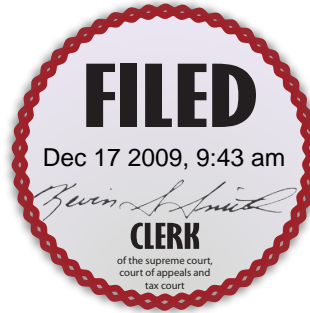


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JEREMIAH JONES,)
)
Appellant-Defendant,)
)
vs.) No. 48A02-0812-CR-1082
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0610-FD-483
48D03-0608-FB-380
48D03-0707-FC-177

December 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Jeremiah Jones appeals the revocation of his placement in a work release program.

We affirm and remand.

Issues

The issues before us are:

- I. whether there was sufficient evidence to support the revocation of Jones's work release privileges; and
- II. whether the trial court properly ordered Jones to serve the entirety of his previously-suspended sentence.

Facts

On June 21, 2007, Jones pled guilty, under two different cause numbers, to one count of Class C felony carrying a handgun without a license, two counts of Class D felony possession of cocaine, and one count of Class D felony possession of a controlled substance. On July 16, 2007, the trial court sentenced Jones to a total aggregate term of eleven years. The first two and a half years of the sentence were to be served in a work release program, and the remaining eight and a half years were suspended to probation. On November 19, 2007, Jones pled guilty to Class C felony possession of a dangerous device or material by a prisoner.¹ On December 3, 2007, the trial court sentenced Jones on this charge to six years, with two years to be served on work release and the remaining four years suspended to probation; this sentence was to be served consecutive to the previously-entered sentence. Thus, Jones's total aggregate sentence for all three offenses

¹ This charge apparently related to an occurrence while Jones was in jail awaiting sentencing on the first group of charges.

was seventeen years, with four and a half years on work release followed by twelve and a half years on probation.

On January 16, 2008, Jones's probation officer filed a "Notice of Violation of Suspended/Executed Sentence," alleging that Jones had violated his probation by testing positive for marijuana. App. pp. 52-54. On February 20, 2008, the director of the work release facility filed a petition to terminate Jones's work release privileges. In addition to the marijuana allegation, this petition further claimed Jones several times violated work release rules by being outside the facility for more than his allotted work hours and that Jones was over \$600 in arrears on his work release fees. The trial court conducted a hearing on these petitions on February 25, 2008. Jones admitted to using marijuana but denied the work release violations. The trial court, however, found that such violations occurred. It revoked Jones's work release privileges and ordered him to serve the entire remainder of his previously-suspended sentence in the Department of Correction ("DOC"). On March 5, 2008, Jones filed a motion to reconsider. On June 2, 2008, the trial court held a hearing on this motion and ruled that Jones could leave the DOC and return to the work release program.

On August 26, 2008, the director of the work release program filed another "Petition to Terminate Work Release Privilege." *Id.* at 64. This petition alleged that Jones had unaccountable time outside the facility, that he had gone over his allotted work hours, that a facility officer was unable to find Jones at his supposed place of employment, and that he was now almost \$900 in arrears on his work release fees. On

September 22, 2008, the trial court held a hearing on the petition, but the court's recording equipment malfunctioned and it was not recorded. It appears that Jones testified at this hearing, then moved for a continuance so that he could produce witnesses to support his assertions that he did not violate work release rules. We ordered that the parties and trial court attempt to create a certified statement of the evidence for this hearing.

On October 6, 2008, the trial court held another hearing, at which witnesses testified for Jones and a work release case manager, Katie Stapleton, testified.² On the same date, the trial court found that Jones had violated the conditions of work release. It issued an order under all three cause numbers stating, "The Court revokes the defendant's sentence and orders said sentence to be served at the Indiana Department of Correction." Id. at 66. Jones now appeals.

Analysis

I. Revocation of Work Release

Placement in a community corrections program, including work release, is at the sole discretion of the trial court. Toomey v. State, 887 N.E.2d 122, 124 (Ind. Ct. App.

² Stapleton testified at the October 6, 2008 hearing that she had also "testified at the previous hearing concerning this matter . . ." Tr. p. 107. It is unclear whether the "previous hearing" referred to was the September 22, 2008 hearing, or the one held on February 25, 2008 on the previous motion to revoke Jones's work release and probation. However, the State made no assertion in the proceedings regarding the certified statement of the evidence that Stapleton had testified at the September 22, 2008 hearing; the State's position was that only Jones had testified at that hearing. We find it odd that the State would not have been the first to present evidence at the September 22, 2008 hearing, because it bore the burden of proving that Jones violated work release rules. We also note that Stapleton's testimony at the October 6, 2008 hearing was very cursory. It is unfortunate that the September 22, 2008 hearing was not recorded. However, we believe we have enough of the record before us, through the October 6, 2008 hearing and the certified statement of the evidence that was produced, to fairly decide this appeal.

2008) (citing Ind. Code § 35-38-2.6-3(a)). Like probation, a defendant's placement on work release instead of incarceration in the DOC is a "matter of grace" and a "conditional liberty that is a favor, not a right." Id. (quoting Million v. State, 646 N.E.2d 998, 1001 (Ind. Ct. App. 1995)). If a defendant violates the terms of his placement on work release, the court may:

- (1) Change the terms of the placement.
- (2) Continue the placement.
- (3) Revoke the placement and commit the person to the department of correction for the remainder of the person's sentence.

I.C. § 35-38-2.6-5.

A revocation of community corrections placement hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. McQueen v. State, 862 N.E.2d 1237, 1242 (Ind. Ct. App. 2007). We consider only the evidence most favorable to 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 community corrections, we will affirm its decision to revoke placement." Id.

Here, the evidence presented established that after the trial court first revoked Jones's participation in the work release program and ordered him to serve the entirety of his sentence in the DOC, but later gave Jones a second chance on work release, he still did not follow the rules of the facility. Specifically, on at least two occasions work

release employees went to Jones's stated place of employment after he had signed out of the work release facility, only to find Jones was not there. In fact, the businesses where Jones was supposed to be working were closed at the times Jones said he was working.

Jones also worked without pay at a barbershop without obtaining prior approval for such an arrangement; Stapleton testified that such an arrangement would not have been approved anyway. Jones admitted that his "volunteer" arrangement with the barbershop was done for the purpose of getting out of the work release facility to run personal errands because he was denied passes out of the facility. There is sufficient evidence that Jones violated rules of the work release program.³

In isolation, Jones's violation of work release rules may appear relatively minor and not worthy of completely revoking his participation in work release. However, they evidence a complete lack of respect for those rules. This is especially true, given that Jones had earlier demonstrated similar lax regard for the rules and had already had his work release privileges revoked. The trial court exhibited considerable discretion in giving Jones a second chance after that first revocation. It was not required to give him a third chance.

II. Sentence

We next address the trial court's action after it determined that Jones had violated work release rules. The written order, which applied to all three cause numbers, stated,

³ These rules violations by themselves are sufficient to support the revocation of Jones's work release privileges. We need not address Jones's argument that the State failed to prove that he recklessly, knowingly, or intentionally did not pay his work release fees.

“The Court revokes the defendant’s sentence and orders said sentence to be served at the Indiana Department of Correction.” App. p. 66. It is unclear from this order whether the trial court only intended for Jones’s work release privileges to be revoked and for that portion of his sentence to be served in the DOC, or whether it also intended to revoke his probation and order the full seventeen-year sentence to be served in the DOC. The trial court’s oral statements at the conclusion of the October 6, 2008 hearing do not clarify this matter. At that time, the trial court stated, “So he goes in the DOC for whatever time he has outstanding.” Tr. p. 117.

It is true that in some instances, if a defendant violates the conditions of a community corrections program, the trial court may revoke not only the defendant’s participation in the program, but also revoke any period of probation that was to follow and order execution of a suspended sentence. See Pavey v. State, 710 N.E.2d 219, 222 (Ind. Ct. App. 1999). We observe, however, that when the State attempts to revoke probation, due process requires the following: (a) written notice of the claimed violations of probation; (b) disclosure of the evidence against the defendant; (c) an opportunity to be heard and present evidence; (d) the right to confront and cross-examine adverse witnesses; and (e) a neutral and detached hearing body. Woods v. State, 892 N.E.2d 637, 640 (Ind. 2008). Before revoking probation a trial court must make a factual determination that a violation of a condition of probation actually occurred. Id.

Here, the State did not file any allegation that Jones violated any terms of his probation, as opposed to his work release privileges. The earlier allegation that Jones had

violated probation by smoking marijuana was already resolved and not at issue with respect to the State's August 26, 2008 "Petition to Terminate Work Release Privilege." App. p. 64. That petition did not allege that Jones violated any rules of probation. Additionally, this was not a case in which work release was ordered as a condition of probation; instead, it was ordered to be an "executed" sentence. See Shaffer v. State, 755 N.E.2d 1193, 1197-98 (Ind. Ct. App. 2001) (Vaidik, J., concurring in result) (discussing difference between placement in community corrections as independent executed sentence and as condition of probation).

There is no evidence that Jones violated any term of his probation, as opposed to terms that governed only his placement on work release. Without any required notice that Jones had allegedly violated terms of his probation, and with no evidence that he violated any such terms, the trial court's order must be read as revoking only his work release privileges and ordering that the four and a half years he was to serve on work release must now be served in the DOC. The subsequent twelve and a half years of probation remains in place.

Conclusion

We affirm the revocation of Jones's work release privileges. We remand for the trial court to issue an order clarifying its October 6, 2008 order so that the DOC is notified that Jones's executed sentence there is for a period of four and a half years (less applicable credit time), after which he is to be released to probation.

Affirmed and remanded.

NAJAM, J., and KIRSCH, J., concur.