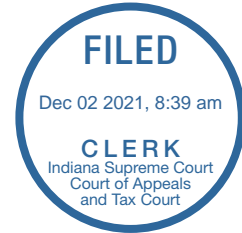


MEMORANDUM DECISION

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

Ryan Deon Horton,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 2, 2021

Court of Appeals Case No.
21A-CR-1045

Appeal from the Monroe Circuit
Court

The Honorable Valeri Haughton,
Judge

Trial Court Cause Nos.
53C02-1904-F5-488
53C02-2009-F6-869

Najam, Judge.

Statement of the Case

[1] Ryan Horton appeals the trial court's revocation of his probation. Horton presents three issues, which we consolidate and restate as two issues:

1. Whether he was denied his right to due process.
2. Whether the trial court abused its discretion when it revoked his probation.

[2] We affirm.

Facts and Procedural History

[3] On October 12, 2020, Horton pleaded guilty to intimidation, as a Level 6 felony, in cause number 53C02-1904-F5-488 ("F5-488"), and domestic battery, as a Level 6 felony, in cause number 53C02-2009-F6-869 ("F6-869"). The trial court entered judgment of conviction accordingly and sentenced Horton to one year of home detention in F5-488 and to two years suspended to probation in F6-869. The court's home detention order in F5-488 stated that Horton would serve 364 days in "Home Detention/Community Alternative Supervision Program (CASP)," and the order listed sixteen conditions of home detention. Appellant's App. Vol. 2 at 27. And, in F6-869, the court entered a no contact order prohibiting Horton from having any contact with his victim, A.D., for the duration of his probation.

[4] On November 16, the State filed a petition in F5-488 alleging that Horton had violated the terms of his home detention when he used controlled substances,

including cocaine and methamphetamine; lied to his probation officer; did not comply with the community corrections case plan; and did not comply with the terms and conditions of CASP. The State also filed a petition in F6-869 alleging that Horton had violated the terms of his probation. On December 28, the State charged Horton with two counts of battery and one count of invasion of privacy, alleging that Horton had contacted A.D. on or about December 24 in violation of the no contact order. On that date, the State filed amended petitions in both causes alleging that Horton had committed two counts of battery; failed to notify his probation officer about his arrest; consumed alcohol; did not comply with the community corrections case plan; and did not comply with the terms and conditions of CASP. And on March 24, 2021, the State filed second amended petitions in both causes alleging that Horton had contacted A.D. in violation of the no contact order.

[5] On March 24, the trial court held an evidentiary hearing on the petitions. On March 26, the trial court found and stated in its CCS entries that Horton had violated the conditions of his probation and home detention “by consuming alcohol; not following the terms and conditions of the CASP program; and by violating the no contact order previously issued.” *Id.* at 22, 108. This appeal ensued.

Discussion and Decision

Issue One: Due Process

[6] Horton first contends that he was denied his right to due process. The due process requirements of a probation revocation proceeding, and our standard of review, are well-established:

“When reviewing an appeal from the revocation of probation, we consider only the evidence most favorable to the judgment, and we will not reweigh the evidence or judge the credibility of the witnesses. *Piper v. State*, 770 N.E.2d 880, 882 (Ind. Ct. App. 2002), *trans. denied*. Probation is a favor granted by the State, not a right to which a criminal defendant is entitled. *Parker v. State*, 676 N.E.2d 1083, 1085 (Ind. Ct. App. 1997). However, once the State grants that favor, it cannot simply revoke the privilege at its discretion. *Id.* Probation revocation implicates a defendant’s liberty interest, which entitles him to some procedural due process. *Id.* (citing *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)). Because probation revocation does not deprive a defendant of his absolute liberty, but only his conditional liberty, he is not entitled to the full due process rights afforded a defendant in a criminal proceeding. *Id.*

The minimum requirements of due process include: (a) *written notice of the claimed violations of probation*; (b) *disclosure to the probationer of evidence against him*; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) *a written statement by the factfinder as to the evidence relied on and reasons for revoking probation*. *Id.* (citing *Morrissey*, 408 U.S. at 489).

Probation revocation is a two-step process. *Id.* First, the court must make a factual determination that a violation of a condition of probation actually has occurred. *Id.* If a violation is proven, then the trial court must determine if the violation warrants revocation of the probation. *Id.* Indiana has codified the due process requirements at Ind. Code § 35-38-2-3 by requiring that an evidentiary hearing be held on the revocation and providing for confrontation and cross-examination of witnesses and representation by counsel. *Id.*; *see also* Ind. Code § 35-38-2-3(d), (e). When a probationer admits to the violations, the procedural due process safeguards and an evidentiary hearing are not necessary. *Parker*, 676 N.E.2d at 1085 [citing *Morrissey*, 408 U.S. at 490; *United States v. Holland*, 850 F.2d 1048, 1050-51 (5th Cir.1988)]. Instead, the court can proceed to the second step of the inquiry and determine whether the violation warrants revocation. *Id.* In making the determination of whether the violation warrants revocation, the probationer must be given an opportunity to present evidence that explains and mitigates his violation. *Id.* at 1086[] n.4.”

Terrell v. State, 886 N.E.2d 98, 100-01 (Ind. Ct. App. 2008) (quoting *Cox v. State*, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006)) (emphases added), *trans. denied*.

[7] Horton asserts that he was denied his right to due process in two ways. First, he alleges that, because the State added a new allegation the morning of the evidentiary hearing, namely, that he had violated the no contact order, he was not given adequate notice either of that allegation or the evidence that was presented in support of that allegation. Second, Horton alleges that the trial court’s written statements insufficiently detailed its reasons for revoking his probation and home detention. We address each contention in turn.

No Contact Order

[8] On the morning of March 24, shortly before the evidentiary hearing that day, the State filed its second amended petitions in both F5-488 and F6-869 to add an allegation that Horton had contacted A.D. in violation of the no contact order. In support of that allegation, during the hearing, the State submitted Exhibit 14, which was a call sheet showing that, between December 27 and March 22, 2021, Horton had called A.D. more than 100 times from jail. On appeal, Horton contends that

Counsel for Appellant attempted to object [to State’s Exhibit 14] stating that this was the first time he had seen the reports. Tr. Vol. 1, p. 93. Counsel objected to the recordings as they were evidence of “not charged conduct.” Tr. Vol.1, p.66-7. The action and dates were not included in any petition to revoke probation. Prior to that, Appellant’s only formal notice for a violation of the [no contact order] was the Invasion of Privacy charge in 53C02-2012-F5-001189[filed on December 28, 2020]. These telephone records and recordings were from December 27, 2020-March 2021. The State did not present evidence that he violated the [no contact order] on December 24, 2020.

Appellant’s Br. at 13-14.

[9] Horton maintains, correctly, that “[d]ue process requires the State to provide notice to the probationer of the alleged violations and the grounds upon which the claims rest.” *Id.* at 14 (citing *Washington v. State*, 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001)). However, while Horton objected to State’s Exhibit 16, which consisted of recordings of calls between Horton and A.D., Horton did *not* object when the State introduced into evidence Exhibit 14, which consisted

of a list of the date, time, and duration of each call Horton had made to A.D. between the end of December 2020 and March 22, 2021. When the State introduced Exhibit 14, Horton’s counsel stated that he had not yet seen the list, and the trial court offered to give him time to look it over. But Horton’s counsel declined the court’s offer and stated, “No, I’m . . . , we’ll deal with this,” and the court admitted Exhibit 14 “without objection.” Tr. at 94. Further, Horton did not object to State’s Exhibit 16 on due process grounds. Neither did Horton move for a continuance based on the last-minute amendment.

[10] In failing to specifically raise due process below, Horton did not provide the trial court with “a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal.” *Endres v. Ind. State Police*, 809 N.E.2d 320, 322 (Ind. 2004) (holding alleged constitutional violations raised for first time on appeal waived); *see also Terpstra v. State*, 138 N.E.3d 278, 285-86 (Ind. Ct. App. 2019) (holding due process rights waived if raised for first time on appeal), *trans. denied*. Horton has waived this issue for our review. Waiver notwithstanding, at no time did Horton suggest that he was not prepared to defend against the alleged conduct, and he did not move to continue the hearing. Accordingly, Horton has not shown any error on this issue. *See Harris v. State*, 427 N.E.2d 658, 662 (Ind. 1981) (holding habitual offender charge filed day of trial not error where defendant did not “request a continuance in order to prepare to meet the allegations of the amended information”).

Trial Court's Written Statements

- [11] The trial court's written statements explaining its reasons for revoking Horton's probation and home detention state in relevant part that the court found that Horton had violated the terms of his probation "as alleged in allegations numbered 7-12" (in F5-488) and "as alleged in allegations numbered 6-9" (in F6-869). In F5-488, allegations seven through twelve stated that Horton: had committed two counts of battery and invasion of privacy; had not notified his probation officer about the charges within twenty-four hours; had consumed alcohol; had not complied with the community corrections case plan; and had not complied with the terms and conditions of CASP. In F6-869, allegations six through nine stated that Horton: had committed two counts of battery and invasion of privacy; had not notified his probation officer about the charges within twenty-four hours; had consumed alcohol; and had violated the no contact order when he contacted A.D. As the court also stated in the corresponding entries in the CCS, in both F5-488 and F6-869, it found that Horton had "violated the conditions of his probation by consuming alcohol; not following the terms and conditions of the CASP program; and by violating the no contact order previously issued." Appellant's App. Vol. 2 at 22, 108.
- [12] Horton contends that the trial court's written statements did not detail the reasons for revoking his probation or the evidence upon which the court had relied. Thus, Horton asserts that the court denied him his right to due process. We cannot agree.

[13] This court has held that, where a trial court’s order of revocation states the reasons for the revocation of probation “and the hearing transcript provides the evidence underlying” the revocation of probation, the due process requirements that the court set forth in writing the facts and reasons for revoking his probation are satisfied. *Hubbard v. State*, 683 N.E.2d 618, 621 (Ind. Ct. App. 1997). Here, the court explained the reasons for the revocation of Horton’s probation and home detention both in written revocation orders and in the corresponding CCS entries, and the transcript shows that the State presented evidence to support each of the court’s findings. Horton has not shown that the court denied him his right to due process. *See id.*; *see also Brown v. State*, 162 N.E.3d 1179, 1182 (Ind. Ct. App. 2021) (addressing the sufficiency of the evidence where the trial court found that the defendant had violated the conditions of his probation “as enumerated” in the State’s petition).

Issue Two: Sufficiency of the Evidence

[14] Horton next contends that the State failed to present sufficient evidence to support the revocation of his probation. As our Supreme Court has often stated:

“Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled.” *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007) (explaining that: “Once a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed. If this discretion were not afforded to trial courts and sentences were scrutinized too severely on appeal, trial judges might be less inclined to order probation to

future defendants.”). A probation hearing is civil in nature, and the State must prove an alleged probation violation by a preponderance of the evidence. *Braxton v. State*, 651 N.E.2d 268, 270 (Ind. 1995); see Ind. Code § 35-38-2-3(f) (2012). When the sufficiency of evidence is at issue, we consider only the evidence most favorable to the judgment—without regard to weight or credibility—and will affirm if “there is substantial evidence of probative value to support the trial court’s conclusion that a probationer has violated any condition of probation.” *Braxton*, 651 N.E.2d at 270.

Murdock v. State, 10 N.E.3d 1265, 1267 (Ind. 2014).

[15] Horton first contends that the State presented insufficient evidence to show that he had consumed alcohol. Horton asserts that “the only evidence” he had consumed alcohol was Correctional Officer Michael Mullis’ testimony that he had “smelled alcohol” on Horton’s person. Appellant’s Br. at 10. But Horton ignores the other evidence the State introduced at the evidentiary hearing. In particular, Bloomington Police Department Officer Joseph Crider testified that, on December 24, 2020, A.D. told him that she and Horton had been drinking cognac at Horton’s apartment, and when he went to Horton’s apartment later that day, Officer Crider observed a bottle of cognac “on the living room floor.” Tr. at 61. Horton told Officer Crider that the bottle was his and not A.D.’s. Officer Crider arrested Horton and took him to the Monroe County Jail. At the jail, Officer Mullis smelled the odor of alcohol on Horton’s person. We hold that the State proved by a preponderance of the evidence that Mullis had consumed alcohol on December 24, 2020.

[16] Horton next contends that “[t]he record does not demonstrate that it was a condition of probation that he follow the terms of CASP.” Appellant’s Br. at 11. But the State presented evidence that “CASP” refers to Horton’s home detention in F5-488, and Horton does not dispute that he was bound by the terms of his home detention. In particular, the “Order for Post-Conviction Home Detention” in F5-488 states that Horton “shall successfully complete . . . Home Detention/Community Alternative Supervision Program” and lists sixteen conditions. Appellant’s App. Vol. 2 at 27. There is no indication, and Horton does not contend, that CASP had terms and conditions separate from those listed in the order. To the extent Horton contends that the State did not present sufficient evidence to show the terms of CASP, his contention fails.

Conclusion

[17] Horton has not shown that he was denied his right to due process. And the State presented sufficient evidence to show that Horton violated the terms of his probation and home detention by a preponderance of the evidence. We affirm the trial court’s revocation of Horton’s probation.

[18] Affirmed.

Vaidik, J., and Weissmann, J., concur.