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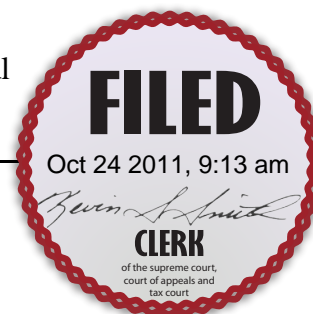
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**IN THE  
COURT OF APPEALS OF INDIANA**

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MARK WILLIAMS, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 49A02-1101-CR-50

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Lisa F. Borges, Judge  
Cause Nos. 49G04-0708-FD-174263 & 49G04-0708-FB-173916

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**October 24, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Mark Williams appeals the revocation of his probation. He argues that he was denied his due process rights because the trial court did not state its reasons for revoking his probation. Because Williams did not admit to violating his probation and the trial court did not state the evidence relied on and its reasons for revoking Williams' probation, thereby infringing Williams' due process rights, we reverse and remand to the trial court for the required finding.

## **Facts and Procedural History**

In November 2007, Williams pled guilty in three separate cause numbers to Class A misdemeanor carrying a handgun without a license and Class C felony battery in Cause No. 49G04-0708-FB-168646 (Cause No. 168646), Class B felony burglary in Cause No. 49G04-0708-FB-173916 (Cause No. 173916), and Class D felony possession of marijuana in Cause No. 49G04-0708-FD-174263 (Cause No. 174263). In exchange, the State agreed to dismiss several other charges and that Williams' executed sentence would not exceed eight years. Appellant's App. p. 34.

Under Cause No. 168646, the trial court sentenced Williams to one year for carrying a handgun without a license and two years for battery, to be served concurrently. Under Cause No. 173916, the trial court sentenced Williams to ten years for burglary, with four years executed and six years suspended (three of which were to be served on probation). The trial court ordered the burglary sentence to be served consecutive to the sentences in Cause No. 168646. Finally, under Cause No. 174263, the trial court sentenced Williams to one year for possession of marijuana with all time not served

suspended. The court placed Williams on probation for one year and ordered it to be served concurrent with the sentence in Cause No. 173916.

On August 21, 2010, the State filed identical notices of probation violation in the burglary and marijuana cases only (Cause Nos. 173916 and 174263). The State alleged that Williams: (1) failed to report to the drug lab as directed on 8/14/10 and failed to call for testing information; (2) submitted to a urine drug screen on 8/26/10 and tested positive for Phencyclidine; (3) failed to pay fees according to the payment plan; and (4) failed to comply with community work service to supplement payments toward his monetary obligation. Appellant's App. p. 38, 89. A hearing was held on September 8, 2010, at which Williams admitted to the then-pending allegations. Tr. p. 7. The trial court continued Williams on probation and imposed additional conditions. The court took a sentence of six years under advisement pending Williams' compliance with probation. *Id.*; *see also* Appellant's App. p. 11, 62.

Despite Williams being on notice that he needed to comply with probation, on October 18, 2010, the State filed amended notices of probation violation in the burglary and marijuana cases to add three new allegations:

NEW 5. was arrested on 10/8/10 and charged with Firearm: Possession by Serious Violent Felon/FB, Possession Cocaine or Narcotic/FC, and Possession of Controlled Substance/FD under cause # 49G20-1001-FB77740. He is currently being held in Marion County Jail on a \$200,000,00 [sic] bond and an Initial Hearing is set for 10/19/10 at 8:30 AM.

NEW 6. failed to maintain full time employment.

NEW 7. failed to report to the drug lab as directed on 9/3/10 and failed to call for testing information.

Appellant's App. p. 40, 92. The State withdrew allegation number five on December 1. *Id.* at 13-14, 64. Then, on December 9, the State filed another set of amended notices that repeated the above violations, changed violation five to from "arrested . . . and charged" to just "arrested," and added the following:

PENDING 8. shall not associate with any person who is in violation of the law or a convicted felon without your [sic] approval of your Probation Officer.

NEW 9. shall not possess a firearm, destructive device, or other dangerous weapon or live in a residence where there is a weapon.

ADDITIONAL INFORMATION: This is the third Amended Violation file[d] under this cause number . . . . The original was file[d] on 8/21/10.

*Id.* at 43, 97.<sup>1</sup>

Williams' probation violation hearing was held on January 5, 2011. At the beginning of the hearing, the parties clarified that the State was withdrawing allegation number six regarding full-time employment, Tr. p. 9, and that after removing the allegations that had already been dealt with, only three allegations remained: number five concerning Williams' arrest, number eight concerning associating with felons, and number nine concerning possession of a firearm, *id.*

The State then presented evidence that Williams was arrested on October 8, 2010. IMPD Detective Garth Schwomeyer testified that members of the violent crime unit were conducting surveillance of Williams' brother, Martez Williams, on this particular day. Martez, a convicted felon, was a suspect in a double homicide. Detective Schwomeyer

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<sup>1</sup> The State appears to have filed yet another amended notice on November 10 which contains allegation eight but not nine. This notice appears in the burglary case, Cause No. 173916, but not in the marijuana case, Cause No. 174263. It is marked "received" but is not file stamped. Appellant's App. p. 95. It is not reflected in the CCS for either case.

observed Williams and Martez exit a vehicle and then enter a residence at 3701 Payton Avenue in Indianapolis, which was the address that Williams reported to probation as his home address. An hour later, the Williams brothers exited the residence. When Williams entered the driver side and started the car and Martez was preparing to enter the passenger side, the officers made the decision to take Martez into custody. When Detective Schwomeyer ordered Williams out of the car, he observed a handgun in plain view on the driver-side floorboard of the car. *Id.* at 20. Detective Schwomeyer also saw a box of ammunition near the cupholder in the front console area. *Id.* at 21. The officers also found drugs in the driver-side door handle. As of result of these discoveries, the police arrested Williams for possession of a firearm by a serious violent felon and drug charges. *Id.* at 22. No charges were filed against Williams in connection with his October 8 arrest. *Id.* Williams testified that he knew his brother was a convicted felon but that he had received permission from his probation officer to associate and live with him. *Id.* at 26. A probation officer testified that such permission was not given. In addition, Williams testified that he did not know the gun was in the car. *Id.*

The trial court found that Williams violated the conditions of his probation, revoked his probation, and sentenced him to his previously-suspended sentences of one year in Cause No. 174263 and six years in Cause No. 173916, to be served concurrently. Appellant's App. p. 15, 65. The trial court stated, "I'm going to show that the State has met their burden and I find that the Defendant is in violation of the terms and conditions of his probation, order that probation be revoked, sentence the Defendant to serve the suspended portion of his sentence . . . ." Tr. p. 30; *see also id.* at 33 ("Show him violated

on the other cause as well . . . .”). The trial court did not give a statement as to the evidence relied on and the reasons for revoking Williams’ probation.

Williams now appeals.

### **Discussion and Decision**

Williams raises two issues on appeal, one of which we find dispositive. That is, Williams contends that the trial court erred in revoking his probation. He argues that he was denied due process rights because the court did not state its reasons for revoking his probation.

Probation is a favor granted by the State, not a right to which a criminal defendant is entitled. *Terrell v. State*, 886 N.E.2d 98, 100 (Ind. Ct. App. 2008), *trans. denied*. 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 due process requirements are: (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.<sup>2</sup> *Cox v. State*, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006) (citing *Morrissey*, 408 U.S. at 489); *see also Medicus v. State*, 664 N.E.2d 1163, 1164 (Ind. 1996).

Accordingly, unless a defendant admits to the alleged probation violations, due process requires a written statement by the court regarding the evidence relied upon and the reasons for revoking probation. *Terrell v. State*, 886 N.E.2d 98, 101 (Ind. Ct. App. 2008). This procedural requirement is aimed at promoting accurate fact-finding and ensuring the accurate review of revocation decisions. *See Hubbard v. State*, 683 N.E.2d 618, 620-21 (Ind. Ct. App. 1997); *see also Medicus*, 664 N.E.2d at 1164 (“Due process requires that the reasons for revoking probation be clearly and plainly stated by the sentencing judge not merely to give appellant notice of the revocation, but also to facilitate meaningful appellate review.”).

At the hearing, the State relied on three allegations to revoke Williams’ probation, all of which Williams contested. In particular, Williams claimed that he had permission from his probation officer to associate and live with his brother and that he did not know the gun was in the car. He also pointed out that charges stemming from his October 8, 2010, arrest were never filed against him.<sup>3</sup> The trial court did not make a written finding as to the evidence relied on and the reasons for revoking Williams’ probation. And unlike other cases, the court did not state its rationale on the record. *See* Tr. p. 30-33; *cf.*

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<sup>2</sup> When setting forth these elements, the State conveniently omits (f), which is the element at issue in this case. We acknowledge that there are some Indiana Supreme Court cases that do not discuss (f), but in those cases, (f) was not at issue. *See, e.g., Cooper v. State*, 917 N.E.2d 667, 672 (Ind. 2009). Nevertheless, *Morrissey* clearly sets forth (f).

<sup>3</sup> The law is well settled that an arrest standing alone will not support the revocation of probation. *Cooper*, 917 N.E.2d at 674.

*Terrell*, 886 N.E.2d at 101 (“[O]ur review of the record indicates that the trial court’s rationale for revoking Terrell’s probation is clear.”). Notably, the State does not attempt to argue otherwise on appeal. *See* Appellee’s Br. p. 14 (failing to acknowledge requirement of written finding). Accordingly, we remand this case to the trial court for the required finding.

Reversed and remanded.

FRIEDLANDER, J., and DARDEN, J., concur.