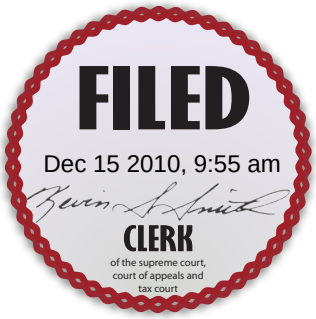

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IN THE
COURT OF APPEALS OF INDIANA

JAMES ALFRED PEEK, SR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-1005-CR-576
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0404-FC-185

December 15, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant James Alfred Peek, Sr., appeals the trial court's order revoking his probation and directing Peek to serve the balance of his previously-suspended sentence in the Department of Correction. Peek argues that there is insufficient evidence supporting the revocation, that the trial court abused its discretion by ordering that Peek be incarcerated, and that the trial court erred by failing to enter a written sentencing statement. Finding sufficient evidence and no error, we affirm.

FACTS

On September 13, 2004, Peek pleaded guilty to class C felony operating a motor vehicle after forfeiture of license for life, class A misdemeanor operating a vehicle with a blood alcohol of .15 or more, and class A misdemeanor operating a vehicle while intoxicated in a manner that endangered another person.

On October 11, 2004, the trial court sentenced Peek to an aggregate term of eight years imprisonment. On May 10, 2005, Peek requested a sentence modification, and on June 20, 2005, the trial court granted the petition, releasing him from incarceration and placing him on in-home detention for the balance of his sentence. On May 10, 2006, Peek filed another request for a sentence modification, which the trial court granted, releasing him from in-home detention and placing him on probation for the balance of his sentence. Among the conditions of probation was a requirement that Peek abstain from alcohol and drug use.

On September 11, 2008, Peek's probation officer filed a notice of probation violation, alleging that Peek had consumed alcoholic beverages. Peek admitted to the

allegation, and the trial court placed him back on probation. On December 10, 2008, Peek's probation officer filed another notice of probation violation, alleging that Peek had failed to report for a scheduled appointment and failed to abstain from alcohol use. Peek again admitted to the allegations, and the trial court again placed him back on probation.

In March of 2010, Peek's girlfriend observed him drinking vodka and contacted his probation officer because "something had to be done, he was practically dying from drinking." Tr. p. 80-81, 84. On March 23, 2010, two probation officers and two detectives arrived at Peek's residence. Peek's girlfriend had observed him drinking vodka before their arrival. Peek's intoxication was immediately apparent to the officers: his speech was "very slurred" and he was "extremely belligerent." Id. at 62. There was an open can of beer next to where Peek was sitting. The officers found beer in the refrigerator and in a bedroom closet and destroyed the beverage.

Two days later, a probation officer and two police officers returned to Peek's home to serve a "pick-up order." Id. at 63. Peek again appeared to be intoxicated: his speech was slurred, he was "very disoriented," and he was "moving slowly." Id. at 64. The officers found more beer in the refrigerator.

Peek's probation officer filed a notice of probation violation on March 25, alleging that Peek had consumed alcohol on March 23 and March 25. On April 5, 2010, the trial court held an evidentiary hearing at which Peek's girlfriend testified. Following the hearing, the trial court found that Peek had violated the terms of his probation, revoked

his probation, and ordered that Peek serve the balance of his sentence in the Department of Correction. Peek now appeals.

DISCUSSION AND DECISION

Peek first argues that there is insufficient evidence supporting the trial court's conclusion that he violated the terms of his probation by consuming alcohol. We will affirm a trial court's decision to revoke probation if there is substantial probative evidence supporting the trial court's conclusion that the probationer violated any condition of probation. Dawson v. State, 751 N.E.2d 812, 814 (Ind. Ct. App. 2001). The State must prove the alleged violation by a preponderance of the evidence. Ind. Code § 35-38-2-3(e).

Peek was prohibited from consuming alcohol as a condition of probation. The record reveals that his girlfriend observed him consuming vodka on multiple occasions and was so concerned about his health that she contacted his probation officer. On two occasions, law enforcement officials arrived at Peek's residence and observed that he had slurred speech, was belligerent, and was disoriented. When they arrived on the first occasion, there was an open can of beer sitting next to Peek's chair; the officers then destroyed the beer that they found in his refrigerator and his closet. Two days later, they found more beer in the refrigerator. Under these circumstances, we find the evidence sufficient to support the trial court's conclusion that Peek violated a condition of his probation.

Peek next contends that the trial court abused its discretion by ordering him to serve the balance of his sentence in the Department of Correction. If the trial court finds that a defendant has violated a condition of probation, it may "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). We review the trial court's sentencing decision following a probation violation for an abuse of discretion. Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007).

Here, Peek has been afforded multiple opportunities from the criminal justice system. When he requested to be released from incarceration to in-home detention, the trial court agreed. When Peek requested to be released from in-home detention to probation, the trial court agreed. When Peek admitted to the first probation violation for alcohol usage, the trial court gave him another chance and let him remain on probation. When Peek admitted to the second probation violation for alcohol usage, the trial court gave him another chance and let him remain on probation. When the third probation violation occurred for alcohol usage, the trial court had had enough. Under these circumstances, we cannot say that the trial court abused its discretion by ordering that Peek serve the balance of his sentence in the Department of Correction.

Finally, Peek complains that the trial court failed to enter a sufficient sentencing statement. As for the finding of the probation violation, due process requires "a written statement by the factfinder as to the evidence relied on and reasons for revoking probation." Morrissey v. Brewer, 408 U.S. 471, 489 (U.S. 1972). While no such statement was entered in this case, at the close of the presentation of the evidence, Peek's

counsel stated, "[y]our honor, I would be foolish to say that there's no evidence upon which the Court could base a finding that Peek has violated [the terms of probation] by consuming alcohol." Tr. p. 85-86. Defense counsel later stated that Peek "definitely has had an alcohol problem that continues to be the case, apparently." Id. at 87. Under these circumstances, it is apparent that Peek's counsel made the decision, following completion of the evidence, to concede that Peek had violated his probation by consuming alcohol, focusing instead on sentencing mitigators. Given these facts, and the additional fact that it is abundantly clear that the trial court found that Peek violated probation based on the substantial evidence of his alcohol consumption, we find that no written sentencing statement was required.[1]

As for the penalty imposed following the trial court's conclusion that Peek had violated probation, we note that no written sentencing statement was required. See Berry v. State, 904 N.E.2d 365, 366 (Ind. Ct. App. 2009) (holding that no sentencing statement is required where the trial court is merely reinstating a portion of a previously-imposed sentence). Therefore, we find no error with regard to the trial court's decision not to enter a written sentencing statement.

The judgment of the trial court is affirmed.

VAIDIK, J., and BARNES, J., concur.

[1] As an aside, we note that even if we had found error in this regard, the remedy would simply be to remand this matter back to the trial court for entry of a written sentencing statement; thus, defense counsel's concession caused no prejudice to Peek.