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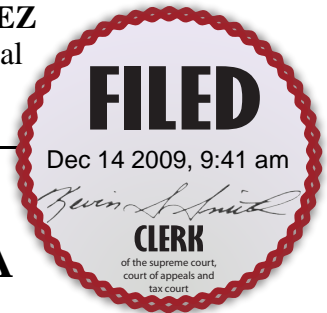
ATTORNEY FOR APPELLANT:

MATTHEW G. GRANTHAM
Bowers, Brewer, Garrett & Wiley, LLP
Huntington, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANGELA N. SANCHEZ
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

KENNETH D. FISHER,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 35A02-0908-CR-716

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey R. Heffelfinger, Judge
The Honorable Jennifer E. Newton, Judge Pro Tempore
Cause No. 35D01-0804-CM-286

December 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Kenneth Fisher appeals the trial court's partial denial of his motion to correct error. For our review, Fisher raises a single issue, which we restate as whether the trial court erred when it entered a nunc pro tunc correction of its prior order revoking Fisher's probation and required him to serve the balance of his original one-year sentence. Concluding no error occurred, we affirm.

Facts and Procedural History

On June 16, 2008, Fisher pled guilty to operating a vehicle while suspended with a prior judgment, a Class A misdemeanor. The trial court sentenced Fisher to one year with all but six days suspended to probation. One of the conditions of Fisher's probation was that he "not be arrested for any additional crimes." Appellant's Appendix at 20. On January 12, 2009, Fisher was charged with driving while suspended. On January 14, 2009, the State filed a petition to revoke Fisher's probation based on the second driving while suspended charge. The State amended its petition on April 20, 2009, to include a second charge against Fisher for dealing in a controlled substance.

On June 2, 2009, the trial court held a consolidated hearing at which Fisher entered guilty pleas to the dealing and driving while suspended charges and admitted the driving while suspended charge violated the terms of his probation. The trial court first considered Fisher's guilty plea on the dealing charge. Fisher agreed to the State's factual basis that he attempted to sell Vicodin to a police informant on September 14, 2007.¹ Later in the hearing, Fisher argued the dealing charge could not serve as a basis for the revocation of his probation because the offense occurred prior to his initial sentencing.

¹ The record does not disclose why Fisher was not charged with the 2007 dealing offense until 2009.

The trial court took Fisher's plea under advisement pending the results of a pre-sentence investigation.

Next the trial court considered Fisher's guilty plea on the driving while suspended charge. In addition to pleading guilty, Fisher admitted the charge "will also constitute a basis for his probation violation" Transcript at 10. Later, Fisher admitted "the only basis [for the revocation of probation] is he drove while suspended while on [p]robation." Id. at 12. The trial court then sentenced Fisher to sixty days on the second driving while suspended charge and stated "[o]n the Probation violation for [the first driving while suspended conviction], on your admission to the Probation violation in that case I will sentence you to the balance of your original sentence." Id. at 14.

Following the hearing, the trial court made an entry on its Chronological Case Summary ("CCS") reading, in relevant part, "[t]he court finds [Fisher] was arrested on 2 new offenses, while on probation. Court orders balance of original sentence be served" Appellant's App. at 4. On July 2, 2009, Fisher filed a motion to correct error, arguing the dealing charge could not constitute a basis for the revocation of his probation but conceding the second driving while suspended charge "occurred while he was on probation" Id. at 8. Fisher asked the trial court to set aside its sentencing order and reset the matter for another hearing on disposition only. The trial court granted Fisher's motion and entered a nunc pro tunc correction of its June 2, 2009, CCS entry stating, in relevant part, "[t]he court finds that [Fisher] committed a criminal offense while on probation specifically [the second driving while suspended conviction]. The court orders balance of original sentence be served" Id. at 4. Fisher now appeals.

Discussion and Decision

I. Standard of Review

We review a trial court's denial of a motion to correct error following a criminal conviction for an abuse of discretion. Gregor v. State, 646 N.E.2d 52, 53 (Ind. Ct. App. 1994). An abuse of discretion occurs "when the trial court's action is against the logic and effect of the facts and circumstances before it and the inferences which may be drawn therefrom[, or its] decision ... is without reason or is based upon impermissible reasons or considerations." Id. (citations omitted).

II. Nunc Pro Tunc Entry

A nunc pro tunc entry is defined in law as an entry made now of something that was actually previously done, to have effect as of the former date. Such an entry may be used to either record an act or event not recorded in the court's order book or to change or supplement an entry already recorded in the order book. Its purpose is to supply an omission in the record of action really had, but omitted through inadvertence or mistake.

Cotton v. State, 658 N.E.2d 898, 900 (Ind. 1995) (quotation, citation, and emphasis omitted). However, the trial court's record must show the unrecorded act or event actually occurred. Id. Therefore, the nunc pro tunc entry must be supported by a written memorial that is: (1) found in the records of the case; (2) required by law to be kept; (3) shows the action taken or orders or rulings made by the court; and (4) exists in the records of the court contemporaneous with or preceding the date of the action described. Id.

Fisher argues there is no written memorial in the record to support the trial court's nunc pro tunc order. We disagree. At the consolidated hearing, Fisher admitted his

second driving while suspended charge constituted a probation violation, but asserted the dealing charge could not because the commission of the crime predated his original sentence to probation. The State, in recommending the imposition of the remainder of Fisher's original one-year sentence, argued only "[Fisher] was on probation for Driving While Suspended but continued to drive." Tr. at 14. The trial court then sentenced Fisher to the remainder of his one-year sentence based expressly "on [Fisher's] admission to the probation violation." Id. The trial court made no further mention of the dealing charge after taking Fisher's guilty plea under advisement.

The transcript of the hearing fulfills all of the requirements for a written memorial under Cotton. In addition, the hearing transcript makes clear the trial court considered only Fisher's second driving while suspended charge in ordering him to serve the remainder of his original one-year sentence. Therefore, the record supports the trial court's nunc pro tunc entry correcting its original June 2, 2009, CCS entry.

Conclusion

The trial court did not err when it granted Fisher's motion to correct error by making a nunc pro tunc entry correcting its prior CCS entry or when it refused to reset the matter for an additional hearing on the disposition of Fisher's probation violation.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.