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IN THE
COURT OF APPEALS OF INDIANA

CORTINO ALLEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-1103-CR-88
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Clark H. Rogers, Judge
The Honorable Valerie C. Horvath, Commissioner
Cause No. 49G17-1005-FD-039303

November 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Cortino Allen ("Allen") was convicted of Battery, as a Class A misdemeanor,[1] and placed on probation. As part of his probation, the trial court ordered that Allen undergo a mental health evaluation and comply with any recommended treatment. He now appeals, presenting the single issue of whether the trial court abused its discretion in setting the terms of his probation. We affirm.

Facts and Procedural History

On March 17, 2010, Jema Frauhiger ("Frauhiger") and her friend Aimee Crews ("Crews") went to a bar together intending to meet one of Crews's business clients. After Frauhiger and Crews had been at the bar for about thirty to forty-five minutes, Allen, who was dating Frauhiger at the time,[2] arrived and began arguing with her. Allen shouted at Frauhiger from close range, accused her of talking to other men, and generally created a disturbance to the point that others asked Frauhiger if she wanted to be walked to her car. Frauhiger and Crews eventually left the bar and went back to Frauhiger's apartment to go to sleep. Allen went to another bar.

Later that evening, Allen went to Frauhiger's apartment. He entered the room where his daughter was sleeping, ripped her blanket off her as she slept, and told her to get up. This upset his daughter and awakened Crews, who was sleeping in the same room. As Crews consoled Allen's daughter, Allen announced that he was going into the living room to practice Tai Chi.

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[1] Ind. Code § 35-42-2-1.
[2] Allen and his daughter were also living with Frauhiger and her son at the time.

After awhile, Allen awakened Frauhiger by screaming at her and pounding on her arm with a closed fist. Frauhiger's young son, now also awake, ran into her room, but Frauhiger urged him out so that he would not witness Allen's behavior. Frauhiger went into the hallway and Allen followed. He then shoved her into a wall.

Several people called the police. When the police arrived and interviewed Allen, he told them that Frauhiger was brainwashing his daughter. After the officers concluded their interviews, they arrested Allen.

On May 17, 2010, the State charged Allen with Domestic Battery, as a Class D felony,[3] Domestic Battery, as a Class A misdemeanor,[4] and Battery, as a Class A misdemeanor. A bench trial was held on February 8, 2011. The domestic battery charges were dismissed after the State rested its case, but Allen was found guilty of Battery at the trial's conclusion. The trial court sentenced Allen to one year in jail, suspended three hundred and thirteen days of that sentence, and awarded him credit time and credit for time served for the balance. Allen was placed on probation, a condition of which was that he "take a mental health evaluation and submit to any recommended treatment." Tr. 128-29.

Allen now appeals.

Discussion and Decision

Allen argues on appeal that the trial court erred in setting the terms of his probation, and particularly challenges the probation condition that he undergo a mental health

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[3] I.C. § 35-42-2-1.3(b).
[4] I.C § 35-42-2-1.3(a).

evaluation and comply with any recommended treatment. He argues that this condition is unreasonably vague because it does not indicate whether or not he will be required to take medication, which he does not want to do. However, by failing to object to the conditions of his probation at the sentencing hearing, Allen failed to properly preserve this issue for appellate review. Hale v. State, 888 N.E.2d 314, 319 (Ind. Ct. App. 2008), trans. denied.

Waiver notwithstanding, we do not agree that this probation condition is unreasonably vague. Probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment. Carswell v. State, 721 N.E.2d 1255, 1258 (Ind. Ct. App. 1999). Thus, probation is conditional liberty dependent upon observance of certain restrictions. Id. Accordingly, probationers simply do not enjoy the freedoms to which citizens are ordinarily entitled. Rivera v. State, 667 N.E.2d 764, 767 (Ind. Ct. App. 1996), trans. denied. These restrictions are designed to ensure that probation serves as a period of genuine rehabilitation and that the community is not harmed by a probationer being at large. Carswell, 721 N.E.2d at 1258. However, "[a] probationer has a due process right to conditions of supervised release that are sufficiently clear to inform him of what conduct will result in his being returned to prison." Smith v. State, 779 N.E.2d 111, 117 (Ind. Ct. App. 2002) (citing United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002)), trans. denied.

To support his vagueness argument, Allen directs our attention to McVey v. State, 863 N.E.2d 434 (Ind. Ct. App. 2007), trans. denied. In that case, the conditions of McVey's probation prohibited him from possessing "pornographic or sexually explicit materials"

depicting "partial or complete nudity or sexually explicit language or any other materials relation to illegal or deviant interests or behaviors." Id. at 447. We remanded McVey's case to the trial court to set out the probation condition with more specificity because there was nothing in the condition that indicated what the court meant by the phrase "deviant interests or behaviors." Id. at 447-48. Our conclusion in McVey was consistent with our holdings in cases with similarly vague conditions of probation. See Foster v. State, 813 N.E.2d 1236, 1239 (Ind. Ct. App. 2004) (probation prohibition against possessing or viewing "any pornographic or sexually explicit materials" was unreasonably vague); Fitzgerald v. State, 805 N.E.2d 857, 866 (Ind. Ct. App. 2004) (prohibition against possessing "pornographic or sexually explicit materials" or "any other material which depicts partial or complete nudity or sexually explicit language" or "any other materials related to illegal or deviant interests or behaviors" was unreasonably vague); Smith, 779 N.E.2d at 117-18 (prohibition against possessing "pornographic or sexually explicit materials" was unreasonably vague).

Unlike the probation conditions in the above cases, where the probationer may or may not be in violation of probation depending upon how one defines terms such as "pornographic," "sexually explicit," or "deviant," Allen's probation condition is clear and not subject to differing interpretations. Allen must complete a mental health exam and then must comply with the treatment recommended by the mental health professional. If he deviates from these orders, his probation may be revoked. We think this probation term is sufficiently defined, and see no need to remand it to the trial court for additional clarity.

To the extent that Allen also argues that his probation condition is unduly intrusive on

his constitutional rights,[5] we cannot agree. Convicted individuals do not enjoy the same constitutional protections as law-abiding citizens, and probation conditions that intrude upon constitutionally protected rights are not necessarily invalid. Taylor v. State, 820 N.E.2d 756, 762 (Ind. Ct. App. 2005), trans. denied. Trial courts have broad discretion in setting the conditions of probation, subject to appellate review for an abuse of discretion. Freije v. State, 709 N.E.2d 323, 324 (Ind. 1999). The only limitation on the trial court's discretion is that the conditions must have a reasonable relationship to the treatment of the accused and the protection of the public, and our review is essentially limited to determining whether the conditions placed upon the defendant are reasonably related to attaining these goals. Carswell, 721 N.E.2d at 1258. When a defendant contends that a probation condition is unduly intrusive on a constitutional right, the following three factors must be balanced: (1) the purpose sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law abiding citizens should be afforded to probationers; and (3) the legitimate needs of law enforcement. Id.

The Indiana code provides that a trial court may order a probationer to "[u]ndergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose." I.C. § 35-38-2-2.3(a)(1). Allen displayed volatile behavior at the bar when he shouted at Frauhiger near her face and caused a disturbance to the point that others were concerned for her safety. At the apartment, Allen ripped a blanket off his sleeping daughter

[5] Allen cites two civil involuntary commitment cases and asserts that he has a right against "forced medication." Appellant's Br. p. 4-5.

and then awakened Frauhiger by screaming at her and pounding her arm with a closed fist. He also shoved her into a wall in the presence of her young son. When interviewed by the police, Allen indicated that he thought that Frauhiger was brainwashing his daughter. Given this display of erratic and violent behavior, we cannot say that the trial court abused its discretion by setting the terms of Allen's probation. Ordering Allen to complete a mental health exam and comply with resulting treatment recommendations serves the rehabilitative purpose of probation by affording Allen the opportunity to obtain any mental health treatment he may need. It also protects the interests of law enforcement by potentially preventing future incidents that may be avoided because of treatment. In short, we think that his probation condition bears a "reasonable relationship to the treatment of the accused and the protection of the public," Carswell, 721 N.E.2d at 1258, and is not an abuse of discretion.

Conclusion

The trial court did not abuse its discretion in setting the conditions of Allen's probation. His challenged probation condition is not unreasonably vague because it is clear that if Allen does not complete the mental health exam and all recommended treatment, he will be in violation of his probation. Furthermore, Allen's probation condition is not unduly burdensome on his constitutional rights because it bears a reasonable relationship between the treatment of Allen and the protection of the public.

Affirmed.

MATHIAS, J., and CRONE, J., concur.