downey relies on the Superior Court plea agreement, we agree there appears to be a written plea agreement in Superior Court addressing pending felony charges in Superior Court and purporting to address the probation violation in Circuit

¹ We have, in other situations, found agreements by which the defendant and the State through the probation department have agreed to a particular punishment in exchange for forgoing formal probation revocation proceedings to be "akin to a plea agreement" that is binding on the trial court if the trial court accepts the agreement. See Watson v. State, 833 N.E.2d 497, 500 (Ind. Ct. App. 2005). The agreement in Watson was written; signed by the defendant, officials of the probation department, and the trial court; and specifically provided revocation proceedings would not be pursued if the defendant complied with the terms of the agreement. Id. There is no written agreement here but only an oral agreement the Circuit Court would not sentence Downey until a later time, an agreement by which the Circuit Court abided.

Court. We also agree the Circuit Court was at least somewhat aware of that agreement² and agreed to withhold sentencing Downey for his probation violation to allow him to participate in the Superior Court’s drug court program. Downey argues the Circuit Court “was well aware that [his] admission on the probation violation was the result of these ‘global’ plea negotiations, as was the State. The parties agreed the intent was to allow [Downey] the opportunity to participate in a Drug Court Program that was managed by another court” Reply Brief at 3. We disagree with Downey’s contention the Circuit Court was required to abide by the terms of the Superior Court plea agreement.

First, we find no evidence the Circuit Court ever saw a copy of the Superior Court plea agreement, let alone approved it and agreed to be bound by its terms. Second, there is evidence the Circuit Court explicitly rejected the terms of the Superior Court plea agreement.³ As demonstrated by the hearing excerpts included above, the Circuit Court made clear its intent to operate independently from the proceedings in Superior Court, and Downey himself admitted the Circuit Court’s intentions were clear: “I know for a fact that you did say that if I do get in trouble or something like that, that you would . . .

² At the March 10, 2008, hearing, the parties notified the Circuit Court that Downey was going to be participating in the Superior Court’s drug court program. There is no discussion of the Superior Court plea agreement that purports to dispose of the Circuit Court probation violation until a March 12, 2009, hearing on the State’s motion to revoke Downey’s release, when the State first noted the existence of the Superior Court plea agreement: “[A]fter the filing of our Motion to Revoke his release on OR and to schedule Disposition on the probation violation, I received . . . I had not seen that plea before, I was not part of it, but within that plea it does state that [Downey] would admit to a probation violation in Dearborn Circuit Court” Tr. at 69.

³ Downey concedes the Superior Court plea agreement was not part of the Clerk’s Record for the Circuit Court case and does not, therefore, appear in the Appendix filed with this court. Because the Superior Court plea agreement is not part of the record, we cannot examine it to determine the exact date it was made. The transcript, however, reveals the plea agreement was made sometime after Downey entered an admission to the probation violation on March 10, 2008. Tr. at 69 (the State, noting the Superior Court plea provided for Downey to admit the Circuit Court probation violation: “actually, that had already been done at the time that plea was entered”). The Circuit Court cannot have been bound by the terms of a plea agreement not yet entered. See also Ind. Code § 35-35-3-3(a)(2) (plea agreement must be made before the defendant pleads guilty).

we would come back to Court and you'd address the matter" Tr. at 79. Ultimately, the Circuit Court did not accept the Superior Court plea agreement and therefore was not bound to withhold sentencing on Downey's probation violation contingent on the outcome of Downey's participation in the drug court program. See Ind. Code § 35-35-3-3(e).

Although Downey does not specifically challenge the substance of the Circuit Court's decision to revoke his probation, we note the Circuit Court did not abuse its discretion. The terms of Downey's probation prohibited him from committing additional crimes or consuming alcohol or drugs. In addition to Downey's admission prior to the withheld sentencing agreement that he had committed two felonies, he tested positive for alcohol and drugs after being released on his own recognizance to participate in the drug court program. The trial court, therefore, did not abuse its discretion when it revoked his probation and sentenced him.⁴ See Milliner v. State, 890 N.E.2d 789, 793 (Ind. Ct. App. 2008) (holding defendant's commission of multiple offenses in a relatively short period of time and violation of multiple terms of probation showed a lack of respect for the law and opportunities afforded him and reinstatement of entire previously-suspended

⁴ Downey also argues the Circuit Court abused its discretion by imposing new conditions on his probation when he was released on his own recognizance in February 2009, contrary to the terms of the March 10, 2008, agreement. This argument is also premised on the existence of a binding plea agreement. As the above discussion demonstrates, there was no such agreement. The Circuit Court, therefore, did not abuse its discretion when it conditioned Downey's release on his compliance with all conditions of his probation.

sentence was not an abuse of discretion), trans. denied.

Conclusion

The trial court did not abuse its discretion when it revoked Downey's probation and ordered him to serve the previously-suspended portion of his sentence.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.