

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.

ATTORNEY FOR APPELLANT:

BRYAN LEE CIYOU
Marion County Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

SYLVESTER BELLAMY,)
)
Appellant-Defendant,)
)
vs.) No. 49A05-0602-CR-100
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Nancy Broyles, Commissioner
Cause No. 49G05-0102-CF-40157

January 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Sylvester Bellamy appeals the trial court's finding that he violated his probation.

We affirm.

ISSUE

Whether sufficient evidence supports the trial court's finding that Bellamy violated his probation.

FACTS

On February 20, 2001, the State charged Bellamy with two class B felonies: sexual misconduct with a minor and incest. On June 12, 2001, Bellamy tendered to the trial court a plea agreement. Therein, he agreed to plead guilty to sexual misconduct with a minor, a class B felony, and the State agreed to dismiss the incest charge. The plea agreement specified that sentencing would be "open to argument subject to a cap of eight years on the executed portion of the sentence . . . to be served at the Department of Correction[]." (App. 51). The agreement further expressly provided that if Bellamy "receives a split or suspended sentence, he shall be placed on probation" with "additional special terms." *Id.* These special terms included that Bellamy "shall successfully complete a three (3) year sex offender treatment program approved by the Probation Department" and

shall be held financially responsible for the cost of the aforementioned sex-offender treatment. Unsuccessful termination from the program for any reason, including failure to pay fees, will be considered a violation of [Bellamy]'s probation."

Id.

On July 24, 2001, the trial court found that a factual basis existed for Bellamy's plea and accepted it. After hearing evidence, it imposed a sentence of twenty years, with thirteen years suspended, and probation for ten years. The trial court also ordered the "first 3 years reporting probation" for Bellamy "to satisfy conditions in plea agreement" of "3 years in sex offender treatment program" and Bellamy "responsible for all costs." (App. 11).

On July 19, 2005, Bellamy began serving probation. He obtained a residence at 1601 South Meridian in Indianapolis and employment at a nearby recycling plant. Bellamy's "take home" pay was \$213 weekly. (Tr. 20).

On August 10, 2005, the Probation Department referred Bellamy to the Community Counseling Center for sexual offender treatment. On October 5, 2005, the Center evaluated Bellamy and placed him in sexual misconduct and substance abuse treatment groups, which met at 46th and Keystone. Each group met weekly and cost \$70 for the first class and \$30 for subsequent sessions. Bellamy missed his sexual misconduct sessions on October 13th and November 3rd. He missed substance abuse sessions on October 12th and November 2nd. On November 5th, the Probation Department was advised by the Center that Bellamy "had been terminated from both groups due to non-attendance and lack of payments." (App. 64).

A Probation Department administrative hearing was held on November 7th regarding Bellamy's "failed urine screens, failure to comply with sex offender treatment, and failure to make payments." *Id.* Bellamy agreed to "begin attending both groups beginning 11/9/05," and the Probation Department agreed to advise the Center to "post-

pone [sic] [Bellamy]'s financial obligation until the week of 11/28/05," and that Bellamy "will be expected to pay something every month beginning December 2005." *Id.* The hearing report stated that Bellamy was "aware that any future non-compliance with sex offender treatment or failed urine screens will result" in a notice of probation violation being filed with the court. *Id.*

On November 9th, the Center notified the Probation Department that although Bellamy had attended his substance abuse class on November 9th, he had admitted using cocaine. The Center confirmed that Bellamy had been "informed that his payments for services were deferred until November 28, 2005."

Three days after the administrative hearing, Bellamy failed to attend the sexual misconduct group session on November 10th. On November 17, 2005, the Center discharged Bellamy for failure to complete his treatment programs, missing scheduled group sessions, and failing to make progress in either treatment program. The Center's discharge summary reviewed its record of Bellamy's earlier missed treatment sessions, the fact that he missed the November 10th sexual misconduct treatment session as well as the November 16th session for substance abuse. It found that after "multiple chances to abide by probations stipulations and follow stipulations," Bellamy had been unable to comply and "realize probation is a privilege and an opportunity to make positive changes in his life." (Ex. 1).

On December 1, 2005, the State filed a notice of probation violation, alleging that Bellamy had failed to comply with sex offender treatment and failed to make a good-faith effort toward paying for that treatment. The trial court held an evidentiary hearing on

January 25, 2006. Evidence of the foregoing facts was introduced. Bellamy testified that “to the best of [his] ability [he] tried to comply” with the court’s order. (Tr. 18). However, Bellamy explained, it was difficult for him to find transportation to the Center, sessions sometimes conflicted with his employment hours, and he missed some sessions because he did not have the money to pay for them.

The trial court found it had been proven by a preponderance of the evidence that Bellamy “did fail to comply with his sex offender treatment” and that he was discharged from the program by the Center “at least in part for his failure to attend” those treatment sessions. (Tr. 30). It then found that Bellamy was “in violation” and ordered his probation revoked. *Id.*

DECISION

We have summarized the law applicable upon a challenge to the revocation of probation as follows:

Probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment. *Bonner v. State*, 776 N.E.2d 1244, 1247 (Ind. Ct. App. 2002), *trans. denied* (2003) (citing *Carswell v. State*, 721 N.E.2d 1255, 1258 (Ind. Ct. App. 1999)). These restrictions are designed to ensure that the probation serves as a period of genuine rehabilitation and that the public is not harmed by a probationer living within the community. *Id.*

A defendant is not entitled to serve a sentence in a probation program; rather, such placement is a "matter of grace" and a "conditional liberty that is a favor, not a right." *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999); *Davis v. State*, 743 N.E.2d 793, 794 (Ind. Ct. App. 2001), *trans. denied*. Therefore, upon finding that a probationer has violated a condition of probation, a court may either continue probation, with or without modifying or enlarging the conditions, extend probation for not more than one year beyond the original probationary period, or order execution of the initial sentence that was suspended. IC 35-38-2-3(g).

A probation revocation hearing must be a narrow inquiry with flexible procedures that allow a court to exercise its "inherent power to enforce obedience to its lawful orders." *Cox*, 706 N.E.2d at 550. The decision whether to revoke probation is a matter within the sound discretion of the trial court. *Dawson v. State*, 751 N.E.2d 812, 814 (Ind. Ct. App. 2001). A probation revocation hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. *Cox*, 706 N.E.2d at 551 (citing *Braxton v. State*, 651 N.E.2d 268, 270 (Ind. 1995)); *McKnight v. State*, 787 N.E.2d 888, 893 (Ind. Ct. App. 2003). Generally, "violation of a single condition of probation is sufficient to revoke probation." *Pitman v. State*, 749 N.E.2d 557, 559 (Ind. Ct. App. 2001), *trans. denied*.

On review, our court considers only the evidence most favorable to the judgment without reweighing that evidence or judging the credibility of witnesses. *Packer v. State*, 777 N.E.2d 733, 740 (Ind. Ct. App. 2000); *Piper v. State*, 770 N.E.2d 880, 882 (Ind. Ct. App. 2002), *trans. denied*. If there is substantial evidence of probative value to support the trial court's conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation. *Cox*, 706 N.E.2d at 551; *Packer*, 777 N.E.2d at 740; *Piper*, 770 N.E.2d at 882.

Brabandt v. State, 797 N.E.2d 855, 860 -61 (Ind. Ct. App. 2003).

Bellamy argues that "there was insufficient evidence that he violated the terms of his probation." Bellamy's Br. at 10. He first asserts that "the condition for which he was violated, not attending sex offender counseling, was not violated." *Id.* However, Bellamy admitted to the trial court that he had missed sex offender treatment sessions. He then appears to argue that the trial court should have considered his circumstances and found that those circumstances excused his noncompliance. The evidence before the trial court conclusively established that Bellamy did not attend sex offender treatment sessions; thus, he failed to comply with his agreement and the trial court's order that he do so. Therefore, his first argument of insufficient evidence must fail.

Bellamy also argues that as in *Baxter v. State*, 774 N.E.2d 1037, 1045 (Ind. Ct. App. 2002), he cannot be found in violation of probation based upon his failure to pay certain fees because there was no evidence that he “recklessly, knowingly, or intentionally failed to pay” those fees. However, the trial court did not revoke Bellamy’s probation because he failed to pay the Center for his treatment sessions. Further, despite Bellamy’s own testimony that he did not attend some sessions because he lacked the money to pay for them, the evidence before the trial court was that the Center would not require Bellamy to pay for the classes between November 7th and November 28th, that Bellamy knew that, and that he nevertheless failed to attend. Finally, as the State observes, the fact that Bellamy admitted to using cocaine supports the inference that he chose to use his money for drugs rather than the treatment sessions he had agreed and been ordered to attend. Therefore, Bellamy’s second argument must also fail.

The plea agreement specified that Bellamy would complete sex offender treatment, and the trial court ordered Bellamy to do so. The evidence established that Bellamy failed to attend required treatment sessions. Therefore, we affirm the trial court’s decision to revoke probation. *Brabandt*, 797 N.E.2d at 861.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.