



## STATEMENT OF THE CASE

Appellant-Defendant, Timothy S. Keller (Keller), appeals the trial court's revocation of his probation.

We affirm.

## ISSUES

Keller presents one issue on appeal, which we restate as the following two issues:

- (1) Whether the State's Petition to Revoke Keller's probation was timely filed; and
- (2) Whether the trial court erred in revoking Keller's probation when the terms of probation had not been given to him in writing.

## FACTS AND PROCEDURAL HISTORY

On August 25, 2004, the State filed an Information, charging Keller with Count I, operating a motor vehicle after forfeiture of license for life, a Class C felony, Ind. Code § 9-30-10-17; Count II, operating a vehicle while intoxicated, a Class A misdemeanor, I.C. § 9-30-5-2(a); Count III, operating a vehicle while intoxicated, a Class C misdemeanor, I.C. § 9-30-5-2(a); and Count IV, driving left of center, I.C. §§ 9-21-8-2 and 9-21-8-49, a Class C infraction. On November 29, 2005, Keller entered into a plea agreement with the State, agreeing to plead guilty to Counts I and II in exchange for the State dismissing Counts III and IV. That same day, the trial court sentenced Keller to four years with two years executed on work release and two years suspended to probation on Count I and one and one-half years on Count II, with the sentences to run concurrent.

On May 16, 2006, the State filed a petition to revoke Keller's work release, alleging that Keller had tested positive for alcohol. On May 23, 2006, the trial court conducted a hearing on the State's petition, during which Keller admitted to the violation of his conditions of probation. The trial court did not revoke Keller's work release privileges on the condition that Keller attend two Alcoholic Anonymous (AA) meetings a week.

On July 17, 2006, the State filed a second petition to revoke Keller's work release asserting that he had been absent from his work release and had tested positive for illegal substances. During the hearing on July 18, 2006, Keller admitted to the violation. The trial court revoked Keller's work release privileges and ordered him to serve the remaining portion of his executed sentence. At the same time, the trial court set a review hearing to determine which program or treatment facility Keller should enter after being released from incarceration on November 29, 2006.

On January 4, 2007, at the review hearing, Keller advised the trial court that he was attempting to enter a twenty-four month treatment program in Louisville, Kentucky. As the State did not oppose Keller's preferred treatment, Keller informed the trial court that he needed to raise half of the treatment costs before he could be admitted. The trial court allowed him some time to raise the funds and set the matter for further review hearings. Additionally, the trial court stated that Keller would have to take a portable breath test three times a week.

During the review hearing on February 15, 2007, Keller advised the trial court that he had not yet raised the required amount to enter the treatment program. Also, at the hearing,

Keller pled guilty to a new charge of resisting arrest, as a Class A misdemeanor, in exchange for the State's dismissal of the second charge of public intoxication, as a Class B misdemeanor. As part of the informal plea agreement, the parties agreed to modify his sentence in the current case. Specifically, Keller was ordered to complete an in-treatment program, complete forty hours of community service, and attend three AA meetings per week for the term of his probation. The trial court informed the probation officer present at the hearing to "[p]repare a [Probation] Order that's very similar to the minute." (Transcript p. 28).

During the subsequent review hearings on March 29, 2007, May 1, 2007, June 1, 2007, and June 21, 2007, Keller informed the trial court that he had not yet been able to raise the sufficient funds to enter a treatment program. Each time, the trial court granted Keller additional time to come up with the money. Thereafter, on July 24, 2007, Keller advised the trial court that he would have the requisite amount within two weeks. The trial court allowed Keller two extra weeks to obtain the money and ordered him to report to his probation officer on August 7, 2007. On August 8, 2007, the probation officer informed the trial court that Keller had failed to appear. An arrest warrant was issued.

The chronological case history reflects that on September 5, 2007, the trial court stated:

after review of this matter, now finds that no further hearing will be held in this matter due to [Keller] being previously sentenced on 7/27/07, if he failed to appear to his probation officer on 8/7/07 with the remaining money for entrance into the healing place. Court therefore orders [Keller] to serve the remainder of his underlying sentence of 2 years (1 year actual, if good time

credit is earned in the Ind. Dept. of [C]orrection[] with credit time beginning 8/21/07).

(Appellant's App. p. 11). On September 10, 2007, the trial court conducted a hearing on its entry of September 5, 2007. During the hearing, Keller's counsel and the State appeared to dispute whether Keller had served the executed portion of his sentence. Unable to agree on the issue, the trial court postponed the case to September 27, 2007, while both parties were to do research on the time actually served by Keller.

On September 25, 2007, the State filed a petition to revoke Keller's probation, alleging that he had violated the conditions of his probation. Specifically, the State asserted that he had failed to participate in an in-patient treatment program, had failed three portable breath tests, and had failed to pay for any of his drug screens and portable breath tests.

During the hearing on September 27, 2008, Keller denied the allegations and requested a formal hearing. Thereafter, on October 8, 2007, during the probation revocation hearing, the trial court found that Keller had violated the terms of his probation and ordered him to serve 632 days at the Department of Correction.

Keller now appeals. Additional facts will be provided as necessary.

#### DISCUSSION AND DECISION

Keller disputes the trial court's revocation of his probation. We first note that probation is a favor granted by the State, not a right to which a criminal defendant is entitled. *Podlusk v. State*, 839 N.E.2d 198, 199-200 (Ind. Ct. App. 2005). Moreover, a probation revocation hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. *Id.* at 200. A trial court's decision to revoke probation is

reviewed for an abuse of discretion. *Id.* We consider only the evidence most favorable to the judgment and do not reweigh the evidence or judge the credibility of the witnesses. *Id.*

### I. *Timely Filing*

As a first issue, Keller maintains that his due process rights were violated because the State belatedly filed its Petition to Revoke Probation. In particular, Keller asserts that the State attempted to revoke Keller's probation without first filing a petition to revoke. We disagree.

Our review of the chronological case history reveals that after Keller failed to report to his probation officer on August 7, 2007, as instructed by the trial court, the trial court, without a hearing, ordered Keller to serve the remainder of his sentence in the Department of Correction. During the subsequent review hearing on September 10, 2007, the parties did not conduct a formal probation revocation hearing, but merely discussed whether Keller had served the executed portion of his sentence. Unable to agree on the issue, the trial court postponed the case to September 27, 2007, while both parties were to do research on the time actually served by Keller. Thereafter, on September 25, 2007, the State filed a petition to revoke Keller's probation alleging that he had violated the conditions of his probation. The trial court held a formal probation revocation hearing on October 8, 2007.

Even if we were to characterize the docket entry of September 5, 2007 as a *sua sponte* revocation of probation by the trial court without the prior filing of a petition to revoke by the State, we find that this error is harmless. The record clearly indicates that the trial court did

not conduct a formal hearing on the petition to revoke Keller's sentence until after the State formally filed its petition.

Next, Keller focuses on a clause included at the end of the modified probation order that states

TO THE DEFENDANT: PLEASE BE ADVISED THAT IF YOU VIOLATE A CONDITION OF YOUR PROBATION DURING THE PROBATIONARY PERIOD, A PETITION TO REVOKE YOUR PROBATION MAY BE FILED BEFORE THE EARLIER OF THE FOLLOWING: (1) ONE YEAR AFTER THE TERMINATION OF PROBATION; (2) FORTY-FIVE DAYS AFTER THE STATE RECEIVES NOTICE OF THE VIOLATION

(Appellant's App. p. 111). He references this language in support of his claim that the trial court limited the State's time period allowed for filing a petition to revoke probation. We find Keller's argument without merit as this clause is an incomplete statement of law. The clause itself is codified in I.C. § 35-38-2-3(a). In *Ashley v. State*, 717 N.E.2d 927, 929 (Ind. Ct. App. 1999), *reh'g denied*, we concluded that the "forty-five day requirement set forth in Ind. Code § 35-38-2-3(a)(2)(B) applies only if a defendant's probation has ended and the State has notice that the defendant violated his probation." This requirement is not applicable to this case. In sum, we conclude that the State timely filed its petition to revoke Keller's probation.

## II. *Written Terms of Probation*

Secondly, Keller contends that he was never provided with any written terms of probation. Specifically, he claims that as the terms of probation were not given to him in writing or entered into the record at sentencing, he did not have sufficient notice of the conditions of his probation.

Our legislature has provided that when a person is placed on probation, the person shall be given a written statement specifying:

- (1) the conditions of probation; and
- (2) that if the person violates a condition of probation during the probationary period, a petition to revoke probation may be filed before the earlier of the following:
  - (A) One (1) year after the termination of probation
  - (B) Forty-five (45) days after the state received notice of the violation.

I.C. § 35-38-2-2.3(b). Although citing to a prior version of this statute, we have stated that the intent of the provision is “to provide a defendant with prospective notice of the standard of conduct required of him or her while on probation and to prohibit the imposition of additional conditions after sentencing.” *Kerrigan v. State*, 540 N.E.2d 1251, 1252 (Ind. Ct. App. 1989). The intent may also be achieved if the conditions are specified in the record, as required by I.C. § 35-38-2-1(a), in the defendant’s presence, and understood by him. *Id.* “Thus, although the trial court commits error in not providing the defendant with a written statement of the conditions, the error is harmless if there is otherwise substantial completion with the intent” of providing a defendant with prospective notice of the standard of conduct required of him or her while on probation and prohibiting the imposition of additional conditions after sentencing. *Id.* See also *White v. State*, 560 N.E.2d 45, 48 (Ind. 1990).

In the instant case, the petition to revoke Keller’s probation was based upon three separate violations: (1) failure to participate in an in-patient treatment program, (2) failing three portable breath tests, and (3) failing to pay for any of his drug screens and portable breath tests. While we agree with Keller that after the first plea agreement, no conditions of probation were reduced to writing, Keller did acknowledge in open court that he was

required to take a portable breath test three times a week. Specifically, during the January 4, 2007 hearing, the trial court stated and Keller agreed that he needed to take a portable breath test three times a week. Again, during the February 15, 2007 hearing, the trial court instructed him and he agreed to take a portable breath test three times a week. In fact, Keller advised the trial court very clearly that he was taking his tests regularly and tried to remain sober. As we have held that the violation of a single condition of probation may be sufficient to revoke probation, we conclude that the trial court properly revoked Keller's probation. *See Washington v. State*. 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001).

#### CONCLUSION

For the foregoing reasons, we hold that the State's Petition to Revoke Keller's probation was properly filed and that the trial court properly revoked Keller's probation.

Affirmed.

BAKER, C.J., and ROBB, J., concur.