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**IN THE
COURT OF APPEALS OF INDIANA**

KEVIN STONE,)

Appellant-Defendant,)

vs.)

No. 49A02-0604-CR-354

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Nancy Broyles, Commissioner
Cause No. 49G05-0506-FC-102256

February 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Kevin Stone appeals the trial court's revocation of his placement in Marion County Community Corrections ("MCCC"). On appeal, Stone raises three issues, which we restate as: (1) whether the trial court's order that Stone obtain employment in ten days¹ was an illegal condition; (2) whether the trial court's order was unconstitutionally vague and violated Stone's due process rights; and (3) whether the trial court's order had an inherent "good faith" component. Concluding the order was not illegal, Stone's due process rights were not violated, and a "good faith" component is not inherent in the trial court's order, we affirm.

Facts and Procedural History

On June 20, 2005, the State charged Stone with nonsupport of a dependant child, a Class C felony. On September 19, 2005, Stone pled guilty pursuant to a plea agreement. Under this agreement, Stone's sentence was set at eight years, with six years suspended to probation, and two years executed through MCCC. One of these years was to be executed on work release, and the other was to be served as directed by MCCC.

The record is not entirely clear as to the date on which Stone entered MCCC's custody, but on January 27, 2006, MCCC filed a Notice of Violation, alleging that Stone had been in MCCC's work release facility for thirty-nine days and had not secured employment.²

On February 3, 2006, the trial court held a hearing on the alleged violation. At this hearing,

¹ Some parts of the record indicate that Stone was ordered to obtain employment within fifteen days. Because MCCC did not file its notice of violation until twenty-three days after the trial court's order, Stone had failed to secure employment within either time limit. We will assume for purposes of this appeal that the trial court ordered Stone to obtain employment within ten days.

² Nothing in the record indicates how long Stone was originally given to secure employment.

Stone informed the trial court that he had found a job.³ Although the transcript of this hearing is not included in the record, the chronological case summary indicates that at this hearing Stone was ordered to return to MCCC, and “all parties agree[d] to 10 days from today defendant is to get a job.” Appellant’s Appendix at 14. However, MCCC had no available beds at the time, and Stone did not actually return to MCCC until February 21. On this date, Stone tested positive for marijuana, in violation of MCCC rules, but was apparently allowed to remain in the work release program, and resumed his job search on February 24. On March 16, MCCC filed another Notice of Violation, alleging that Stone had violated MCCC rules by testing positive for marijuana and by failing to secure employment within the ten-day period. The trial court held a hearing on March 24. MCCC orally withdrew the violation relating to the positive drug test, and proceeded solely on Stone’s failure to secure employment. Following the hearing, the trial court found that Stone was in violation of MCCC rules, revoked his placement in MCCC, and ordered that Stone execute 730 days in the Department of Correction. Stone now appeals the revocation of his placement in MCCC.

Discussion and Decision

I. Standard of Review

Before addressing the merits of Stone’s arguments, we will briefly discuss the nature of a hearing on a termination of placement in a community corrections program. “For purposes of appellate review, we treat a hearing on a petition to revoke a placement in a community corrections program the same as we do a hearing on a petition to revoke

probation.” Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999). Neither probation nor placement in MCCC is a defendant’s right, but is instead a “matter of grace” or a “conditional liberty that is a favor.” Id. Indeed, the trial court may order a defendant to execute a portion of his or her sentence on probation or in community corrections as a matter of its sole discretion. Id. Likewise, the decision to terminate such placement is a matter for the trial court to decide based on its discretion. Pavey v. State, 710 N.E.2d 219, 221 (Ind. Ct. App. 1999).

II. Legality of Trial Court’s Order

A person serving his or her sentence in a community corrections program enjoys only conditional liberty. Jester v. State, 746 N.E.2d 437, 439 (Ind. Ct. App. 2001). “As part of this conditional liberty, a judge may set reasonable terms on the community corrections placement.” Id.; see also Ind. Code § 35-38-2.6-3(a) (“The court may impose reasonable terms on the placement [in community corrections]”). In determining the terms of a defendant’s placement, a trial court enjoys broad discretion. See Smith v. State, 779 N.E.2d 111, 117 (Ind. Ct. App. 2002), trans. denied (relating to terms of probation). The only limit on the trial court’s discretion is that the terms “must be reasonably related to the treatment of the defendant and the protection of public safety.” Id.

Stone argues that the trial court’s condition that he obtain employment within ten days was “unduly intrusive on a constitutional right.” Appellant’s Brief at 14. When a defendant challenges a term on this basis, we generally examine three factors: “(1) The purpose to be served by [placement in community corrections], (2) the extent to which constitutional rights

³ Stone testified at the March 24 hearing that this job “fell through.” Transcript at 15.

enjoyed by law-abiding citizens should be enjoyed by [those placed in community corrections], and (3) the legitimate needs of law enforcement.” Id. (dealing with challenges to probation revocations). Smith, 779 N.E.2d at 117. However, we find it unnecessary, and indeed impractical, to use this analysis in this case, as we discern no substantive constitutional right imposed upon by the trial court’s order.

The instances in which we have held probation conditions invalid based on intrusiveness have involved clearly identifiable constitutional rights. See Trammell v. State, 751 N.E.2d 283, 290-91 (Ind. Ct. App. 2001) (invalidating probation requirement that defendant not become pregnant as not reasonably related to defendant’s rehabilitation and overly intrusive on her privacy rights); Carroll v. State, 740 N.E.2d 1225, 1234-35 (Ind. Ct. App. 2000), trans. denied (condition that defendant give “clean-up statement” without first being given grant of immunity impermissibly burdened defendant’s right against self-incrimination); Green v. State, 719 N.E.2d 426, 430 (Ind. Ct. App. 1999) (invalidating condition that required work release participant to give up right to be free of search or seizure without reasonable suspicion). Here, Stone does not identify the constitutional right upon which the condition imposed by the trial court intrudes. Indeed, the only identifiable “right” impinged upon by the court’s order is a general liberty interest in being unemployed, an interest clearly given up by one who participates in a work-release program. We conclude that this condition does not impermissibly intrude upon Stone’s constitutional rights.

Stone also argues that the condition is unreasonable as it requires “a convicted felon to

find a job in a few days in a declining job market.”⁴ Appellant’s Br. at 15. We agree that a term imposed by the trial court on a defendant assigned to community corrections must be reasonable. See Jester, 746 N.E.2d 439; Ind. Code § 35-38-2.6-3(a). We also agree that in some circumstances, it may be unreasonable to require a convicted felon to obtain a job in ten days. However, in this case, Stone had been placed in MCCC for thirty-nine days prior to his first revocation hearing, and twenty-three days passed between the time he resumed his job search and his second notice of violation. Therefore, Stone did not have “a few days” in which to find a job; he had sixty-two. Although we understand that employers may be reluctant to hire convicted felons,⁵ we also recognize that the evident purpose of work release is to allow people convicted of crimes the opportunity to work while serving their sentences. Regardless of the amount of effort Stone put into his search for employment, the simple fact is that in roughly two months on work release, he was still unemployed. Neither MCCC nor the trial court is required to permit people to languish indefinitely on work release without a job, especially considering the crowded nature of MCCC facilities. See Tr. at 11 (Stone was unable to return to MCCC for eighteen days because the facility had no available beds); see also MCCC Annual Report FY 2004-05, at 36, available at <http://www.indygov.org/eGov/County/Corrections/home.htm> (last visited February 2, 2007)

⁴ We note that Stone has provided no evidence relating to the conditions of the Marion County job market at the time he was seeking employment.

⁵ At Stone’s hearing, both he and an MCCC work release coordinator testified that some convicted felons have a more difficult time than others obtaining employment. The legislature has also recognized this potential difficulty by requiring that the Department of Correction “establish directives governing . . . eligibility and selection of prospective employers for participation in the work release program.” Ind. Code § 11-10-8-5(a)(1).

(indicating that MCCC's residential component maintains a work-release waiting list). On the facts of this case, the trial court's order that Stone obtain employment within ten days was reasonable.

Stone argues that there is not a sufficient nexus between the trial court's order that he obtain a job and the goals associated with placing him in community corrections. We disagree. Stone's underlying offense is nonsupport of a dependant. Unlike those who commit many other crimes, those who have committed nonsupport have the opportunity to substantially reduce the harm caused by their offense through the commencement of child support and the payment of the amount due in arrears. Ordering a defendant to execute his or her sentence in the Department of Correction does not facilitate such payment. See Linda R. v. Richard D., 410 U.S. 614, 618 (1973) (recognizing that incarcerating a parent for nonsupport does not redress the injury caused to the child and custodial parent). Therefore, a clear policy rationale exists for placing one convicted of nonsupport of a dependant on work release instead of in the Department of Correction—facilitating support of the child while the offender serves his or her sentence. However, if the offender is not actually employed while on work release, he or she is not reducing the harm caused by the nonsupport, and this rationale for ordering placement in community corrections disappears. The specific purpose of the work release program is to facilitate actual employment, and not just the search for employment. Although the search is necessary for the gain, at some point, a line must be

drawn, and one unable to obtain employment must make way for one who is able.⁶

We emphasize that our holding is confined to the order given in this case, and do not hold that in all circumstances requiring an offender assigned to work release to obtain employment within ten days is reasonable. We merely hold that this condition, which was imposed after Stone had already been in MCCC for thirty-nine days, is not unreasonable. Therefore, the condition is legal and the trial court acted within its discretion in ordering it, and in revoking Stone's placement after he violated the condition.

II. Due Process

Stone also argues that the procedure through which his placement was revoked violated his due process rights. In the context of a hearing on revocation of placement in community corrections, a defendant is entitled to the due process rights of: "written notice of the claimed violations, disclosure of the evidence against him, an opportunity to be heard and present evidence, the right to confront and cross-examine witnesses, . . . a neutral and detached hearing body . . . [and] the right to confrontation, cross-examination, and representation by counsel." Cox, 706 N.E.2d at 549 (quoting Isaac v. State, 605 N.E.2d 144, 148 (Ind. 1992), cert. denied, 508 U.S. 922 (1993)).

Stone argues that he was not given proper notice, as his "term of probation was such that it did not give him an understanding why he was being revoked. He had done all

⁶ We also note that work release programs are funded, in part, through the wages of those in the programs. Ind. Code § 11-10-8-6(a)(5) (offender's earnings go towards expense of offender's room and board). Therefore, one placed in community corrections while unemployed not only costs another offender the opportunity to be in the program, but also deprives the State of the reimbursement for room and board that it would receive from one who is employed.

possible to obtain a job, and yet this was insufficient.” Appellant’s Br. at 15. We first note that the record does not indicate that Stone did “all possible” to obtain a job. Stone testified that during the twenty-three days between the date of the trial court’s order and the date MCCC filed its notice, he went out five times to apply for jobs, and applied to at least four places on each trip. The record does not reveal what Stone did during his first thirty-nine days of placement in the program. Although we do not diminish Stone’s efforts or imply that he made no attempt to obtain a job, we cannot agree that the mere act of filling out roughly twenty applications in twenty-three days constitutes making all possible efforts to obtain employment.

Regardless, we disagree with Stone’s argument that the trial court’s order did not give him notice such that he understood the reason his placement was being revoked. In support of his argument, Stone cites Pope v. State, 853 N.E.2d 970 (Ind. Ct. App. 2006), in which we reversed the trial court’s revocation of the defendant’s placement in community corrections. In Pope, the defendant had failed a drug test, but was not informed that she had done so. The defendant was arrested, brought before the trial court without an attorney, and not allowed to view the drug test results or speak in her defense at her hearing. We held that even though the defendant was given an opportunity to challenge the trial court’s decision over a month later, her due process rights were violated. Id. at 973. Stone likens his situation to Pope’s in that they both “did not have an understanding why [they were] being revoked.” Appellant’s Br. 15. We disagree and find Stone’s reliance on Pope misplaced. Unlike Pope, Stone knew the precise reason for his revocation. The trial court unambiguously informed Stone that he

was to have a job within ten days. The trial court did not order Stone to attempt to obtain a job or to apply for a job; the trial court ordered Stone to have a job.⁷ Stone did not have a job within ten days, thereby violating the trial court’s order. Whether this order was harsh has no bearing on whether it was clear and informed Stone of the reason for his revocation. Moreover, Stone was provided counsel at his revocation hearing, and given the opportunity to testify in his defense. We conclude that Stone’s due process rights were not violated.

III. Inherent “Good Faith” Component

Stone argues that when the trial court imposes a condition on one’s placement in community corrections, such a condition inherently contains a “good faith” component such that one cannot be found to have violated a condition if he or she has made a good faith effort to comply with the condition. In support of this argument, Stone cites Garrett v. State, 680 N.E.2d 1 (Ind. Ct. App. 1997). In Garrett, we held that the trial court abused its discretion in revoking the defendant’s probation for failure to pay restitution where the trial court failed to consider whether the defendant had the ability to pay restitution. Id. at 3. However, our holding in Garrett rested on a statutory provision that a court may not revoke probation based on a defendant’s inability to meet a financial obligation “unless the person recklessly, knowingly, or intentionally fails to pay.”⁸ Id. at 2 (quoting Ind. Code § 35-38-2- 3(f)). Here,

⁷ Again, we note that the transcript of the hearing at which the trial court gave this order is not part of the record, and we rely on the chronological case summary.

⁸ In Garrett, we also held that the trial court erroneously revoked the defendant’s probation because the State introduced insufficient evidence to show that the defendant had failed to make a good faith effort to obtain employment. Id. at 4. However, in Garrett, the trial court’s imposed condition was not that Garrett obtain employment, but that she “make a good faith effort to be employed or faithfully pursue a course of study or vocational training that will equip [her] for suitable employment.” Id. at 3. Therefore, we did not

Stone's revocation had nothing to do with his inability to meet a financial obligation, and there is no statutory requirement that a defendant placed in community corrections may not be revoked unless he recklessly, knowingly, or intentionally fails to obtain employment. Therefore, Garrett is of no avail to Stone.

We recognize that in certain circumstances we have read provisions akin to "good faith" into trial courts' orders to save them from being vague or unreasonable. See Smith v. State, 727 N.E.2d 763, 768 (Ind. Ct. App. 2000) ("it is inherent in Ind. Code § 35-38-2-2.4 that a probationer is not required to avoid inadvertent or unintentional contact with persons less than sixteen years of age."); Carswell v. State, 721 N.E.2d 1255, 1262 (Ind. Ct. App. 1999) ("[W]e think that a limitation that all searches of probationers be conducted only upon reasonable cause is inherent in such conditions, even if not explicitly stated."). However, as discussed above, the trial court's order that Stone obtain employment within ten days was neither vague nor unreasonable. Therefore, we have no need to read a "good faith" exception into the trial court's order, and decline to do so.

Conclusion

We conclude that the trial court's order that Stone obtain employment within ten days was reasonable and therefore legal. We further conclude that the State did not deny Stone his due process rights. Finally, we hold that there is no need to infer a "good faith" component in the trial court's order.

Affirmed.

read a "good faith" requirement into the trial court's order; the trial court's order itself required only that

BAKER, J., and DARDEN, J., concur.

Garrett make a good faith effort.