F. PROBATION/ PAROLE/CLEMENCY

F.1. Probation (IC 35-38-2)

TITLE: Johnson v. State
INDEX NO.: F.1.
CITE: (3/6/2015), 27 N.E.3d 793 (Ind. Ct. App. 2015)
SUBJECT: Remanded for indigency hearing
HOLDING: Even though the Tr. Ct. set D's probation fees (at $340), it was not error to first conduct an indigency hearing because Ind. Code § 33-37-2-3 does not dictate when to hold such a hearing. See Berry v. State, 950 N.E.2d 798, 802 (Ind. Ct. App. 2011). However, at the latest, the hearing should be held upon completion of a person's sentence.

Thus, the Court remanded case, stating that once D completes his sentence, the Tr. Ct. should hold the indigency hearing about D's ability to pay. See Ind. Code § 33-37-2-3. Also, because D's probation was revoked before he completed his sentence, the Tr. Ct. shall also recalculate the probation fee, if appropriate, to correspond to the probation time D will actually have served. See Ind. Code 35-38-2-1(e). Held, remanded for further proceedings.

RELATED CASES: Negash, 113 N.E.3d 1281 (Ind. Ct. App. 2018) (because Tr. Ct. imposed probation fees, it will need to hold indigency hearing, at the latest, at time D completes his sentence); Polk, 88 N.E.3d 226 (Ind. Ct. App. 2017) (noting that the indigency hearing would have to be held before Tr. Ct. could revoke probation on the basis of a failure to pay fees).

TITLE: King, Jr. v. State
INDEX NO.: F.1.
CITE: (3rd Dist.; 12-21-99), Ind. App., 720 N.E.2d 1232
SUBJECT: Probation revocation - cannot increase sentence as punishment
HOLDING: Tr. Ct. committed reversible error when it enhanced D's conviction from Class A misdemeanor to Class D felony after revoking his probation. After final judgment, Ct. retains only such continuing jurisdiction as is permitted by judgment itself or as is given Ct. by statute or rule. Marts, 478 N.E.2d 63. Moreover, while withholding judgment may be useful practice, it finds no sanction in law. Chissell, App., 705 N.E.2d 501. Here, Tr. Ct. found D guilty of Class A misdemeanor criminal recklessness; however, at sentencing hearing, Tr. Ct. stated that if D violated probation, he would increase D's sentence to Class D felony criminal recklessness. Revocation of probation is not added punishment but merely imposition of punishment that Ct. previously withheld when judgment of conviction was entered, whereas, sentence enhancement is not condition of probation but additional punishment. In effect, Tr. Ct. was entering judgment as Class A misdemeanor & withholding judgment as Class D felony for same offense. Because Tr. Ct. had no authority to do so, conviction for Class D felony must be vacated & conviction for Class A misdemeanor reinstated. Held, judgment reversed.

RELATED CASES: Ennis, App., 806 N.E.2d 804 (distinguishing King, Ct. held that D was not being punished by Tr. Ct. for subsequent conduct, but rather, Tr. Ct. was correcting invalid judgment from class D to class C felony to comply with legislature's directive).

F. PROBATION/ PAROLE/CLEMENCY

F.1. Probation (IC 35-38-2)

F.1.a. Eligibility

TITLE: Halbig v. State
INDEX NO.: F.1.a.
CITE: (7/5/88), Ind., 525 N.E.2d 288
SUBJECT: Probation - not a constitutional right
HOLDING: Probation is merely sentencing tool available to trial judges to use when & as they wish. There is no right to suspended sentence. Therefore, no constitutional issue is presented when D fails to receive consideration of probation regarding sentence provided by legislature. Stroud, 517 N.E.2d 780.

RELATED CASES: Campbell, App., 551 N.E.2d 1164 (probation is matter addressed to sound discretion of trial judge & may be granted as substitute for incarceration).

TITLE: State v. Williams
INDEX NO.: F.1.a.
CITE: (1/18/82), Ind., 430 N.E.2d 756
SUBJECT: Probation - eligibility; suspendibility of habitual offender sentence
HOLDING: Tr. Ct. had no authority to place D on probation & suspend D's sentence on habitual offender charge. To be placed on probation, some part of D's sentence must be suspended. Ct. may suspend any part of sentence for Class A or B felony unless person has prior unrelated felony. Ind. Code § 35-50-2-2. Here, enhancement brought about by habitual offender statute cannot be invoked unless there is, in fact, prior unrelated felony conviction. In addition, habitual offender enhancement is not felony in itself but rather additional penalty for earlier crime. Thus, when D receives enhanced sentence under habitual offender statute, such sentence may not be suspended.

RELATED CASES: Collins, App., 583 N.E.2d 761 (explaining that Williams, 430 N.E.2d 756, is still good law but is no longer correct that habitual offender enhancement is never suspendible because change in Ind. Code § 35-50-2-2 now permits Ct's. to suspend sentences for certain felonies).

F. PROBATION/ PAROLE/CLEMENCY

F.1. Probation (IC 35-38-2)

F.1.b. Conditions (IC 35-38-2-2)

TITLE: Antcliff v. State
INDEX NO.: F.1.b.
CITE: (1st Dist., 6-19-97), Ind. App., 688 N.E.2d 166
SUBJECT: Ordering home detention as condition of probation
HOLDING: Tr. Ct. did not violate plea agreement by ordering D to serve suspended portion of his sentence on home detention. Plea agreement provided that D's maximum executed sentence could not exceed six years, & that terms of probation would be left to Tr. Ct.'s discretion. Under Ind. Code 35-38-2-2.3(a)(15), Tr. Ct. has discretion to place D on home detention as condition of probation. Probation is "a matter of grace & a conditional liberty that is a favor, not a right," & is not equivalent to incarceration. Barton, App., 598 N.E.2d 623. Tr. Ct. did not imprison D by placing him on home detention in this case. Held, no error; reversed & remanded on other grounds.

RELATED CASES: Barker, 994 N.E.2d 306 (Ind. Ct. App. 2013) (Courts may order home detention as a condition of probation, but home detention must be considered executed time rather than time suspended to probation; here Tr. Ct. violated plea agreement 40-year cap on executed sentence by ordering 120 days of home detention in addition to D's 40-year executed sentence; see full review at C.3.b.3); Tubbs, App, 888 N.E.2d 814 (unlike in Antcliff, plea agreement here did not afford Tr. Ct. broad discretion in fixing terms of probation; thus, imposition of three years in community corrections after a nine-year executed sentence constituted an additional substantial obligation of a punitive nature not authorized by agreement).

TITLE: Bunton v. State
INDEX NO.: F.1.b.
CITE: (3d Dist. 8/10/87), Ind. App., 511 N.E.2d 325
SUBJECT: Conditions of probation - imprisonment
HOLDING: Tr. Ct. did not err in placing D on probation while also ordering him to serve executed 4-year term of imprisonment. Ind. Code 35-38-2-2 provides that D may be ordered to serve consecutive period of imprisonment as condition of probation. McVey, App., 438 N.E.2d 770 (case discussed predecessor statute with same provision, Ind. Code 35-7-2-1(c) repealed in 1983).

RELATED CASES: Stromatt, App., 779 N.E.2d 971 (Tr. Ct. has discretion to order either intermittent or consecutive imprisonment as condition of probation, & there need not be suspended portion of sentence for probation to attach; see full review at F.1.c.1); Wilson, App, 403 N.E.2d 1104 (requirement that probationer spend weekends in jail was proper condition of probation).

TITLE: Carroll v. State
INDEX NO.: F.1.b.
CITE: (4th Dist., 12-14-00), 740 N.E.2d 1225 Ind. App.
SUBJECT: Probation conditions - non-immunized clean-up statement
HOLDING: Requirement that D give clean-up statement as condition of probation was improper under Indiana law. D was ordered to give full, truthful & complete statement to drug task force about other crimes & activities of other people. Even though probation order did not provide for grant of immunity, D nonetheless retained his privilege against self-incrimination & was free to refuse to respond to incriminating questions. Thus, probation condition did not violate D's privilege against self-incrimination. However, condition was improper because clean- up statement is not specifically included among twenty listed obligations that Tr. Ct. may impose pursuant to Ind. Code 35-38-2-2.3(a). Further, Tr. Ct.'s comments at revocation hearing clearly showed that purpose of clean-up statement was not D's rehabilitation but was intended to be coercive. Under these circumstances, Ct. found that requiring non-immunized clean-up statement as condition of probation exceeded Tr. Ct.'s authority. Held, probation revocation reversed & remanded with instructions to strike condition requiring clean-up statement.

RELATED CASES: Clemons, 83 N.E.3d 104 (Ind. Ct. App. 2017) (probation condition ordering D to not associate with people of bad character or reputation or with people likely to influence her to commit a crime was impermissibly vague), Collins, 911 N.E.2d 700 (Ind. Ct. App. 2009) (where conditions specified forbidden places as examples of where children congregate, conditions not to be present at locations where children are known to congregate was not unconstitutionally vague; where condition specified forbidden activities as examples, conditions that probation shall not participate in any activity which involves children was not unconstitutionally vague).

TITLE: Carswell v. State
INDEX NO.: F.1.b.
CITE: (2nd Dist.; 12-27-99), Ind. App., 721 N.E.2d 1255
SUBJECT: Probation - conditions for child molest
HOLDING: Probation conditions that D pay for any counseling expenses which victims may incur related to molestation & that D not reside within two blocks of any area where children congregate were erroneous; however, conditions that D submit to warrantless searches, to drug & alcohol tests, & to polygraph examinations as long as polygraph results are not admitted into subsequent Ct. proceedings were not erroneous. Here, D was placed on probation for 2 convictions of child molesting. One condition of D's probation was that he pay for all costs of any counseling of victims due to molestation; however, at time of sentencing, victims had never been through any counseling. Because Tr. Ct. may consider only those expenses incurred by victim prior to date of sentencing in formulating its restitution order, Kotsopoulos, App., 654 N.E.2d 44, 46, this condition was erroneous.

D was also ordered not to reside within two blocks of school, playground or any area where children congregate. Although restricting D from residing two blocks from school or playground was reasonable, restricting D from residing within two blocks of any area where children congregate was too vague. Such condition resulted in total absence of any predictable standard for identifying in advance places near which he was forbidden to locate & should state specific places where children congregate.

Third condition of probation required D to submit to warrantless searches. When determining whether search conditions are valid, Ct. must consider whether condition as written is so broad as to be facially invalid & whether imposition of search condition is reasonably related to D's rehabilitation & protection of public. Probationer's home is protected by Fourth Amendment's requirement that searches be reasonable. Rivera, App., 667 N.E.2d 764. Although better practice may be for judge to include within probation condition itself limitation that such searches be reasonable, there is no error in failure to include such language because reasonableness standard is implied. Thus, condition that D submit to warrantless searches was not facially invalid due to fact that it contained no reasonableness limitation. In addition, search condition was reasonably related to D's rehabilitation & protection of public because molestation goes all too often unreported & recidivism is high.

Ct. also ordered D to submit to drug & alcohol testing & to take lie detection test regarding drug & alcohol use. Any positive results could be used against D in Ct. proceeding. Although there was no evidence that D was drug or alcohol abuser or that his crimes were related to such abuse, condition that he submit to tests was reasonably related to rehabilitation & protection of public because drug use is illegal & it is well known that alcohol impairs judgment. However, Ct. struck portion of condition that results of polygraph will be admitted into subsequent proceedings on basis that Ct. cannot coerce D to agree to admissibility of evidence that otherwise would be inadmissible because it has not been found to be scientifically reliable. Patton, App., 580 N.E.2d 693. Ct. noted that polygraph results may be admissible in probation revocation proceedings because revocation proceeding is civil matter which requires more flexible procedures.

Lastly, Tr. Ct. ordered D to submit to polygraph examinations for treatment purposes & stated he shall be immune from any further prosecution. Although condition did not prohibit all evidentiary uses of polygraph results, condition was proper. Because polygraph results are inadmissible absent stipulation & D was granted immunity, only realistic use of results would be in sentencing. This alone does not invalidate condition. Held, judgment affirmed in part & reversed in part. Note: Although case suggests that polygraph results are admissible in probation revocation hearings, challenge any

admission of results on basis that it violates D privilege against self-incrimination & due process due to its unreliability.

RELATED CASES: Terrell, 40 N.E.3d 501 (Ind. Ct. App. 2015) (D waived state and federal search & seizure rights as condition of probation and search was reasonable); Stott, App., 822 N.E.2d 176 (prohibition from being within 1000 feet of schools & daycare centers is specific & accurately defined as well as serving purpose of keeping D from being where potential victims congregate); Fitzgerald, App., 805 N.E.2d 857 (to extent probation condition prohibiting D from visiting parks, schools, playgrounds, & day care centers could be read to prohibit D from visiting even parks where children do not congregate, such as state parks, probation order was remanded to Tr. Ct. to clarify & limit condition to restrictions relevant to goals of probation); Smith, App., 779 N.E.2d 111 (remanded with instructions to set out any prohibition against pornographic or sexually explicit materials with more specificity; see full review, this section).

TITLE: Chism v. State
INDEX NO.: F.1.b.
CITE: (03-14-05), Ind., 824 N.E.2d 334
SUBJECT: Probation - home detention; authority to order GPS monitoring
HOLDING: Tr. Ct. did not abuse its discretion by modifying conditions of D's probation to allow use of monitoring by global positioning satellites (GPS), which permitted community corrections to identify D's exact location at any given moment with the aid of a satellite. As a condition of home detention, a Ct. must require an offender to maintain "a working telephone in the offender's home" & may require an offender to maintain a "monitoring device" in the offender's home or on the offender's person, or both. Ind. Code 35-38-2.5-6(6). A "monitoring device" is defined as an electronic device that "is limited in capability to the recording or transmitting of information regarding an offender's presence or absence from the offender's home." Ind. Code 35-38- 2.5-3(1). D argued that because GPS monitoring records more than his "presence or absence" from his home, it does not qualify as a "monitoring device" under the Code. Ct. concluded that statute differentiates between: 1) those devices that require the offender's consent (& that of others residing in the home) to allow corrections personnel to watch or listen to things happening inside offender's home, & 2) those devices that a Ct. may require without the offender's consent, devices that simply tell whether the offender is there or not without transmitting images or sound. The GPS monitoring system falls in the latter category. Fact that GPS will tell corrections where D is when he is not at home does not destroy its status as a device that broadcasts only location. Held, transfer granted, Ct. App.' opinion at 813 N.E.2d 402 vacated, judgment affirmed.

TITLE: Disney v. State
INDEX NO.: F.1.b.
CITE: (1st Dist. 10/28/82), Ind. App., 441 N.E.2d 489
SUBJECT: Plea agreement - conditions of probation
HOLDING: A condition of probation which imposes a substantial obligation of a punitive nature is a part of sentence & must be specified in plea agreement. Thus, it is error for Tr. Ct. to include restitution/reparation as condition of probation when there was no mention of such in plea recommendation. A Tr. Ct. is not bound to accept a plea agreement but once agreement is accepted by Ct., Ct. may not change terms. Ind. Code 35-5-6-2(b) [now Ind. Code 35-35-3-3]; State ex rel. Goldsmith v. Marion Superior Ct., 419 N.E.2d 109. Here, Tr. Ct. accepted plea recommendation which did not include/specify that restitution/reparation was a term of probation & later imposed $500 restitution (medical expenses & lost wages to rape victim) as condition of probation. Held, remand with instructions to grant PCR petition to extent that restitution requirement be stricken from probation order.

RELATED CASES: S.S., App., 827 N.E.2d 1168 (Tr. Ct. erred in imposing informal home detention after accepting juvenile D's plea to carrying a handgun without a license in exchange for receiving a suspended commitment); L.W., App., 798 N.E.2d 904 (Juvenile Ct. did not err in placing D on informal home detention as condition of suspended commitment, even though this condition was not part of plea agreement; see full review at U.11.e); Briscoe, App., 783 N.E.2d 790 (Tr. Ct. erroneously imposed $2000 fine on D as part of sentence, because it was not provided for in plea agreement); Freije, 709 N.E.2d 323 (Tr. Ct. violated plea agreement by including home detention & 650 hours of community service work as conditions of D's probation); Sinn, App., 693 N.E.2d 78 (Tr. Ct. erred in ordering D to pay restitution when plea agreement contained no provision allowing such order); Antcliff, App., 688 N.E.2d 166 (where plea agreement expressly provides that Ct. has discretion in establishing terms of probation, Ct. may impose home detention as condition of probation without condition being mentioned in plea agreement itself).

TITLE: Dupin v. State
INDEX NO.: F.1.b.
CITE: (4th Dist. 6/13/88), Ind. App., 524 N.E.2d 329
SUBJECT: Probation conditions - restitution/insurance settlement
HOLDING: Settlement payments to victims from D's insurance company cannot be set off against D's restitution obligations to same victims. Primary goal of restitution is to vindicate society's rights, not to compensate D's victim. Miller, 502 N.E.2d 92. Restitution is part of criminal sentence, like fine or other penalty. Id. Thus, civil settlement is no substitute for restitution. [Citations from other jurisdictions omitted.] Conditions of probation are within discretion of Tr. Ct. Further, settlement agreements here contained specific language that settlement would have no application to any restitution obligation imposed upon D. Held, D not entitled to set-off for insurance settlements.

TITLE: Freije v. State
INDEX NO: F.1.b.
CITE: (3-11-99), Ind., 709 N.E.2d 323
SUBJECT: Additional conditions of probation precluded by plea agreement
HOLDING: Tr. Ct. violated plea agreement by including home detention & 650 hours of community service work as conditions of D's probation. Plea agreement was accepted by Tr. Ct. & called for suspended sentence to be served on probation but made no mention of any conditions of probation & did not grant Tr. Ct. discretion to impose conditions. If Tr. Ct. accepts plea agreement, it shall be bound by its terms. Ind. Code 35-35-3-3(e). Although placement on home detention & performing community service are among obligations listed in Ind. Code 35-38-2-2.3(a) that Tr. Ct. may impose as conditions of probation, Ind. Code 35-35-3-3(e) imposes limits on discretion to impose such conditions. Disney, App., 441 N.E.2d 489. Condition of probation which imposes substantial obligation of punitive nature is part of sentence & penalty & must be specified in plea agreement. Id. Conditions that materially add to punitive obligation, such as home detention & community service, may not be imposed in absence of plea agreement provision giving Tr. Ct. discretion to impose conditions of probation. Held, transfer granted, Ct. App.' decision at 699 N.E.2d 720 reversed & remanded to Tr. Ct. with instructions to accept or reject plea agreement as written.

RELATED CASES: Berry, 10 N.E.3d 1243 (Ind. 2014) (Tr. Ct. exceeded its authority in ordering work release as condition of probation in excess of executed-time cap in plea agreement); Jackson, 968 N.E.2d 328 (Ind. Ct. App. 2012) (Tr. Ct. erroneously imposed community service as a condition of probation, which was not included in written plea agreement; Tr. Ct. cannot vary terms of plea agreement simply by seeking D's verbal assent); Tubbs, App., 888 N.E.2d 814 (imposition of three years in community corrections after a nine-year executed sentence constituted an additional substantial obligation of a punitive nature not authorized by D's plea agreement); L.W., App., 798 N.E.2d 904 (Juvenile Ct. did not err in placing D on informal home detention as condition of suspended commitment, even though this condition was not part of plea agreement; see full review at U.11.e).

TITLE: Howe v. State
INDEX NO.: F.1.b.
CITE: (1/30/2015), 25 N.E.3d 210 (Ind. Ct. App. 2015)
SUBJECT: No error in denying motion to modify probation to allow D contact with daughter
HOLDING: Trial court did not abuse its discretion in denying Defendant's petition to modify probation to allow contact with his daughter. Defendant is incarcerated for a 2005 altercation with his daughter's mother at her home, during which he shot his former mother-in-law in front of his daughter, M. As part of his sentence, Defendant will be on probation for 10 years after his possible release in 2023. Defendant sought modification of an order of protection after learning from probation department that he is not to have contact with his child. Defendant argued that M. was not a victim of the crime and he wanted a relationship with his daughter, who was 12 at the time he sought the modification. M's mother objected to the request, *citing* their daughter's issues stemming from the incident. In affirming denial of Defendant's motion, Court held that M. is an eligible person for protection within the meaning of Ind. Code § 35-38-2-2.3. There is a nexus between the no contact order and Defendant's crimes even though M. was not physically injured or directly attacked during the altercation. Defendant may petition the divorce court for a parenting time order and, depending upon its findings, request the criminal court for relief from the no contact order to the extent necessary to exercise any parenting time ordered. Held, judgment affirmed; Robb, J., concurring in result on basis there is nothing yet to modify as to Defendant's probation because he has not yet begun serving it. However, M. was never mentioned during discussion of the no contact order, so use of "victims" encompassed only M.'s mother and grandmother.

TITLE: Hunter v. State
INDEX NO.: F.1.b.
CITE: (04-01-08), Ind. 883 N.E.2d 1161
SUBJECT: Insufficient evidence of probation violation based on vague "no contact" condition
HOLDING: Conditions of probation must describe with clarity and particularity the misconduct that will result in D being returned to prison. Here, Tr. Ct. revoked D's probation for violating a probation condition that prohibited him from having contact with any person under age 18 and required him to report any incidental contact to his probation officer. Conditions of probation stated "Contact includes face-to-face, telephonic, written, electronic, or any indirect contact via third parties." D was present on multiple occasions in his sister's mobile home when children came home from school, but immediately left the home and did not have face-to-face contact or interaction with them. D argued that he understood the word "contact" as set forth in the terms of his probation to mean "interaction" and that State failed to prove that there was any interaction between children and D. Court agreed, noting that the word "contact" is not commonly understood to occur by mere presence alone. The probation condition lacked sufficient clarity to provide D fair notice that the conduct at issue would constitute a probation violation. Smith v. State, 779 N.E.2d 111 (Ind. Ct. App. 2002). Thus, there was insufficient evidence of violating the prohibition on contact. Court also held that D did not violate the requirement to report because of the vagary of the word "contact" as applied to his challenged behavior. Held, transfer granted, memorandum Court of Appeals' opinion vacated, judgment reversed; Sullivan, J., dissenting.

RELATED CASES: McCarty, 94 N.E.3d350 (Ind. Ct. App. 2018) (probation term requiring D to “avoid persons and places of harmful character, or a person who is likely to influence you to commit a crime" is impermissibly vague; remanded for clarification); Clemons, 83 N.E.3d 104 (Ind. Ct. App. 2017) (probation condition ordering D to not associate with people of bad character or reputation or with people likely to influence her to commit a crime was impermissibly vague); Alford, 965 N.E.2d 133 (Ind. Ct. App. 2012) (Ct. affirmed probation violation finding that D violated no contact order, a condition of probation, by posting false negative review of his father’s cleaning business on Angie’s list; even though D’s contact with father was indirect and not immediately known by father, it was still contact; D used Angie’s list as intermediary through which to communicate with and harass his father); Richardson, App., 890 N.E.2d 766 (D could not be violated for living with his parents in Kentucky when neither State nor Tr. Ct. advised him of alleged travel-restriction condition of probation).

TITLE: Hurd v. State
INDEX NO.: F.1.b.
CITE: (5/21/2014), 9 N.E.3d 720 (Ind. Ct. App. 2014)
SUBJECT: Unreasonable probation condition - 2-mile ban
HOLDING: After D was convicted of battery, Tr. Ct. placed him on probation and issued a sweeping "stay away" order preventing him from "being within hundreds of city blocks in the central part of Indianapolis" which resulted in a pending probation violation. Even though the order was modified, Court of Appeals found an abuse of discretion and the probation condition was not reasonably related to D's treatment and the protection of the public safety. Held, conviction affirmed, reversed and remanded to vacate any probation violations based upon this original condition.

RELATED CASES: Berry, 23 N.E.3d 854 (Ind. Ct. App. 2015) (Tr. Ct.'s statement ordering D to stay away from all properties managed by the Indianapolis Housing Agency was merely a reminder of the ban but not part of an obligation imposed on D by Tr. Ct. as part of D's sentence).

TITLE: Jackson v. State
INDEX NO.: F.1.b.
CITE: (2nd Dist., 10-20-04), Ind. App., 816 N.E.2d 868
SUBJECT: Probation conditions upheld - goals of rehabilitation & public safety
HOLDING: Probation conditions for D convicted of rape were reasonably related to treatment of D & protection of public safety. D claimed that prohibition against contact with anyone under age of eighteen conflicts with Ind. Code 35-38-2-2.4(2), which gives Tr. Ct. discretion to require an offender to avoid contact with anyone under age of sixteen. However, age requirement listed in statute is not a mandatory age limit to be imposed on all sex offenders. If Tr. Ct. imposes a more severe age restriction, it has discretion to do so if Ct. felt such a condition would protect community & rehabilitate D. In this case, where D raped a nineteen-year-old girl, Ct. concluded that no contact with anyone under eighteen was a reasonable probation condition related to goal of protecting community while rehabilitating D. Ct. also rejected D's challenge to conditions requiring daily reports to probation officer regarding his personal life & intimate relationships. Because of D's status as a convicted sex offender, these conditions were necessary to help protect community & rehabilitate D during his three years of probation. Held, judgment affirmed.

TITLE: Jackson v. State

INDEX NO.: F.1.b.

CITE: (3/31/2015), 29 N.E.3d 151 (Ind. Ct. App. 2015)

SUBJECT: Insufficient evidence of probation revocation based on ambiguous reporting requirement

HOLDING: State presented insufficient evidence to support probation revocation where probation condition was ambiguous regarding whether and when D had to report an arrest while on probation for a charge that allegedly occurred before the probation began. One of D's probation conditions provided: "Violation of any law (city, state, or federal) is a violation of your probation; within forty-eight (48) hours of being arrested or charged with a new criminal offense, you must contact your Probation Officer."

D was on probation in February 2014 after pleading guilty in 2012 to neglect of a dependent. While on probation, she was arrested and charged with having committed child molesting in January 2012, before she was sentenced and placed on probation for the neglect charge. D did not notify her probation officer until 30 days after her arrest.

D argued that she was only required to notify her probation officer of any arrests arising from criminal offenses she committed during the probationary term, while the State believed the probation condition required her to notify her probation officer within 48 hours of being arrested regardless of when the alleged offense occurred. Court agreed with D that the probation condition is ambiguous and the use of the semicolon means the two independent clauses are closely related. The clauses would be unrelated if they had been separated by a period. Further, the wording of the second clause renders its meaning ambiguous because the phrase "with a new criminal offense" can be read to apply both to "being arrested" and "charged" or only to "charged." In other words, it is unclear whether D was required to report any arrest or only an arrest arising from a new criminal offense. Court construes any ambiguity against the State. Valenzuela v. State, 898 N.E.2d 480 (Ind. Ct. App. 2008). Accordingly, probation condition here means that D was only required to notify probation officer of any arrests resulting from alleged offenses committed after she began her probation. Held, probation revocation reversed; Bradford, J., dissenting, believes that based on a fair and plain reading of the probation condition, which creates two independent duties, the State presented sufficient evidence to prove that D violated the terms of her probation by failing to report her new arrest within 48 hours to her probation officer.

TITLE: Jones v. State
INDEX NO.: F.1.b.
CITE: (5th Dist., 6-13-03), Ind. App., 789 N.E.2d 1008
SUBJECT: Modifying terms of probation absent violation
HOLDING: Absent material change in circumstances or violation of terms of probation by D, Tr. Ct. may not impose additional conditions of probation not required by statute. Conditions of probation that materially add to punitive obligation may not be imposed in absence of plea agreement provision giving Tr. Ct. discretion to impose conditions of probation. Freije v. State, 709 N.E.2d 323 (Ind. 1999).

Here, D pled guilty to sexual battery, & Ind. Code 35-38-2-2.2 required Tr. Ct. to impose as term of probation that D register with sheriff or police chief & refrain from residing within one thousand feet of school property for probationary period. At sentencing, judge failed to impose these statutorily required conditions, & judge had power to correct this error in D's sentence at a later hearing. However, Tr. Ct. went too far & abused its discretion when it imposed fourteen additional conditions of probation not required by statute, absent a violation of probation. Cases discussing Tr. Ct.'s power to modify conditions of probation at any time involve Ds who are in Ct. on petition to revoke probation. Held, judgment affirmed in part & reversed in part.

Note: Ind. Code § 35-38-2-8, which specifically provides for alteration of probation terms even in absence of a violation, has superseded Jones.

RELATED CASES: Balding, App., 812 N.E.2d 169 (State's delay in requesting collection of DNA sample from D until after probation revocation did not make requirement to submit a sample a new term of D's sentence).

TITLE: Laux v. State
INDEX NO.: F.1.b.
CITE: (2-2-05), Ind., 821 N.E.2d 816
SUBJECT: No contact order improper
HOLDING: Tr. Ct. erred by imposing an order for D to have no contact with his ex- wife's family & their children after his conviction for murdering her. Court held that neither the murder statute (IC 35-50-2-3(a)) nor the death penalty statute (IC 35-50-2-5) authorizes a judge to order a "no contact" order. If the Tr. Ct. had suspended part of the sentence, it could have conditioned that suspension on no contact. The Court further noted alternate statutes would provide a mechanism for the victim's family to seek & obtain a no-contact order. See Ind. Code 5-2-9-5. Held, judgment affirmed in all respects except for the vacating of the no-contact order; Sullivan, J., dissenting would allow the no contact order as the Indiana Civil Protection Order Act (IC 34-26-5-1 & particularly Ind. Code 34-26-5-9(b)(2)) authorize such action even in conjunction with a criminal case (IC 34-26-5-6(1)&(4)) & believes the record sufficiently establishes the family members' wishes to have the order.

TITLE: Lind v. State
INDEX NO.: F.1.b.
CITE: (3d Dist. 3/5/90), Ind. App., 550 N.E.2d 823
SUBJECT: Probation conditions - rules of treatment program
HOLDING: Tr. Ct. did not err in revoking D's probation for violating rules of treatment program, resulting in his dismissal from program. As written condition of D's probation, he was ordered to undergo counseling & therapy. Finding satisfactory program was left to D & his probation officer. Initial program chosen was terminated for unstated reason, & D began therapy with H.E.L.P. Evidence was presented that D missed numerous counseling sessions, & counselor testified that H.E.L.P. had rule that 2 unexcused absences resulted in automatic request for violation of probation, because without regular attendance, patient cannot be successfully & safely treated in outpatient setting. D argues that his probation was violated for failure to follow rules which were not written conditions of probation. It is inherent in Tr. Ct.'s order to undergo counseling & therapy that D abide by program rules so that he could be successfully treated. D's failure to adhere to attendance policy shows blatant disregard for Tr. Ct.'s order to undergo treatment. Held, revocation affirmed. **Note:** See also Disney, App., 441 N.E.2d 489, & related cases (card at F.1.b; Probation - conditions; must be written).

TITLE: Lowrance v. State
INDEX NO.: F.1.b.
CITE: (12/9/2016), 64 N.E.3d 935 (Ind. Ct. App. 2016)
SUBJECT: Sentencing statement did not reinstate right to bear arms
HOLDING: The Tr. Ct.'s statement at D's 1996 sentencing hearing did not restore D's right to bear arms but simply spelled out the terms of his probation. D was convicted of two counts of attempted murder, but he obtained post-conviction relief, and at his new trial he was convicted of Class C felony battery and attempted voluntary manslaughter. Addressing the terms of D's probation, the Tr. Ct. stated, "I'm not going to order that you not possess a firearm, although there was a deadly weapon involved here." Once D completed probation, he tried to buy a gun but was declined because of his convictions. D filed a Motion for Nunc Pro Tunc, asking the Tr. Ct. to make an entry on the docket that the statement at the sentencing hearing constituted an order returning D's right to bear arms. The Tr. Ct. *denied* the motion, and in affirming the Tr. Ct., the Court of Appeals stated, "the Tr. Ct.'s statement at the sentencing hearing did nothing more than set for the terms of [D's] probation." Held, judgment affirmed.

TITLE: Madden v. State
INDEX NO.: F.1.b.
CITE: (2/4/2015), 25 N.E.3d 791 (Ind. Ct. App. 2015)
SUBJECT: Tr. Ct. may delegate decisions re: electronic monitoring to community corrections
HOLDING: Tr. Ct. did not impermissibly delegate its sentencing authority in letting the Jefferson County Community Corrections Department decide whether to put D on electronic monitoring as a condition of probation.

Probation statutes do not bar community correction programs from making decisions about electronic monitoring. Although Ind. Code §35-38-21(a)(1) requires a Tr. Ct. to "specify . . . the conditions of the probation" and Ind. Code § 35-38-2-2.3(a)(16) says "the court may require a person to . . . undergo home detention under. . . . " (emphasis added), D mistakenly concludes the import of these statutes is that only a Tr. Ct. may decide about home detention. Indeed, several statutes let Tr. Ct.s delegate this authority to community corrections. For instance, Ind. Code § 35-38-2.5-5(c) lets a Tr. Ct. order a probationer to home detention supervised by community corrections. Ind. Code § 35-38-2.5-6(3) allows a court to order someone on home detention to follow a schedule prepared by community corrections. See also Ind. Code 35-38-2.5-10(d) (requiring community corrections programs to set the monitoring device and surveillance equipment). Held, judgment affirmed. Riley, J., dissenting, arguing that neither the probation nor home detention statutes contain language that allows Tr. Ct.s to delegate this authority.

TITLE: Malone v. State
INDEX NO.: F.1.b.
CITE: (1st Dist., 5/21/91), Ind. App., 571 N.E.2d 329
SUBJECT: Probation - modification of condition
HOLDING: Tr. Ct. did not err when it required D to abstain from alcohol as condition of probation, although no such condition was part of written plea agreement. Although Tr. Ct. is bound by terms of plea agreement at time it accepts agreement, Tr. Ct. may modify conditions of probation at any time. Ind. Code § 35-38-2-1(b)(1). However, conditions which are punitive in nature must be included in plea agreement itself. Here, order of abstention from use of alcohol is not penal or punitive but is condition reasonably related to probationer's rehabilitation. Thus, Tr. Ct. properly required D to abstain from alcohol as part of his probation. Held, judgment affirmed.

TITLE: McCloud v. State
INDEX NO.: F.1.b.
CITE: (4th Dist., 8/29/83), Ind. App., 452 N.E.2d 1053
SUBJECT: Conditions - reasonable relationship with goals of probation
HOLDING: While restitution may be inappropriate condition following conspiracy conviction, where there was substantial evidence that D unlawfully removed his employer's products from plant in support of conspiracy he had begun with another, Tr. Ct. appropriately considered employer victim of crime & acted within its discretion in ordering D to pay restitution as condition of probation. Tr. Ct. may require probationer to make restitution to victim of his crime for damage or injury sustained. Only limitation on sentencing judge's broad power to impose probationary conditions designed to serve accused & community is that condition must have reasonable relationship to treatment of accused & protection of public. Ewing, App., 310 N.E.2d 571. Here, State established that D agreed to commit theft from employer & did in fact take employer's products as overt act in furtherance of conspiracy. Thus, Tr. Ct. appropriately considered employer victim of crime when ordering D to pay restitution as condition of probation. Held, judgment affirmed.

RELATED CASES: Patton, 990 N.E.2d 511 (Ind. Ct. App. 2013) (probation condition prohibiting D from visiting websites children commonly access was narrowly tailored to D's rehabilitative needs and society's interests); Sickels, 982 N.E.2d 1010 (Ind. 2013) (even though custodial parent holds support payments in trust for benefit of children, custodial parent is a "victim" for purposes of Ind. Code 35-50-5-3(a) and is entitled to restitution for arrearage, even if children are emancipated, because law presumes custodial parent used her money to offset arrearage); Whitener, 982 N.E.2d 439 (Ind. Ct. App. 2013) (although D's rape conviction was vacated because it was based on the same evidence that supported his burglary conviction and thus violated double jeopardy, requiring D to register as a sex offender as a probation condition was proper and reasonably related to his rehabilitation); Rumple, App., 529 N.E.2d 861 (D, who was convicted of possession of marijuana, could not be ordered to pay restitution as condition of probation because there was no victim to crime); Judge, App., 659 N.E.2d 608 (D may be ordered to pay restitution to police & fire departments since state entity can be considered victim for purposes of payment of restitution); Reinbold, 555 N.E.2d 463, *rev'd* on other grounds (survivors of murder victims, particularly their dependent children, could constitute victim for purposes of restitution).

TITLE: McVey v. State
INDEX NO.: F.1.b.
CITE: (4th Dist., 03-30-07), Ind. App., 863 N.E.2d 4340
SUBJECT: Probation conditions for sex offenders
HOLDING: In child molesting prosecution, D challenged six special probation conditions as unconstitutionally vague or otherwise improper as not bearing a reasonable relationship to his rehabilitation. Condition requiring D to notify probation officer of establishment "of a dating, intimate and/or sexual relationship" was insufficiently clear as to what conduct could result in his being returned to prison, as there are widely varying opinions on what constitutes a "date." Condition preventing D from being alone with & participating in activities involving children under eighteen years of age is reasonable, but additional prohibition on "incidental contacts" is overly broad. Following Fitzgerald v. State, 805 N.E.2d 857 (Ind. Ct. App. 2004), Court held that: 1) condition prohibiting possession of pornographic or sexually explicit material or any materials "related to illegal or deviant interests or behaviors" was unconstitutionally vague; & 2) condition prohibiting D from being present at parks or other locations where children might be present was unconstitutionally vague.

Court upheld two challenged probation conditions as sufficiently clear & specific, bearing a reasonable relationship to protection of public & rehabilitation: 1) that D shall not travel alone after 10:00 p.m., unless given prior permission by probation officer; & 2) that D receive prior approval from his probation officer to use the internet. Held, reversed & remanded to alter or reconsider & clarify certain conditions with greater specificity.

RELATED CASES: Salhab, 153 N.E.3d 297 (Ind. Ct. App 2020); Kelp, 119 N.E.3d 1071 (Ind. Ct. App. 2019) (probation condition prohibiting D from visiting “businesses that sell sexual devices or aids” was unfairly broad because it could extend to drug stores); Bratcher, 999 N.E.2d 864 (Ind. Ct. App. 2013) (a probation condition banning the D's use of the internet without approval by his probation officer is constitutional); Patton, 990 N.E.2d 511 (Ind. Ct. App. 2013) (probation condition prohibiting D from visiting websites children commonly access was not overly broad or excessively vague); Collins, 911 N.E.2d 700 (Ind. Ct. App. 2009) (finding sex offender conditions unconstitutionally vague).

TITLE: Meunier-Short v. State
INDEX NO.: F.1.b.
CITE: (4/14/2016), 52 N.E.3d 927 (Ind. Ct. App. 2016)
SUBJECT: Probation conditions to attend college & work full time erroneous
HOLDING: When imposing terms of probation, Tr. Ct. abused its discretion when it told D to return to college and maintain a "C" average, and to also maintain full time employment. As a condition of probation, a Tr. Ct. may require a person to "[w]ork faithfully at suitable employment or faithfully pursue a course of study or career and technical education that will equip the person for suitable employment." Ind. Code § 35-38-2-2.3(a)(1) (emphasis added). The Tr. Ct. erred by ordering both. Thus, the case is remanded for Tr. Ct. to give D the option for one or the other as a condition of probation. Held, judgment reversed in part.

TITLE: Patton v. State
INDEX NO.: F.1.b.
CITE: (2d Dist. 11/04/91), Ind. App., 580 N.E.2d 693
SUBJECT: Unrestricted admissibility of future polygraphs - improper condition of probation
HOLDING: Condition of probation that "any polygraph taken of D will be admissible as evidence in court..." was error because it is inappropriate for Ct. to coerce D to agree to admissibility of otherwise inadmissible evidence. D objected to condition both on that ground & on ground that it compelled him to be witness against himself. Ct. rejected self-incrimination argument, noting that conditions which may impinge on probationer's exercise of constitutional right may sometimes be proper. Owens v. Kelley, (11th Cir. 1982), 681 F.2d 1362. Ct. found condition on its face didn't impinge on D's 5th Amend. rights because he retained right to assert privilege during polygraph, & intrusion on right was not greater than requiring him to answer reasonable inquiries of probation officer.

As to blanket admissibility of future polygraphs, however, Ct. noted that polygraphs are generally excluded because they are not proven sufficiently accurate to provide foundation for admissibility. Condition requiring polygraph exams would be appropriate if it bore reasonable relationship to rehabilitative aspect of probation, i.e., by instilling fear of detection of violations or monitoring progress. Requiring D to stipulate to unrestricted admissibility of exam results in any subsequent proceeding, including trial on pending or subsequent charge, went too far. Held, remanded to strike offensive part of condition.

RELATED CASES: Smith, 929 N.E.2d 255 (Ind. Ct. App. 2010) (probation condition stating that any unfavorable polygraph test results would constitute probation violation deprived D of right to due process because it removed State's burden to prove that a violation actually occurred); Hoeppner, App., 918 N.E.2d 695 (probation condition providing that results of a polygraph examination are admissible in future court proceedings is impermissible; a condition requiring that positive results will constitute a probation violation seems to remove the State's obligation to prove that a violation has, in fact, occurred, thus violating due process; these provisions stricken or modified by court of appeals); Carswell, App., 721 N.E.2d 1255 (when D is given immunity, condition requiring polygraph does not need to limit all evidentiary use of results because polygraph is inadmissible without stipulation regardless); Johnson, App., 716 N.E.2d 983 (Tr. Ct. did not abuse discretion by ordering as term of D's probation that he submit to polygraph examinations when requested by probation department).

TITLE: Polk v. State
INDEX NO.: F.1.b.
CITE: (11/30/2017), 88 N.E.3d 226 (Ind. Ct. App. 2017)
SUBJECT: Case remanded after trial court failed to impose probation fees for felony conviction
HOLDING: Ind. Code § 35-38-2-1(b) requires trial court to impose probation fees for felony convictions. Here, after Defendant was convicted of various felonies, trial court found him to be indigent and ordered the probation department to conduct a financial assessment. Then in its written sentencing order, trial court said it was assessing $0 in court costs against Defendant, but was silent on the amount of probation fees. However, Defendant's probation order contained a "standard condition" requiring him to pay all fines, costs, fees and restitution as directed.

Probation fees were never imposed, so Defendant appealed, arguing the trial court's order for the probation department to conduct a financial assessment was an improper delegation of its authority.

Trial court abused its discretion because it did not follow its statutory requirement to impose probation fees on Defendant. Thus, the Court remanded the case for trial court to impose probation fees and to hold an indigency hearing. See Johnson v. State, 27 N.E.3d 793, 795 (Ind. Ct. App. 2015) (requiring trial courts to hold indigency hearings for probation fees, "(a)t the latest,... at the time a defendant completes his sentence"). Court noted that the indigency hearing would have to be held before trial court could revoke probation on the basis of a failure to pay fees.

TITLE: Robinette v. State
INDEX NO.: F.1.b.
CITE: (2nd Dist., 11-2-94), Ind. App., 641 N.E.2d 1286
SUBJECT: No-contact probation condition
HOLDING: D pleaded guilty to battering his estranged wife & was sentenced to four years suspended imprisonment, with probation for two years. As special condition of probation, D was ordered to have no contact with his wife & her mother. Marriage was dissolved after imposition of sentence. Four-year sentence was ordered executed after D violated this condition two times by battering, intimidating, & harassing his estranged wife. Held, probation revocation affirmed.

In dicta, Ct. stated that no-contact probation condition did not infringe upon any constitutional right to privacy in marriage. D waived argument by failing to object to special probation condition at time it was imposed & at hearings for probation violations. Rejected privacy right was based upon D's unilateral desire to associate with his wife, where wife wanted no part of marital relationship, had begun dissolution proceedings, & was victim of felony battery perpetrated by D.

RELATED CASES: Rodriguez, App., 714 N.E.2d 667 (limitation on visitation with daughter was proper condition of home detention)

TITLE: Seals v. State
INDEX NO.: F.1.b.
CITE: (2nd Dist., 10-27-98), Ind. App., 700 N.E.2d 1189
SUBJECT: Probation - oral advisement of conditions & D's acknowledgment sufficient
HOLDING: Failure to provide probationer with written statement of conditions of probation at sentencing hearing is harmless where record reflects that probationer has been orally advised by sentencing Ct. of conditions of his probation & where D specifically acknowledges that he understands those conditions. White, 560 N.E.2d 45. For oral advisement to be sufficient, it must 1) apprise D in adequately definite terms of behavior required of him, 2) be addressed to D, 3) be administered by sentencing Ct., & 4) be identified as conditions of D's continued probation. Ratliff, App., 546 N.E.2d 309. Here, Tr. Ct. informed D that he was required as condition of his probation to report to probation officer as directed. D indicated that he understood this condition. Following sentencing hearing, probation officer contacted D & ordered him to report to probation office. D did not report or otherwise contact probation officer. Therefore, D failed to comply with probation condition of which he was aware, & Tr. Ct.'s failure to provide written statement was harmless. Held, probation revocation affirmed.

RELATED CASES: Allen, App., 809 N.E.2d 845(although sentencing Ct. gave a "fairly specific" advisement of conditions, the probation violation was properly dismissed because D did not acknowledge that he understood the conditions; see full review, this section).

TITLE: Skipworth v. State
INDEX NO.: F.1.b.
CITE: (1/10/2017), 68 N.E.3d 589 (Ind. Ct. App. 2017)
SUBJECT: Domestic violence counseling order affirmed
HOLDING: Trial court did not err in ordering domestic violence counseling even though Defendant was not convicted on a domestic battery charge. Defendant was convicted of strangulation and criminal confinement involving his former girlfriend. Although complaining witness (C.W.) described her relationship with Defendant as "just roommates," there was evidence in the record that the two had previously lived together as part of an intimate relationship, so domestic violence counseling was "reasonably related" to Defendant's treatment and public safety.

Court agreed with Defendant's argument that the trial court's written sentencing statements erred by making alternate misdemeanor sentencing discretionary upon completion of his probation and by requiring the 26-week course as a condition of his probation because it would be impossible to complete the entire course before his suspended sentence expired. Thus, Court remanded to trial court to correct this clerical error. Held, judgment affirmed in part and remanded.

TITLE: Smith v. State
INDEX NO.: F.1.b.
CITE: (11-27-02), Ind. App., 779 N.E.2d 111
SUBJECT: Probation condition forbidding pornographic materials - unconstitutionally vague
HOLDING: Probation condition that D convicted of child molesting was forbidden from possessing pornographic or sexually explicit materials was unreasonably vague. Blanket prohibition on "pornography" is unclear & unconstitutionally vague, but restriction of D's access to sexually oriented materials is constitutional, so long as restriction is set forth with sufficient clarity & with nexus to goals of supervised release. U.S. v. Loy, 237 F.3d 21 (3rd Cir. 2001). Held, remanded to Tr. Ct. with instructions to set out any prohibition against "pornographic or sexually explicit materials" with more specificity.

RELATED CASES: Rexroat, 855 N.E.2d 165 (Ind. Ct. App. 2012) (condition requiring D to have no contact with any person under age of 18 unless approved by probation was not overbroad in violation of First Amendment rights; condition did not explicitly prohibit incidental contact); Harris, App., 836 N.E.2d 267 (condition to not possess any items that attract children or may be used to coerce children to engage in inappropriate or illegal sexual activities was unconstitutionally vague); Foster, App., 813 N.E.2d 1236 (as in Smith, this condition did not define "sexually explicit or pornographic"; thus condition was not sufficiently clear to inform D what conduct would result in his being returned to prison); Fitzgerald, App., 805 N.E.2d 857 (condition restricting possession or viewing of "any pornographic or sexually explicit materials, including...videos, television programs, DVD's, CD's, magazines, books, Internet web sites, games, sexual devices or aids or any material which depicts partial or complete nudity...or any other materials related to illegal or deviant interests or behaviors" was unreasonably vague, even though it was not as patently overbroad as similar condition in Smith).

TITLE: Smith v. State
INDEX NO.: F.1.b.
CITE: (2nd Dist., 4-27-00), Ind. App., 727 N.E.2d 763
SUBJECT: "No contact" probation condition upheld
HOLDING: Probation condition prohibiting contact with children under age sixteen until completion of sex offenders treatment program was neither vague nor overbroad under Indiana & United States Constitutions. Ind. Code 35-38-2-2.4 provides that as condition of probation, Tr. Ct. may require offender to: 1) participate in approved treatment program for sex offenders, & 2) avoid contact with any person who is less than sixteen years of age, unless probationer receives Ct. approval or successfully completes treatment program. Here, mother of five-year-old boy testified that she had married D after his release from prison & that she was aware of "no contact" probation condition. D was present in same car & house as boy. Further, evidence established that on at least one occasion D had physical contact with boy. In rejecting D's vagueness challenge to statute, Ct. noted that no reasonable person of ordinary intelligence would have difficulty determining that intentional interaction with & physical touching of boy was proscribed by statute.

D also argued that Ind. Code 35-38-2-2.4 was unconstitutionally overbroad because it impermissibly impedes upon his First Amendment right of association by unreasonably prohibiting inadvertent or unintentional contact with persons under age sixteen. Although condition requiring probationer to avoid such contact with children is unworkable & too broad to be reasonably related to purposes of statute, Ct. held that failure of Ind. Code 35-38-2-2.4 to explicitly address inadvertent or unintentional contact does not render statute facially overbroad. It is inherent in statute that probationer is not required to avoid inadvertent or unintentional contact with persons under sixteen years of age. Held, probation revocation affirmed.

TITLE: State v. Allen

INDEX NO.: F.1.b.

CITE: (4th Dist., 6-03-04), Ind. App., 809 N.E.2d 845

SUBJECT: Failure to give D written copy of probation conditions - dismissal of probation violation charge affirmed

HOLDING: Tr. Ct. did not err in granting D's motion to dismiss a probation violation charge where judge at sentencing had read D the terms of his probation but did not provide a written copy of the terms to him. Ind. Code 35-38-2-2.3 (b) provides that when a person is placed on probation, he "shall" be given a written statement specifying the conditions of probation. However, harmless error can be found if the Ct. does not provide a written copy of the conditions but orally advises D of the conditions & he acknowledges that he understands the conditions. Kerrigan v. State, 540 N.E.2d 1251 (Ind. Ct. App. 1989). Here, Ct. found that although sentencing Ct. gave a "fairly specific" advisement of conditions, the probation violation was properly dismissed because D did not acknowledge that he understood the conditions. Held, judgment affirmed.

RELATED CASES: Gil, 988 N.E.2d 1231 (Ind. Ct. App. 2013) (Tr. Ct. failed to provide D a written statement of probation terms but did orally indicate the sole term of probation (no contact with victim); however, Ct. reversed because D did not acknowledge this term).

TITLE: State v. Burdin
INDEX NO.: F.1.b.
CITE: 924 S.W.2d 82 (Tenn. 1996)
SUBJECT: Sex Offender Can't Be Made to Publicize Conviction as Probation Condition
HOLDING: Requiring D to place sign in front yard stating that he is convicted child molester is not authorized probation condition under Tennessee law. Even conditions authorized under "catch-all" category must serve purpose of rehabilitation. Court also commented that display of such a sign would be inconsistent with policy, expressed in state's sex offender registry statute, of limiting public disclosure of information about sex offenders.

TITLE: State v. Greeson
INDEX NO.: F.1.b
CITE: 2007 Mont. 23, 152 P.3d 695 (Mont. 2007)
SUBJECT: Alcohol-testing unrelated to crime of identity theft
HOLDING: The Montana Supreme Court held D convicted of identity theft should not have been subjected to a special probation condition that required her to submit to regular drug and alcohol testing where there was no indication that drugs or alcohol played a role in her commission of the offense.

Under a state statute, a probation condition is valid only if it is sufficiently related to the objectives of rehabilitation and the protection of the victim and society. Nothing in the record indicated that D had a drug or alcohol problem or that substance abuse contributed to her crime, thus the goals of probation were not furthered by the special condition. Although D admitted to experimenting with marijuana and using alcohol in her youth, this was insufficient to justify the condition. Similarly, it rejected the State's argument that a family history of chemical dependence justified the condition, saying that this factor by itself was "totally irrelevant." Court also sought to clarify alcohol-related probation conditions in State v. Holt, 139 P.3d 819 (Mont. 2006). In Holt, it held that the fact that D would be more likely to reoffend if he used alcohol did not justify forbidding him to drink in the absence of evidence that alcohol played a part in the thefts he committed.

TITLE: Tharp v. State

INDEX NO.: F.1.b.

CITE: (2nd Dist., 02-18-10), 922 N.E.2d 641 (Ind. Ct. App. 2010), *rev'd*. on other grounds 942 N.E.2d 814

SUBJECT: Erroneous delegation of authority to add more terms to probation

HOLDING: Tr. Ct. erred by giving probation department authority to add probation terms beyond what Tr. Ct's. probation order imposed. Delegating authority to probation department to add more terms to Tharp's probation was erroneous because Tr. Ct., not probation department, sets all terms of probation and must do so at sentencing. Lucas v. State, 501, N.E.2d 480, 481 (Ind. Ct. App. 1996) Here, at sentencing, Tr. Ct. issued probation order listing twelve standard conditions of probation. However, "Special Conditions" section of order provides that "[c]ourt leaves terms and conditions of probation up to probation." Tr. Ct. should have imposed all probation conditions at sentencing instead of giving probation department option to add more conditions. Held, judgment reversed.

TITLE: Trammell v. State
INDEX NO.: F.1.b.
CITE: (1st Dist., 6-18-01), Ind. App., 751 N.E.2d 283
SUBJECT: No pregnancy as condition of probation
HOLDING: Tr. Ct.'s order that D not become pregnant while on probation excessively impinged upon her privacy right of procreation & served no discernible rehabilitative purpose. Probation condition must have reasonable relationship to treatment of accused & protection of public. Carswell v. State, 721 N.E.2d 1255 (Ind. Ct. App. 1999). No-pregnancy condition did nothing to improve D's parenting skills or educate her regarding perinatal care or child nutrition & development should she choose to become pregnant after her probationary period expires or even happen to become pregnant while on probation. There are significantly less intrusive means of protecting unborn child that offer decisively more reasonable balance of rehabilitative, constitutional, & law enforcement factors. Held, neglect of dependent conviction affirmed but remanded with instructions to vacate no-pregnancy probation condition.

TITLE: Taylor v. State
INDEX NO.: F.1.b.
CITE: (5th Dist., 1-14-05), Ind. App., 820 N.E.2d 756
SUBJECT: Probation condition - establishing paternity of child
HOLDING: Tr. Ct. did not act beyond scope of its authority in requiring D to establish paternity of child as condition of probation, where D had always lived with mother and child. D argued that this condition had no relationship to his OWI conviction, nor did it safeguard the general public. D attempted to distinguish Gordy v. State, 674 N.E.2d 190 (Ind. Ct. App.1996), where a similar probation condition was upheld where D attempted to cash an AFDC check he stole from the mother of his children. Court noted public policy favors establishing paternity of a child born out of wedlock and it also prospectively safeguards the general public by creating a legal obligation for support and formally establishes the familial relationships that create a law-abiding citizen. Court also rejected D's privacy challenge under the federal and Indiana constitutions, noting convicted individuals do not enjoy the same constitutional protections as other citizens and probation is a matter of grace. Court also relied on fact that blood testing for paternity likely was not necessary here where D and the mother testified under oath that D is the father. Court also declined to reweigh the sufficiency of the evidence in relation to the OWI conviction, where D and his passenger both testified the passenger actually was driving and the D had to climb out the driver's side door due to a broken passenger's door but a police officer testified she saw D in the driver's seat. Held, judgment affirmed.

RELATED CASES: Hale, App., 888 N.E.2d 314 (In prosecution for operating vehicle with alcohol concentration equivalent of at least .15 causing death, Tr. Ct. did not abuse its discretion in imposing as a term of probation that D not operate any type of motor vehicle for his ten years of probation).

TITLE: United States v. Maloney
INDEX NO.: F.1.b.
CITE: 515 F.3d 350 (3rd Cir. 2008)
SUBJECT: Probation term concerning questioning by police found overly vague
HOLDING: Third Circuit Court of Appeals held a condition of supervised release that required an offender to notify his probation officer within 72 hours of being "arrested or questioned" by a law enforcement officer was too vague to support a finding that a violation occurred when the offender neglected to report that he had been confronted by a city code enforcement officer and cited for failing to display a peddler's license. Court noted a great deal of disagreement at the revocation hearing as to just what "questioning" meant in this context. The district court and probation officer focused on the fact that the offender ultimately received a summons for failing to display the license, but Court noted that "the language of the condition focuses not on the result of the questioning, but on the simple act of questioning. We will not read the condition of supervision to incorporate a result-based threshold that is not evident on its face." Court also rejected probation officer's argument that the condition should be construed to encompass any "contact" with law enforcement, saying there was nothing in the record to indicate that the offender should have interpreted it that broadly. To comply with the condition, the offender would have to guess what the term meant, making it impermissibly vague.

TITLE: United States v. Sales
INDEX NO.: F.1.b.
CITE: 476 F.3d 732 (9th Cir. 2007)
SUBJECT: Computer limitations appropriate for child porn, not counterfeiting
HOLDING: The Ninth Circuit Court of Appeals held that a district court abused its discretion under the federal supervised release statute when it imposed extremely broad restrictions on computer use upon D convicted of using computer equipment to counterfeit currency. Court noted that the sweeping restrictions on computer use courts have routinely approved in cases involving Ds' use of computers to acquire and distribute child pornography are not appropriate in this sort of case.

D was convicted of using his scanner and printer to make counterfeit cash. On appeal, he challenged conditions of his supervised release related to his computer use. One condition required him to obtain approval from his probation officer before using any computer or computer-related devices, screen names, passwords, e-mail accounts, or Internet service providers. The category of computer-related devices was broad enough to encompass cell phones and Internet appliances such as WebTV. The other release condition provided that all computers, computer-related devices, and their peripheral equipment used by D were subject to unannounced searches and seizures, as well as the installation of search and/or monitoring software and/or hardware.

Court held that the release conditions were invalid because they were not reasonably related to the nature and circumstances of D's counterfeiting offense or to his history and characteristics, as required by the supervised release statute, 18 U.S.C. ' 3583. Court distinguished case from those involving offenders who were involved in downloading and distributing child pornography. Such broad computer restrictions were appropriate in those cases due to the strong link between child porn and the Internet. However, no suggestion in the record connected the Internet and D's counterfeiting activities. As for the search and seizure provision, Court found it to be overbroad and insufficiently tailored to D's crime.

TITLE: United States v. Soltero

INDEX NO.: F.1.b.

CITE: 510 F.3d 858 (9th Cir. 2007)

SUBJECT: Supervised release condition prohibiting association with 'any disruptive group' violated First Amendment

HOLDING: Ninth Circuit Court of Appeals held that a condition of supervised release that required a street gang member convicted of being a felon in possession of a firearm to refrain from "associating with any known member of any . . . disruptive group" violated his First Amendment right to free association. Court held the substantial encroachment upon D's First Amendment rights created by the condition was unjustified and had to be struck., noting "the term 'disruptive group' has a broad meaning and could reasonably be interpreted to include not only a criminal gang, but also a labor union on strike, a throng of political protestors, or a group of sports fans celebrating after their team's championship victory." Court did uphold a release condition that prohibited D from associating with members of the particular gang to which he belonged or "any criminal street gang."

TITLE: Walker v. State
INDEX NO.: F.1.b.
CITE: (3d Dist. 8/29/84), Ind. App., 467 N.E.2d 1248
SUBJECT: Probation - conditions
HOLDING: Tr. Ct. did not abuse discretion in imposing following conditions of probation on D, convicted of check deception: (1) restitution either in cash or by labor; (2) hire accountant; (3) apologize to victims; (4) refrain from leaving state; (5) refrain from handling banking accounts; (6) refrain from committing criminal offenses; (7) seek employment; (8) inform probation dept. re bankruptcy proceedings; (9) pay fine if restitution not accomplished. Here, D contends conditions are contradictory/unreasonable. Tr. Ct. is vested with broad discretion in granting probation/formulating conditions. Hoffa, App., 358 N.E.2d 753, reversed on other grounds 368 N.E.2d 250. Court finds each condition either falls into specific category of Ind. Code 35-38-2-2 or into "catchall" category (subsection 14). Held, no error.

RELATED CASES: Coleman, 162 N.E.3d 1184 (Ind. Ct. App. 2021) (after D pleaded guilty to strangulation, Tr. Ct. did not abuse its discretion in ordering that he attend and complete classes in anger management or conflict resolution, even though plea agreement did not include any conditions of probation); Johnson, App., 659 N.E.2d 194 (requirement that Ds attend reproductive health lecture was valid condition of probation); Gordy, App., 674 N.E.2d 190 (Tr. Ct. did not act beyond scope of its authority in requiring D to establish paternity of four of his children as condition of probation); Shumaker, App., 431 N.E.2d 862 (good behavior is always condition of probation); Ewing, App, 310 N.E.2d 571 (Tr. Ct. may impose special probation conditions on persons convicted of drug and drug related offenses which are in addition to or different from conditions imposed upon other offenders).

TITLE: Weida v. State
INDEX NO.: F.1.b.
CITE: (4/12/2018), 94 N.E.3d 682 (Ind. 2018)
SUBJECT: Internet probation conditions for sex offenders
HOLDING: As part of D's sentence for Level 5 felony incest with his 16 year-old niece, Tr. Ct. ordered standard sex offender probation conditions, including prohibiting all internet use without prior approval of his probation officer (Condition 26) and prohibiting accessing or using certain web sites, chat rooms and instant messaging programs frequented by children (Condition 8). On transfer from a divided Court of Appeals opinion, Supreme Court concluded that D's "troubles recognizing sexual boundaries in person and online should not result in the far-reaching, broad internet ban" imposed by Condition 26. This Condition is not reasonably related to D's rehabilitation or maintaining public safety, considering fact "we live in an internet-saturated society." Restricting D's access to obscene or sexually explicit material would be more appropriate and reasonably relate to his rehabilitation and public safety.

However, when viewed in the larger context of D's probation conditions, Condition 8 is not unconstitutionally vague, because it reasonably relates to D's rehabilitation and protecting the public, and is not unduly intrusive upon his right to free speech under the First Amendment. It does not ban internet access altogether, but only access to websites children use to communicate. Thus it provides sufficient clarity and particularity to give a person with ordinary intelligence fair notice of what conduct is generally proscribed. Held, transfer granted, Court of Appeals opinion at 83.N.E.3d 704 vacated, judgment affirmed in part, reversed in part and remanded.

TITLE: White v. State
INDEX NO.: F.1.b.
CITE: (9/20/90), Ind., 560 N.E.2d 45
SUBJECT: Probation conditions - writing; deadline for alternative service
HOLDING: Where sentencing order was silent as to deadline for completing alternative service, Tr. Ct. did not err in revoking D's probation for failing to complete service by date indicated to him by probation officer. Among conditions of D's probation was completion of 10 days alternative service. Nearly one month before end of D's term of probation, his probation officer filed petition to revoke probation due to numerous violations, including failure to complete alternative service &, Tr. Ct. revoked probation due to this failure. On appeal, D claimed that because deadline for completion of service was not included in Tr. Ct.'s written conditions of probation, Tr. Ct. erred in revoking probation before full term had expired. Court of Appeals agreed & reversed. Ind. S. Ct. accepts transfer & vacates Court of Appeals opinion, noting confusion on this issue. First, Court notes that probation is opportunity for D to undergo rehabilitation in lieu of incarceration, & Tr. Ct. must have opportunity to monitor D's progress & perhaps revoke probation if it is not succeeding. Tr. Ct. has no authority to revoke probation after completion of term. See Rode v. Baird, (1924), 144 N.E. 415. [But see 1990 amendment to Ind. Code 35-38-2-3.] Tr. Ct. set conditions of probation, & necessarily delegated to probation officer supervision & implementation of those conditions. Time for completing service was not "condition" of probation, but detail of implementation to be worked out by probation officer. Held, revocation upheld. Dickson, J., DISSENTS.

TITLE: Wilder v. State
INDEX NO.: F.1.b.
CITE: (1/9/2018), 91/1016 (Ind. Ct. App. 2018)
SUBJECT: Probation condition prohibiting possession of handgun
HOLDING: A condition of probation prohibiting D from possessing firearms was proper because he was convicted of battery resulting in bodily injury, a crime of violence, and the purpose of the condition is to keep dangerous weapons out of the hands of "those who have shown a propensity for violence."

Ind. Code § 35-38-2-2.3(a)(9), which seems to allow a categorical ban on firearm possession by any probationer, is constitutional as applied to D who committed a violent crime. The condition is a more "modest burden" on D's right to bear arms, applying only during the 365-day probation period. Because the curtailment of D's right to bear arms is related to the State's role of keeping dangerous weapons out of the hands of probationers, his rights under the Second Amendment to the U.S. Constitution were not violated. Likewise, because there was a rational basis for the firearm restriction, the condition does not impose a material burden on his right to bear arms under Article 1, Section 32 of the Indiana Constitution and it fulfills a significant and legitimate law enforcement need. Held, judgment affirmed.

F. PROBATION/ PAROLE/CLEMENCY

F.1. Probation (IC 35-38-2)

F.1.c. Duration of term

TITLE: Hart v. State
INDEX NO.: F.1.c.
CITE: (2nd Dist., 07-22-08), Ind. App., 889 N.E.2d 1266
SUBJECT: Probationary period begins upon release from prison
HOLDING: In opinion affirming denial of D's petition for post-conviction relief, Court rejected D's argument that his probationary period had expired while he was in prison serving a consecutive sentence in a different case. Given the rehabilitative purpose of probation, a process which can only be accomplished outside the confines of prison, it is axiomatic that "[o]ne may not be simultaneously on probation and serving an executed sentence." Thurman v. State, 320 N.E.2d 795 (Ind. Ct. App. 1974). Although D may have been within his "probationary period" while incarcerated, he had not yet actually begun serving the monitored probation components of his sentences outside of prison. Rather, D's release from the DOC triggered the monitored probationary phase of his sentence. D's reliance on Crump v. State, 740 N.E.2d 564 (Ind. Ct. App. 2000) and Meeker v. Indiana Parole Board, 794 N.E.2d 1105 (Ind. Ct. App. 2003), in support of his contention that he served and completed his probation while simultaneously serving his executed sentences, is misplaced. Held, judgment affirmed.

RELATED CASES: Davis, 35 N.E.3d 261 (Ind. Ct. App. 2015) (probation counsel ineffective for failing to argue probationary term had expired before D committed new offense; probation begins when a person is released from incarceration, not when they report to probation).

F. PROBATION/ PAROLE/CLEMENCY

F.1. Probation (IC 35-38-2)

F.1.c.1. In general

TITLE: Albright v. State
INDEX NO.: F.1.c.1.
CITE: (2nd Dist., 3-24-99), Ind. App., 708 N.E.2d 15
SUBJECT: Erroneous sentence - probation & sentence exceeded maximum allowed by statute
HOLDING: Tr. Ct. erred in sentencing D to combined term of probation & imprisonment exceeding statutory maximum for class A misdemeanor. D pled guilty to two counts of operating while intoxicated, both class A misdemeanors. At time of his sentencing hearing, D had been incarcerated for 288 days while awaiting trial. Judge sentenced D to one year for each offense, to be served consecutively. Judge reduced executed portion of D's sentence to time served but placed D on probation for one full year for each offense. D's time served equaled 576 days because he was entitled to good time credit under Ind. Code 35-50-6-3.

Combined term of probation & imprisonment exceeding one year is inconsistent with maximum term for conviction for misdemeanor. Smith, 621 N.E.2d 325. Having served at least 365 days, D's first one-year sentence had been completed. Thus, no probationary period could be imposed for that conviction. In addition, D had served 211 days, & had only 154 days left to serve on his second one-year sentence. Therefore, Tr. Ct. erred when it imposed full year of probation for second conviction. Because sentencing order imposed, sentence that was greater than one year for each of convictions, Ct. remanded to Tr. Ct. for determination of sentencing order that imposes terms of probation & imprisonment not in excess of one year for either of D's convictions. Held, judgment reversed & remanded.

RELATED CASES: Wann, 997 N.E.2d 1103 (Ind. Ct. App. 2013) (order to serve 90 days of originally suspended sentence in jail did not violate Tr. Ct.'s statutory authority to sentence within statutory maximum for misdemeanor); Jones, 982 N.E.2d 417 (Ind. Ct. App. 2013) (sentence for OWI Class A misdemeanor was not illegal where it ordered D to execute 40 days executed, 325 days to be suspended, and 325 days to be served on probation; under Smith, 621 N.E.2d 325, 326, only the total number of days created by adding executed days and days on probation are counted to determine if sentence impermissibly exceeds the 1-year maximum for Class A misdemeanors); Jennings, 982 N.E.2d 1003 (Ind. 2013) ("term of imprisonment" means the total amount of time incarcerated and does not include suspended time); Collins, App., 835 N.E.2d 1010 (Tr. Ct. erred in sentencing D in excess of prescribed statutory maximum; incarcerated period includes entire portion of D's sentence, i.e., both the executed & suspended sentence); Copeland, App., 802 N.E.2d 969 (Tr. Ct. lacked authority to impose a 180-day probation period on a Class A misdemeanor domestic battery conviction where it had also ordered a 365-day suspended sentence); Fry, 939 N.E.2d 687 (Ind. Ct. App. 2010); Beck, App., 790 N.E.2d 520 (Tr. Ct. erred when it sentenced D to combined jail term & period of probation that exceeded one year); Williams, App., 759 N.E.2d 661 (failure to credit D with 487 days presentence jail time had effect of improperly sentencing D to time that exceeded statutory maximum); Jester, App., 746 N.E.2d 437 (community service was condition of D's work release & not sentence above & beyond one-year maximum imposed; community service is reasonable term of placement for person completing sentence

on work release); Tawdul, App., 720 N.E.2d 1211 (remanded for resentencing where D's combined executed sentence & probationary period exceeded one year).

TITLE: Day v. State
INDEX NO.: F.1.c.1.
CITE: (5th Dist., 9/9/96), Ind. App., 669 N.E.2d 1072
SUBJECT: Probation - probation may begin after consecutive sentences
HOLDING: Tr. Ct. did not err in ordering D to being his probationary term after serving consecutive sentences. Whenever Ct. suspends sentence for felony, it shall place person on probation under Ind. Code § 35-38-2 for fixed period to end not later than date that maximum sentence that may be imposed for felony will expire. Ind. Code § 35-50-2-2(c). Here, D was ordered to serve nine years of probation after serving consecutive sentences for two offenses. D was not entitled to consecutive probationary terms served directly following completion of each prison term solely because sentences imposed were consecutive. Because D's probationary term was equal to & did not exceed his suspended sentences, Tr. Ct.'s order was not in violation of Ind. Code § 35-50-2-2. Held, judgment affirmed.

TITLE: Hoage v. State
INDEX NO.: F.1.c.1.
CITE: (2d Dist. 7/11/85), Ind. App., 479 N.E.2d 1362
SUBJECT: Probation - duration of term cannot exceed statutory maximum
HOLDING: Tr. Ct. erred in sentencing D to one-year suspended sentence with 30 days executed & 4 additional years "informal probation" for misdemeanor assault & battery conviction. Statutory maximum is one year. Ind. Code 35-50-3-1 & 2. Tr. Ct.'s discretion in sentencing is limited by its grant of statutory authority. Rife, App., 424 N.E.2d 188. Court rejects state's contention that D's oral agreement at sentencing hearing constitutes consent. Tr. Ct. was without authority to impose sentence greater than allowable by law. Morgan, App., 417 N.E.2d 1154. D's consent to probationary period exceeding statutory maximum, obtained in coercive setting in which court has power to imprison D without any probation, is without effect. US v. Rodriguez (CA9 1982), 682 F.2d 827. Held, probation beyond one year reversed.

RELATED CASES: Willis, App., 498 N.E.2d 1029 (probation term in sentence for murder provided for 30-year prison sentence and 30-year probation term was void since no portion of 30-year sentence was suspended).

TITLE: Slinkard v. State
INDEX NO.: F.1.c.1.
CITE: (1st Dist., 4-28-04), Ind. App., 807 N.E.2d 127
SUBJECT: Requiring substance abuse program in addition to maximum jail term - no error
HOLDING: In operating vehicle with .10% BAC or greater prosecution, Tr. Ct. did not err in requiring D to participate in substance abuse program (SAP) for which he had to pay program service fee of $225, in addition to serving sixty days in jail. A Tr. Ct. generally does not have statutory authority to combine executed sentence & probationary term that exceeds maximum statutory term of conviction of misdemeanor. Smith v. State, 621 N.E.2d 325 (Ind. 1993). However, D was not placed on probation, & requiring him to participate in SAP is not akin to probation. A trial judge has authority pursuant to Ind. Code 9-30-5-15 to impose additional penalties on a class C misdemeanant involved in a driving offense. Statute specifically provides for additional penalties & involvement in SAP for individuals who have had multiple convictions for driving while intoxicated. In addition, Ind. Code 33-19-5-1(3) allows for alcohol & drug services user fees to be imposed by Ct. Held, judgment affirmed in part & reversed in part on other grounds.

TITLE: Smith v. State
INDEX NO.: F.1.c.1.
CITE: (09-28-93), Ind., 621 N.E.2d 325
SUBJECT: Maximum probation period for misdemeanor
HOLDING: Fundamental sentencing guidelines concerning felonies apply likewise to misdemeanors. Although under limited circumstances misdemeanor probation period may now be extended under Ind. Code 35-50-3-1, it was error for Tr. Ct. to sentence D to combined term of probation & imprisonment exceeding one year; granting transfer & reversing Ct. App. decision at 610 N.E.2d 265 on this issue. D was convicted of class A misdemeanor & received sentence of one year's incarceration with 255 days suspended, followed by one year's probation, including 6 months of home detention. Therefore, total time of probation & imprisonment was 100 days greater than year. Ct. App. upheld sentence, finding that Ind. Code 35-50-2-2(c) did not limit misdemeanor sentences. Ind. S. Ct. noted that "`it is necessary to consider the whole act & all other law relating thereto, and, if possible, give effect to it in all of its parts.'" (*citing* to Dowd v. Johnson, 47 N.E.2d 976). Ct. held that combination of executed sentence & probationary period could not exceed maximum statutory sentence for offense, & found it was error to extend misdemeanant's penalty to term exceeding then-existing one year limitation, no matter what combination of prison sentence or assessment of probation under suspended sentence was used. Held, remanded to Tr. Ct. for determination of probation consistent with opinion. **Note:** Ind. Code 35-50-3-1, amended in 1993, now extends maximum probationary sentence for misdemeanors only when use or abuse of alcohol, drugs, or similar substances is contributing factor or material element of offense.

RELATED CASES: Jennings, 982 N.E.2d 1003 (Ind. 2013) (the current version of I. C. 35-50-3-1(b) supersedes Smith as it allows for a sentence that exceeds the maximum for a misdemeanor as long as the combined term of imprisonment and probation does not exceed one year; "term of imprisonment" means the total amount of time incarcerated and does not include suspended time); Judge et al., App., 659 N.E.2d 608 (imposition of two-year probationary term on each D was excessive, where maximum consecutive sentence available for convictions was one year & 180 days' imprisonment).

TITLE: Strowmatt v. State

INDEX NO.: F.1.c.1.

CITE: (12-17-02), Ind. App., 779 N.E.2d 971

SUBJECT: Imprisonment as condition of probation - intermittent or consecutive; discretionary with Ct.

HOLDING: Tr. Ct. did not err in sentencing D to twenty years for child molesting conviction, with 10 years suspended, & entire ten-year term of probation to be served in prison as condition of probation. D argued that because portion of sentence of imprisonment as condition of probation was not ordered served consecutive or intermittent to another portion of probation period, Tr. Ct.'s sentencing judgment exceeded statutory authority. Ind. Code 35-38-2-2.3 authorizes either intermittent or consecutive imprisonment as condition of probation. Further, Tr. Ct. may suspend sentence, place D on probation & then order, as condition of probation, D to serve consecutive period of imprisonment. McVey v. State, 438 N.E.2d 770 (Ind. Ct. App. 1982). D also argued that there must be suspended portion of sentence for probation to attach, either consecutive or intermittent. Tr. Ct. may impose conditions of probation at whatever time or intervals it deems appropriate, meaning that terms imposed are discretionary with Tr. Ct. Ind. Code 35-38-2-2. Because Tr. Ct.'s sentencing order was authorized by statute & did not exceed term of probation, Tr. Ct. properly sentenced D. Therefore, post-conviction Ct. properly denied motion to correct erroneous sentence. Held, judgment affirmed.

RELATED CASES: Sharp, App., 817 N.E.2d 644 (assuming that 18-month term of imprisonment exceeded remaining amount of probation, Tr. Ct. erred by imposing 18-month term of imprisonment as condition of D's probation because that term exceeded remaining amount of D's probation).

TITLE: Sutton v. State
INDEX NO.: F.1.c.1.
CITE: (4th Dist. 11/27/90), Ind. App., 562 N.E.2d 1310
SUBJECT: Credit time - incarceration as condition of probation
HOLDING: Tr. Ct. did not err in refusing to give D credit for pre-trial incarceration against incarceration imposed as condition of probation. D was convicted of battery, class C felony, & received 8-year sentence. Tr. Ct. suspended this sentence, placing D on 8 years' probation, & then ordered D to serve "a term of imprisonment of 7 years consecutive time at an appropriate facility" as condition of probation. Tr. Ct. ordered that 352 days which D had served pre-trial should not apply to this term of imprisonment added as condition of probation. D objects to this denial of credit-time, arguing that total sentence exceeds 8 year maximum & is therefore illegal. Majority finds that sentence is proper. Tr. Ct. made clear that term of probation should end on same date as suspended sentence. Assuming that D remains in Class I, he will be actually imprisoned for less than 4 & 1/2 years, including 352 days served pre-trial. Ct. App. has held that Tr. Ct. may suspend sentence, place D on probation, & order term of imprisonment as condition of probation. McVey, App., 438 N.E.2d 770. No statute requires Tr. Ct. to credit time served pre-trial against probation, nor has legislature addressed question of whether it must be credited against imprisonment imposed as condition of probation. Absent statutory requirements, matter is within discretion of Tr. Ct., & Ct. App. finds no abuse of discretion. Held, sentence affirmed. Baker, J., DISSENTS, arguing that D earned Class I credit of 704 days for time served pre-trial, so that only 6 years & 26 days remained for Tr. Ct. to suspend.

F. PROBATION/ PAROLE/CLEMENCY

F.1. Probation (IC 35-38-2)

F.1.c.2. Extension and modification

TITLE: Addington v. State
INDEX NO.: F.1.c.2.
CITE: (2nd Dist., 07-16-07), Ind. App., 869 N.E.2d 1222
SUBJECT: Probationary period tolled by agreement
HOLDING: At probation revocation hearing, D expressly requested that Tr. Ct. withhold sanction & allow him to participate in drug Ct. program. Sanction remained unresolved pending the outcome of D's participation in the drug Ct. program & no final determination was made until Tr. Ct. actually imposed the sentence. Thus, Tr. Ct.'s order tolled D's probationary period until Tr. Ct. made a final determination in the case five months later when it imposed twenty-four months of the suspended sentence. Following holding in Debro v. State, 821 N.E.2d 367 (Ind. 2005), Ct. held that D cannot now complain that Tr. Ct.'s imposition of sentence following termination of his participation in drug Ct. was untimely. Held, judgment affirmed.

TITLE: Ferrill v. State
INDEX NO.: F.1.c.2.
CITE: (2nd Dist., 04-14-09), 904 N.E.2d 323 (Ind. Ct. App. 2009)
SUBJECT: Probation - no authority to *sua sponte* modify conditions
HOLDING: Tr. Ct. did not have authority to *sua sponte* modify probation conditions. Ind. Code 35-38-2-1(b) seems to indicate that a Tr. Ct. may modify the probation conditions "at any time." However, the cases discussing Tr. Ct.'s power to modify the conditions at any time involve Ds who are in court on a petition to revoke probation. Jones v. State, 789 N.E.2d 1008, 1011 (Ind. Ct. App. 2003). Thus, a Tr. Ct. is without authority to modify the terms of a D's probation unless the D first violates the conditions of his probation even though the additional conditions arguably are reasonably related to the rehabilitation of the D. Id. at 1012.

Here, there was confusion over whether D was originally ordered to GPS monitoring as a condition of his probation. The order of probation never included GPS monitoring as a condition. Eventually, Tr. Ct. *sua sponte* set the case for a hearing to review the probation conditions and found that even if the parties did not believe GPS monitoring was originally a condition of probation, the court was now ordering GPS monitoring. Because GPS monitoring was never a written condition, it was not an original condition of probation to which D could be subjected. Moreover, because D was never found to have violated probation, Tr. Ct. could not *sua sponte* modify probation to include GPS as a condition. Thus, Tr. Ct. erred by adding GPS monitoring as a condition of probation. Held, judgment reversed.

RELATED CASES: Collins, 911 N.E.2d 700 (Ind. Ct. App. 2009) (declining to follow Ferrill, *supra*, and holding that Tr. Ct's have statutory authority to add probation conditions after probation begins even though the probationer has not committed a violation; such authority does not violate due process or ex post facto protections).

TITLE: Gilbreath v. State
INDEX NO.: F.1.c.2.
CITE: (5th Dist., 5-4-01), Ind. App., 748 N.E.2d 919
SUBJECT: Illegal extension of D's probation - petition to revoke not filed
HOLDING: Tr. Ct. impermissibly extended term of D's probationary period & failed to follow statutory procedures for revoking probation. One day after D's probationary period ended, State filed "motion to extend probation" -- not a "petition to revoke probation" as required by Ind. Code 35-38-2-3(a). Revocation of probation without statutory prerequisite of filing petition for revocation of probation violates D's due process rights. England v. State, 670 N.E.2d 104 (Ind. Ct. App. 1996). D's due process rights were also violated by absence of hearing before Tr. Ct. issued its order extending probation. Statute authorizing extension of probation requires that petition to revoke be filed within probationary period & finding by Ct. that person has violated a condition. Ind. Code 35-38-2-3(g). Here, motion that was filed (in lieu of required petition) was not filed within probationary period & Tr. Ct. made no finding that D had violated a condition of probation. Held, reversed & remanded.

TITLE: Hardy v. State
INDEX NO: F.1.c.2.
CITE: (09-28-12), 975 N.E.2d 833 (Ind. Ct. App. 2012)
SUBJECT: Probation revocation - probation period extended by agreement
HOLDING: Tr. Ct. did not abuse its discretion in ordering D to serve five previously suspended sentences when it revoked his probation. D argued that Tr. Ct. could not revoke his probation in three of the five cases because he believed the revocation petition was filed more than one year after the maximum termination date under IND. CODE 35-38-2-3. However, D signed an agreement extending his probation in these three cases to January 2014 to allow him additional time to complete his probation requirements. Extension agreement was not the result of a revocation proceeding and D did not show he had a right to counsel when entering into it. A probation modification agreement is akin to a plea agreement, and once accepted by Tr. Ct., it is binding upon both parties and Tr. Ct. D did not challenge the validity of the extension agreement before Tr. Ct. and therefore waived any challenge to it. In the other two cases, although D had not yet begun serving his probation when the petitions for revocation were filed, Tr. Ct. had authority to revoke his probation. Rosa v. State, 832 N.E.2d 1119 (Ind. Ct. App. 2005). Held, judgment affirmed.

TITLE: Hayes v. State
INDEX NO.: F.1.c.2.
CITE: (1st Dist. 04/28/92), Ind. App., 590 N.E.2d 1116
SUBJECT: Tolling of probation period when violation filed
HOLDING: Even where probation violation (PV) charge is ultimately dismissed, period of probation during pendency of charge is tolled, & probation period is extended by that period of time. D was placed on probation for 2 years, beginning 5/7/87. On 6/16/88, notice of PV was filed, & arrest warrant issued. PV charge was dismissed by probation on 12/9/88. On 4/4/89, second PV charge was filed, & third charge was filed on 4/5/89. Both of these charges were also ultimately dismissed on 1/17/90, & at that time, probation department requested Ct. to extend probation until 5/7/91, to allow D to pay fines & costs. Ct. granted extension, & on 1/30/91, another PV charge was filed, alleging D had been arrested for burglary & theft. On 4/19/91, D was convicted of theft, & on 5/3/91, Ct. revoked D's probation. D argued that period after filing of notice of PV until determination of charges, should not be tolled where he is found not guilty or violation charge is dismissed, &/or he should be credited with that time on his probation period. Ct., however, found statutory language in Ind. Code 35-38-2-3(c) was plain & unambiguous, & must be held to mean what it clearly & expressly says: "[t]he issuance of a summons or warrant tolls the period of probation until the final determination of the charge." Ultimate determination in D's favor or dismissal of PV did not work to change this tolling. Due to tolled periods, D was still on probation when last PV charge was filed, & Ct. had authority to revoke probation. Transfer denied.

RELATED CASES: Perry, App., 642 N.E.2d 536 (conditions of probation not tolled during period PV filed); Phillips, App., 611 N.E.2d 198, ("Notice of Hearing" form is equivalent to summons & so service of notice tolls probationary period.)

TITLE: Howe v. State
INDEX NO.: F.1.c.2.
CITE: (1/30/2015), 25 N.E.3d 210 (Ind. Ct. App. 2015)
SUBJECT: No error in denying motion to modify probation to allow D contact with daughter
HOLDING: Trial court did not abuse its discretion in denying Defendant's petition to modify probation to allow contact with his daughter. Defendant is incarcerated for a 2005 altercation with his daughter's mother at her home, during which he shot his former mother-in-law in front of his daughter, M. As part of his sentence, Defendant will be on probation for 10 years after his possible release in 2023. Defendant sought modification of an order of protection after learning from probation department that he is not to have contact with his child. Defendant argued that M. was not a victim of the crime and he wanted a relationship with his daughter, who was 12 at the time he sought the modification. M's mother objected to the request, *citing* their daughter's issues stemming from the incident. In affirming denial of Defendant's motion, Court held that M. is an eligible person for protection within the meaning of Ind. Code § 35-38-2-2.3. There is a nexus between the no contact order and Defendant's crimes even though M. was not physically injured or directly attacked during the altercation. Defendant may petition the divorce court for a parenting time order and, depending upon its findings, request the criminal court for relief from the no contact order to the extent necessary to exercise any parenting time ordered. Held, judgment affirmed; Robb, J., concurring in result on basis there is nothing yet to modify as to Defendant's probation because he has not yet begun serving it. However, M. was never mentioned during discussion of the no contact order, so use of "victims" encompassed only M.'s mother and grandmother.

TITLE: Knight v. State

INDEX NO.: F.1.c.2.

CITE: 155 N.E.3d 1242 (Ind. Ct. App. 2020) (09/15/2020)

SUBJECT: Trial court followed procedural requirements for probation hearing but lacked discretion to impose additional community service requirements

HOLDING: Under Ind. Code § 35-38-2-1.8, "probation can be altered at any time, even in the absence of a probation violation. Collins v. State, 911 N.E.2d 700, 708 (Ind. Ct. App. 2009). Here, after a senior judge accepted Defendant's plea agreement, the presiding judge scheduled a modification of probation hearing and amended the conditions of probation to include a term requiring Defendant to perform 600 hours of community service and to report his progress to the probation department monthly. The Court of Appeals held that while the trial court complied with the procedural requirements of Ind. Code § 35-38-2-1.8(c) when conducting a new probation hearing, the imposition of the community service condition was beyond the trial court's discretion because that condition was not specified in the plea agreement and the agreement contained language that limited the court's discretion. Although the agreement conferred broad discretion to the trial court to impose probation conditions, the later language providing that Defendant's probation would revert to nonreporting probation ultimately imposed a limitation of the trial court's discretion to order a probation condition that would require continued reporting. Defendant waived his claimed violation of his right to allocution during the new probation hearing by failing to object.

TITLE: Perry v. State
INDEX NO.: F.1.c.2.
CITE: (3rd Dist., 11-16-94), Ind. App., 641 N.E.2d 536
SUBJECT: Conditions of probation not tolled during period PV filed
HOLDING: Although period of probation is tolled between State's filing of revocation petition & final determination of charge, D remains subject to conditions of probation during tolled period. D pleaded guilty to Operating While Intoxicated & as condition of probation was ordered to refrain from possessing or consuming alcohol. State eventually filed petition to revoke probation, alleging that D tested positive for presence of alcohol. D admitted this violation & was ordered to serve 60 days on home detention. On date of hearing, State filed second petition to revoke probation, alleging that D had once again tested positive for alcohol consumption. At second hearing Tr. Ct. revoked D's probation & ordered execution of original sentence, less time served. Purpose of Ind. Code 35-38-2-3(c), which automatically tolls period of probation upon filing of petition to revoke probation, is to grant Tr. Ct. power to revoke probation upon determination of violation, even though disposition regarding that violation occurs after original term of probation has expired, Slinkard v. State, Ind. App., 625 N.E.2d 1282. Ct. rejected D's argument that legislature intended to free probationers from conditions of their probation during time frame between filing revocation petition & final disposition. Ind. Code 35-38-2-3(c) tolls period of probation, not conditions of probation, & D remained subject to conditions of probation at time of second violation.

TITLE: Sandy v. State
INDEX NO.: F.1.c.2.
CITE: (3d Dist. 12/22/86), Ind. App., 501 N.E.2d 486
SUBJECT: Revocation of suspended sentence
HOLDING: Tr. Ct. had no authority to revoke D's suspended sentence once term of underlying sentence had expired. Rode v. Baird (1924), 196 Ind. 335. Here, D was given 2 months suspended sentence following conviction of DWI. Suspended sentence was conditioned upon attendance & completion of alcohol & drug services program & no further alcohol related arrests for one year. Tr. Ct. did not implicitly put D on probation. Suspension of sentences & grant or denial of probation is exclusively governed by statute. Thurman, App., 320 N.E.2d 795. For misdemeanor convictions, controlling statute is Ind. Code 35-50-3-1. When Tr. Ct. merely suspends sentence, Tr. Ct. can still place reasonable conditions on D's continued liberty; however, conditions & Tr. Ct.'s power to revoke suspension evaporate at end of suspended sentence. Tr. Ct. revoked D's suspended sentence 11 months after entering judgment. Held, revocation reversed. Garrard CONCURS IN RESULT, but would apply AR 15(E) & find defect one of form & not ground for reversal.

TITLE: Slayton v. State
INDEX NO.: F.1.c.2.
CITE: (2d Dist. 3/7/89), Ind. App., 534 N.E.2d 1130
SUBJECT: Probation - duration of term
HOLDING: Tr. Ct. had no authority to extend D's probation beyond term of suspended sentence. D was originally sentenced to 3 consecutive 1-year misdemeanor terms, which were suspended, & was placed on probation for 3 years. Before 3 years was up, Tr. Ct. determined that D violated probation & ordered probation extended 1 additional year. During additional year, D again received notice of probation violation. At evidentiary hearing, D moved to dismiss because Tr. Ct. did not have authority to extend probation beyond 3-year suspended sentence. Tr. Ct. denied motion, found violation, & revoked 1-year extended probation, ordering D incarcerated for 1 year. D appeals, arguing that Tr. Ct. could not revoke probation, because as matter of law, he was not on probation at time. State argues that D is impermissibly making collateral attack on original proceedings in which probation was extended. Ind. Code 35-50-3-1 provided at time D was sentenced that Tr. Ct. may suspend misdemeanor sentence & place D on probation for not more than 1 year. D received 3 1-year sentences, & was placed on 3 years of probation. State argues that Tr. Ct. has authority to modify or enlarge conditions of probation, but that does not include length of term. Conditions or undertakings of probation which may be modified or enlarged are found in Ind. Code 35-38-2-2. Because Tr. Ct. did not had authority to extend D's probation, he was not on probation at time of alleged violation. Held, reversed & remanded with instructions to terminate D's probation.

RELATED CASES: Snider, App., 753 N.E.2d 721 (Tr. Ct. properly sentenced D, who pled guilty to class D felony, to a non-suspendable one year on in-home detention followed by six months probation); Bailey, App, 731 N.E.2d 447 (after Slayton was decided, legislature amended Ind. Code 35-38-2-3 to allow Cts. to extend probationary period for 1 year if D violates probation; thus, now Cts. can extend probationary period beyond maximum sentence); Antcliff, App., 688 N.E.2d 166 (Ind. Code 35-38-2.5- 5 provides that D can only be placed on home detention during probation for minimum term of imprisonment for crime committed; because minimum sentence for Class D felony is six months according to Ind. Code 35-50-2-7, D could only be placed on home detention for six months).

F. PROBATION/ PARAOLE/CLEMENCY

F.1. Probation (IC 35-38-2)

. Violations/revocation (grounds)

TITLE: Ashba v. State
INDEX NO.: F.1.d.
CITE: (5th Dist. 04/29/91), Ind. App., 570 N.E.2d 937
SUBJECT: Revocation of probation while on parole
HOLDING: Probation may be revoked for offense committed while D is on parole for same conviction, & revocation of both parole & probation for same offense does not violate prohibition against double jeopardy (DJ). D pleaded guilty to burglary & received 6 year sentence, with 2 years executed, 4 years suspended, & 4 years of probation. After serving short period of sentence, he was released by DOC & placed on parole. While on parole, D was charged with misdemeanor, & DOC revoked his parole & reinstituted 180 days of his sentence. Tr. Ct. found violation of probation because of same misdemeanor charge, & revoked his probation, ordering service of additional 180 days of his suspended sentence.

D argued that because he was on parole from DOC, he remained in its custody & control, & Tr. Ct. lacked jurisdiction to revoke his probation because he had not begun his probationary period. Ct. App. looked to federal, & other state jurisdictions. All of them had adopted position that Tr. Ct. could revoke D's probation before he completes sentence & begins probationary period. Ct. also looked to Ind. Code 35-38-2-1 & Ind. Code 35-38-2-3 & noted that both statutes spoke of terminating or revoking probation at any time. This language permitted Tr. Ct. to revoke probation even before D enters probationary phase of sentence. The grant of suspended sentence & probation is grant of conditional liberty & is favor, not right, & once D engages in unlawful activity, whether on parole or not, he violates terms of probation. Revoking both D's parole & probation for the same conduct does not violate prohibition against DJ because violation of condition of probation is not offense for purposes of DJ. Held, judgment affirmed.

RELATED CASES: Kincaid, App., 736 N.E.2d 1257 (no error in ordering D to serve six years executed for probation violation, even though D served two years executed in Ohio for same instance of illegal use of cocaine); Shumate, App., 718 N.E.2d 1133 (although DJ did not bar second probation revocation, collateral estoppel did).

TITLE: Barnes v. State
INDEX NO.: F.1.d.
CITE: (2nd Dist., 2-12-97), Ind. App., 676 N.E.2d 764
SUBJECT: Probation revocation - failure to pay restitution
HOLDING: Before incarcerating probationer for failure to make restitution, Tr. Ct. must inquire into reasons for failure to make required payments. If Tr. Ct. finds that probationer has willfully refused to make restitution or has failed to make sufficient bona fide efforts to pay, his probation can be revoked. Bahr, App., 634 N.E.2d 543. However, if Tr. Ct. finds that probationer is unable to pay despite sufficient bona fide efforts, Tr. Ct. must consider imposition of alternative means of punishment rather than imprisonment. To imprison probationer who is unable to comply with financial conditions of probation through no fault of his own without considering alternative means of punishment violates fundamental fairness required by Fourteenth Amendment. Bearden v. Georgia, 461 U.S. 660 (1983).

Here, Tr. Ct. properly revoked D's probation for his failure to pay restitution. D argued that he was unable to make restitution payments due to his incarceration on unrelated criminal charges & indigent status. Upon inquiry into reasons for D's failure to pay, Tr. Ct. found that D was indigent by choice because he chose to violate law. This is not situation where probationer is unable to comply with financial conditions through no fault of his own. Instead, D voluntarily engaged in course of conduct which made him unable to comply with financial conditions of his probation. D's constitutional rights to fundamental fairness were not violated by his probation revocation & incarceration. Held, judgment affirmed.

RELATED CASES: Barnes, App., 692 N.E.2d 485 (State failed to prove willful failure to pay fines & costs); Garrett, App., 680 N.E.2d 1 (evidence insufficient to show that D violated her probation by failing to make good faith effort to pay restitution & to become employed); Mitchell, App., 559 N.E.2d 313 (finding that D is unable to pay restitution cannot solely be based on finding that D is eligible for indigent counsel); Bitner, App., 546 N.E.2d 117 (Tr. Ct. required to determine whether D has ability to pay restitution when restitution ordered, along with suspended sentence, pursuant to sentencing statute rather than probation statute); Sparkman, App., 432 N.E.2d 437 (evidence sufficient to show that D violated probation by knowingly or intentionally failing to meet financial obligation imposed upon him by sentence).

TITLE: Bedtelyon v. State
INDEX NO.: F.1.d.
CITE: (03/04/2022), Ind. Ct. App., 184 N.E.3d 1216
SUBJECT: Sexually suggestive anime cartoons did not meet statutory definition of obscene matter
HOLDING: Under the terms of his probation after a conviction for sexual misconduct with a minor, Defendant was prohibited from "accessing, viewing, or using internet websites and computer applications that depict obscene matter as defined by IC 35-49-2-1." After his probation officer learned he viewed several anime videos on YouTube with titles like, "My Mother and Sister Pretend to Be Expecting My Babies After I Lost My Memory," she watched the videos and determined they were obscene. Relying only on the testimony of other people who watched the videos, the trial court found Defendant violated the probation term against viewing obscene matter and revoked his previously suspended sentence. The Court of Appeals reversed because the testimony merely proved the videos were suggestive but did not prove they constituted "obscene matter" under the statutory definition. Overall, the evidence suggested the videos might have erotic themes, are erotic in tone, and describe erotic feelings. But the State did not present evidence that "sexual conduct" as defined by statute was depicted or described, rather than merely implied. The Court found the State's arguments otherwise were "conclusory." It also found the State's reliance on a prior case, Fordyce v. State, was misplaced. Fordyce involved an obscene book in which there was a description of incestuous sexual conduct. But here, the Court could not infer from such a "slim record" that sexual conduct occurred in the videos. Held, judgment reversed and remanded.

TITLE: Brown v. State
INDEX NO.: F.1.d.
CITE: (2d Dist. 12/22/83), Ind. App., 458 N.E.2d 245
SUBJECT: Probation - revocation; burden of proof; criminal activity
HOLDING: Where sole ground for revocation of probation is conviction of subsequent crime & that conviction is reversed, then basis for revocation no longer exists & must be reversed. (CA app., CT, FL, MD decisions cited). Reversal is not required if revocation was based on proof of conduct. (CT, MD decisions cited.) Here, D's conviction for involuntary manslaughter was sole basis for probation revocation. Manslaughter conviction was reversed because of presence of unauthorized persons during D's grand jury proceedings (Brown, App., 434 N.E.2d 144). State contends reversal on any basis other than sufficiency does not change fact jury found D guilty as charged. Court finds no authority for this position. Effect of appellate court's reversal of judgment is to vacate & nullify Tr. Ct.'s judgment, restoring parties to position they held before judgment. Held, denial of D's PCR petition reversed.

TITLE: C.S. v. State
INDEX NO.: F.1.d.
CITE: (2nd Dist., 11-30-04), Ind. App., 817 N.E.2d 1279
SUBJECT: Probation revocation - evidence insufficient; presence of cocaine metabolites in urine
HOLDING: Ct. reversed revocation of probation for juvenile who tested positive for cocaine metabolites. Drug screen was done five days after juvenile was placed on probation. Ct. noted that "cocaine metabolites appear in the urine for some time period after cocaine has been ingested." State produced no evidence of what that time period might be & no prior screen established that the juvenile was free of drugs prior to probation being implemented. Because of this, Ct. was "left to merely speculate" whether the cocaine was used before or after probation was imposed.

Based on Cox v. State, 706 N.E.2d 547 (Ind.1999), Ct. rejected juvenile's claim that his confrontation rights to cross-examine his accuser were violated because the testing information was presented by a probation officer without knowledge of the testing procedures employed. Probation revocation hearings are not governed by the Indiana Rules of Evidence & the hearsay nature of testimony is not objectionable. Held, judgment reversed.

RELATED CASES: Carpenter, 999 N.E.2d 104 (Ind. Ct. App. 2013) (where State's expert testified that a person can test positive for phenobarbital up to three weeks after ingestion, the State failed to prove D ingested the drug during probation when she was placed on probation just five days earlier).

TITLE: Gardner v. State
INDEX NO.: F.1.d.
CITE: (2nd Dist., 4-2-97), Ind. App., 678 N.E.2d 398
SUBJECT: Probation revocation - community corrections program; no error
HOLDING: D was sentenced to 545 days imprisonment with zero days suspended, but was required to serve sentence at community corrections program with probation thereafter. After sentencing hearing, but before beginning his executed sentence or probation period, D was arrested for new offense. On appeal from probation revocation, D argued that neither his probationary period nor his executed sentence had begun. Therefore, there was no probation that could be revoked. Ct. reviewed language of Ind. Code 35-38-2.6 & noted that placement in community corrections program is akin to probation, because statute provides for suspended sentence. Probation is merely condition resulting from suspended sentence. State v. Lowdermilk, 245 Ind. 93, 195 N.E.2d 476 (1964). Ct. held that, following Lowdermilk, & fact that placement into community corrections program inherently involves suspension of sentence, D's sentence was suspended on day of sentencing, & he was therefore on probation at time of violation. However, in sentencing D, Tr. Ct. used term "executed sentence," & sentencing order noted that D received zero days suspended sentence. Probation after community corrections commitment would ordinarily violate principle that probation must rest upon suspended sentence. Here, however, legislature has circumvented that "rule" with Ind. Code 35-38-2.6-7, which requires probation after completion of community corrections program. Thus, D's probation was properly revoked -- either because probation may be revoked prospectively, Ashba v. State, 570 N.E.2d 937 (Ind. Ct. App. 1991), affirmed 580 N.E.2d 244 (Ind. 1991), or because he was already on probation. Held, judgment affirmed.

TITLE: Gee v. State
INDEX NO.: F.1.d.
CITE: (2d Dist. 10/19/83), Ind. App., 454 N.E.2d 1265
SUBJECT: Probation revocation - grounds
HOLDING: Tr. Ct. erred in revoking D's probation where there was no evidence D violated specific terms of his probation or committed another crime. Ind. Code 35-7-2-2(f); Ind. Code 35-7-1-1; Hoffa 368 N.E.2d 250; Shumaker, App., 431 N.E.2d 862. Here, specific grounds for revoking D's probation (2-year sentence suspended on condition D submit to 2-year probation & serve 30 consecutive weekends in jail) were unclear. Mellaril (a tranquilizer) was found on D during a strip search when he reported to jail. No revocation petition was filed. At revocation hearing, state argued D violated terms of probation by failing to cooperate with jail officials. On appeal, state argues D committed another crime (possession of controlled substance). State must prove violation of probation by preponderance of evidence. Ind. Code 35-7-2-2. State did not prove D's possession of pills violated terms of his probation. "Good behavior" condition simply means lawful conduct (Shumaker; Hoffa). Condition D serve weekends in jail did not require him to follow jail's rules & regulations. D was arrested for possession of a controlled substance after officer found Mellaril. Arrest standing alone does not support probation revocation; however, if after a hearing, judge determines arrest was reasonable & probable cause exists to believe D violated criminal law, revocation is proper. Hoffa. Mellaril is not a controlled substance, thus possession of it is not a crime. Because D cannot be convicted of a nonexistent crime (Moon, 366 N.E.2d 1168; Young, 231 N.E.2d 797), Tr. Ct. should not have found D's arrest reasonable nor probable cause to believe D committed a crime. Held, revocation reversed.

TITLE: Gilfillen v. State
INDEX NO.: F.1.d.
CITE: (12/18/91), 582 N.E.2d 821 (Ind.)
SUBJECT: Revocation of probation - improper grounds
HOLDING: Where D was found guilty of child molesting at trial, but steadfastly protested his innocence, it was error to revoke his probation for failure to successfully complete sex abuse counseling due to his refusal to admit he had problem. Tr. Ct. found that D had violated his probation requirement that he receive counseling after his release from prison, because he had not made good faith effort to work on his sexual abuse problem & had twice failed to complete counseling. D did regularly attend ordered counseling sessions but continued to protest his lack of sexual abuse problem & his innocence. Case was distinguished from Lind, Ind. App., 550 N.E.2d 823, where D's probation was revoked for failure to attend counseling sessions regularly. In Lind, D had pled guilty, thus admitting his problem, & also did not attend his sessions as required. In D's case no such admission was ever made & forcing him to make such an admission or face revocation of probation was tantamount to requiring him to admit he was guilty of crimes charged, an unacceptable alternative. Court noted that "[r]easonable conditions on probation may be imposed on a D, but thought control is not one of them." Court also noted, however, that Ds' continued denials of guilt can be used to determine whether they are proper candidates for probation. Held, Court of Appeals decision vacated, & cause remanded for further consistent revocation proceedings.

TITLE: Gleason v. State
INDEX NO.: F.1.d.
CITE: 4th Dist., 05-09-94, Ind. App., 634 N.E.2d 67
SUBJECT: Grounds for PV must be alleged
HOLDING: Tr. Ct. erred in finding PV based on conviction not alleged in motion seeking revocation. Due process requires Ds charged with PV are entitled, among other things, to written notice of claimed violations. Here notice claimed D violated probation by arrest in Michigan, & that D admitted taking nude pictures of boys who were now 20, but may have been under 18 at time pictures were taken. At hearing, State presented evidence D had taken nude photos of boys, & also that he had been convicted of felony in Michigan while on probation. Mere arrest in Michigan was insufficient to support PV, absent proof of conviction or that D committed conduct, Hoffa, 368 N.E.2d 250, & Tr. Ct. did not find PV on this ground. Because if boys D took pictures of were 16 or over, there would be no crime in Ind., Tr. Ct. also found no violation on this act. Tr. Ct. did find PV based on Michigan conviction, however. Ct. found this was error, because conviction was not alleged in motion & D had no notice of ground.

TITLE: Goonen v. State
INDEX NO.: F.1.d.
CITE: (2nd Dist., 1-29-99), Ind. App., 705 N.E.2d 209
SUBJECT: Sufficient evidence of probation violation - obstruction of justice
HOLDING: Tr. Ct. properly found that D violated his probation by committing obstruction of justice. D's plea agreement to conspiracy to commit robbery charge required him to give sworn, recorded clean-up statement detailing charged offenses & all other non-violent offenses he had committed. D also agreed to "testify truthfully at any hearing or trial upon request." In consideration for D's guilty plea, State agreed to drop two other pending charges & not to prosecute D for any non-forcible offenses that he admitted in his recorded statement. When D was called as witness for State in unrelated armed robbery trial, he cited safety concerns & attempted to assert his Fifth Amendment privilege against self-incrimination. After D refused to testify, trial judge found him in direct criminal contempt & sentenced him to six months without good time credit.

In affirming probation revocation based on D's obstruction of justice from refusal to testify, Ct. found substantial evidence of probative value to support finding that D violated probation condition against committing another crime. D testified that he was not involved with robbery offenses & that if he testified, he would simply relate to Ct. what he saw or was told by others after fact. At most, State could have charged D with assisting a criminal, which is non-forcible offense. Because State granted D immunity for non-forcible offenses, D could not seek refuge by invoking his privilege against self-incrimination. In re Schultz, App., 428 N.E.2d 1284. Further, after reviewing record, Ct. was unpersuaded by D's attempted assertion of his Fifth Amendment right for reasons of his personal safety. State showed by preponderance of evidence that, contrary to judge's order, D knowingly or intentionally withheld testimony in robbery trial, & that he could not utilize Fifth Amendment's protections. Held, probation revocation affirmed.

RELATED CASES: Downs, App., 827 N.E.2d 646 (Ct. rejected D's argument that his failure to testify breached plea agreement, thereby voiding it; D cannot break his own plea agreement by purposely violating one of its provisions & consequently benefit himself).

TITLE: Heaton v. State

INDEX NO.: F.1.d.

CITE: (3/5/2013), 984 N.E.2d 614 (Ind. 2013)

SUBJECT: Probation violation - state must prove new criminal offense by preponderance of evidence

HOLDING: When a D commits a new criminal offense while on probation, the correct legal standard is the statutorily-mandated preponderance of the evidence standard, not a probable cause standard. Despite the fact that Ind. Code 35-38-2-3(e) requires the State to prove a probation violation by a preponderance of the evidence, the Indiana Supreme Court has noted, "if the Tr. Ct. after a hearing finds that the arrest [on a new criminal charge] was reasonable and there is probable cause to believe the D violated a criminal law, revocation will be sustained." Cooper v. State, 917 N.E.2d 667 (Ind. 2009). To the extent that Cooper may be read to permit proof only by probable cause when a new criminal charge is alleged as a probation violation, it is overruled. Here, D was alleged to have violated probation by committing a new crime and by failing to follow technical probation conditions, such as attending a substance abuse evaluation. At one point during the revocation proceedings, the Tr. Ct. referenced the probable cause standard when discussing whether D committed the new crime. But, yet, at a different point, the Tr. Ct. referenced the preponderance of the evidence standard. Because the record is unclear as to which standard the Tr. Ct. actually applied in determining whether the D had committed a new criminal offense, this Court cannot be assured that the Tr. Ct. applied the proper standard. Further, the error is not harmless despite the Tr. Ct. applying the proper standard of proof when finding that D committed the technical violations. Because the additional violations are technical in nature, the Tr. Ct. may decide to continue the probationer on probation without modification absent the new criminal offense. Held, Court of Appeals' opinion at 959 N.E.2d 330 vacated, the Tr. Ct.' order finding that the D violated her probation and ordering her to serve a portion of her previously suspended sentence vacated, and this cause is remanded for a new determination of whether the D violated her probation conditions by a preponderance of the evidence, and if so, the appropriate sanction for such violations.

RELATED CASES: Lampley, 31 N.E.3d 1034 (Ind. Ct. App. 2015) (D's admission at evidentiary hearing on work release violation that he smoked marijuana, resulting in a positive urine screen, was sufficient evidence to support revocation of his probation); Jackson, 6 N.E.3d 1040 (Ind. Ct. App. 2014) (mere fact that D was charged with sex offense in Kentucky was insufficient to revoke probation; State failed to carry burden to prove by preponderance that D actually committed the offense).

TITLE: Hilligoss v. State
INDEX NO.: F.1.d.
CITE: (11/18/2015), 45 N.E.3d 1228 (Ind. Ct. App. 2015)
SUBJECT: Fundamental error in probation revocation
HOLDING: Tr. Ct. committed fundamental error in accepting D's admission to a probation violation without proper advisements. Because a probation revocation results in a loss of liberty, the probationer must be given certain due process rights before his probation may be revoked. Dalton v. State, 560 N.E.2d 58, 560 (Ind. Ct. App. 1990), (*citing* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973)). The fundamental error occurred when the Tr. Ct. failed to advise D that by admitting the violation, he would surrender his rights of counsel, confrontation, and cross-examination, and that the State would carry the burden to prove its allegations by a preponderance of evidence. See Ind. Code § 35-38-2-3(f). To demonstrate fundamental error, D was not required to show that the error was "sufficiently 'egregious' or 'blatant' [such] that the Tr. Ct. should have acted *sua sponte*." See Young v. State, 30 N.E.3d 719, 726 n.6 (Ind. 2015) (clarifying Brewington v. State, 7 N.E.3d 946, 974 (Ind. 2014)). Held, judgment reversed.

HOLDING: Saucerman, 193 N.E.3d 1028 (Ind. Ct. App. 2022) (Tr. Ct.'s failure to advise probationer that he was giving up right to evidentiary hearing prior to admitting violation violated due process).

TITLE: Hoage v. State
INDEX NO.: F.1.d.
CITE: (2d Dist. 7/11/85), Ind. App., 479 N.E.2d 1362
SUBJECT: Sentencing - injudicious threats
HOLDING: Where Tr. Ct.'s threat was made after sentence was imposed, D was not prejudiced. Here, prosecutor noted that D was living in DC & state could not extradite him to serve 30-day executed sentence on misdemeanor to start 5 months hence. Judge responded that he would suggest to another judge that D's visitation privileges be terminated permanently. Court finds Ind. Code 35-38-2-3, which establishes permissible sanctions for violation of probation, does not include such injudiciously made threats. Held, no reversal on this point; remanded for other corrections.

TITLE: Holsapple v. State

INDEX NO.: F.1.d.

CITE: (05/06/2020), 148 N.E.3d 1035 (Ind. Ct. App. 2020)

SUBJECT: Plea agreement cannot deprive trial court discretion as to appropriate sanction for probation violation

HOLDING: The prosecution may not enter into an agreement which deprives a trial court discretion to impose sanctions for probation violations. Here, Defendant was convicted and sentenced pursuant to the terms of a plea agreement, but execution of her sentences was stayed while she participated in a problem-solving court program. When she was alleged to have violated the terms of the program, the trial court held a hearing on the notice of termination request from the problem-solving court, and Defendant admitted to violating the terms of her participation agreement by failing to appear for Mental Health Court, failing to appear for a required drug test, and failing to appear for a Mental Health Court sanctions hearing. The trial court found that based on the admitted violations, Defendant was no longer eligible to participate in problem solving court and the Court of Appeals affirmed the trial court's determination that Defendant violated the terms of her placement. However, the Court found that a plea agreement cannot bind the trial court's hands as to an appropriate sanction in a later probation violation proceeding. Rather, as in any probation revocation proceeding, the trial court may impose one or more sanctions, including ordering execution of all or part of the sentence that was suspended at the time of initial sentencing. The Court reversed the trial court's order that Defendant serve the entire sentence because it is based on the predetermined sanction and remanded for the trial court to determine in its discretion the appropriate sanction for her violation

RELATED CASES: Mefford, 165 N.E.3d 571 (Ind. Ct. App. 2021) (distinguishing Holsapple in affirming D's termination from participation in a drug court program, the entry of conviction for two Level 6 felonies and his five-year executed sentence; Tr. Ct did not have discretion to pose anything less than the executed five years provided in D's plea agreemt.

TITLE: Johnson v. State
INDEX NO.: F.1.d.
CITE: (10/31/2016), 62 N.E.3d 1224 (Ind. Ct. App. 2016)
SUBJECT: Revoking community corrections placement an abuse of discretion
HOLDING: The Tr. Ct. abused its discretion in revoking D's placement in community corrections and ordering him to serve the remainder of his executed sentence in DOC.

The evidence supports the Tr. Ct.'s determination that D violated the requirement that he not leave his apartment. However, under the circumstances, including D's limited mental functioning, scant financial resources, his previous successful placement on work release, the nature of the violation, and the severity of the court's sentence, "we conclude that the Tr. Ct. abused its discretion in finding that Johnson's violation warranted serving the entirety of the remaining portion of his executed sentence in the DOC. Accordingly, we remand to the Tr. Ct. with instructions to enter an order that Johnson be placed on work release for the remaining portion of his executed sentence." Held, judgment reversed.

TITLE: Johnson v. State
INDEX NO: F.1.d.
CITE: (3rd Dist., 01-25-93), Ind. App., 606 N.E.2d 881
SUBJECT: Revoking probation prior to its commencement is proper
HOLDING: Although D had not yet started probationary part of his sentence, Ct. had authority to revoke probation for violation of placement rules. D was sentenced to 5 years, with 3 years suspended & 2 years on probation. Tr. Ct. recommended that first year of executed sentence be at DOC, & second year in residential center. After D arrived at center, petition to revoke probation was filed when he failed to return as required. Tr. Ct. found he had violated probation, & ordered that remainder of 5 year sentence be served at DOC.

In finding revocation was proper, even though D had not yet commenced probationary part of sentence, Ct. relied on Ashba, App., 570 N.E.2d 937, for proposition that Tr. Ct. may terminate probation before completion of sentence, or revoke probation before D enters probationary phase of sentence. Although once term of probation has expired, Tr. Ct. loses jurisdiction to revoke, White, 560 N.E.2d 45, here D had not yet entered probationary phase, & Ashba controlled. Held, revocation of probation affirmed.

RELATED CASES: Hardy, 975 N.E.2d 833 (Ind. Ct. App. 2012) (although D had not yet begun serving his probation when the petitions for revocation were filed, Tr. Ct. had authority to revoke his probation; see full review at F.1.c.2); Davis, 916 N.E.2d 736 (Ind. Ct. App. 2009) (D's counsel's admission that D had a new arrest and that he agrees to serve twelve years for the probation violation contingent on the fact that if he beats the new arrest was insufficient to support a probation revocation); Baldi, 908 N.E.2d 639 (Ind. Ct. App. 2009) (D's probation can be revoked while he is still on parole for an unrelated conviction because D's probation can be revoked before he begins serving his sentence); Baker, App., 894 N.E.2d 594 court finds no reason to stray from well-established precedent that D's probationary period begins immediately after sentencing; D's probation was violated when he committed battery while serving his executed sentence); Rosa, App., 832 N.E.2d 1119 (although D's probation term was not scheduled to commence until 2007, this did not limit Tr. Ct. from revoking D's probation for a violation prior to that time); Ashley, App., 717 N.E.2d 927 (D's probation may be revoked any time after sentencing & before completion of probation); Childers, App., 656 N.E.2d 514 (suspended sentence could be revoked even though D had not yet entered probationary period that accompanied suspended sentence).

TITLE: Johnson v. State
INDEX NO.: F.1.d.
CITE: (5th Dist., 3-2-98), Ind. App., 692 N.E.2d 485
SUBJECT: Probation violation - insufficient evidence
HOLDING: Evidence was insufficient to prove that probationer tested positive for cocaine use, committed crime of public intoxication, & willfully failed to pay Ct. fines & costs. When probationer is accused of committing criminal offense, arrest alone does not warrant probation revocation. Gee, App., 454 N.E.2d 1265. Here, only evidence offered to prove probationer's cocaine use was his probation officer's testimony that probationer had tested positive for drugs. State did not offer test results of drug, & probation officer did not specifically mention "cocaine." Only evidence of probationer's arrest for public intoxication was probation officer's testimony that probationer had new arrest. Thus, Tr. Ct. erred in revoking probationer's probation. Held, probation revocation reversed.

TITLE: Justice v. State
INDEX NO.: F.1.d.
CITE: (1st Dist. 2/28/90), Ind. App., 550 N.E.2d 809
SUBJECT: Probation revocation based on charges resulting in acquittal
HOLDING: Double jeopardy (DJ) does not bar continued execution of sentence for probation violation based on charges ultimately resulting in acquittal. D was on probation at time he was charged with numerous offenses, & Tr. Ct. revoked his probation for violation of good behavior condition. All charges other than attempted burglary were either dismissed by state or discharged pursuant to CR 4. D was convicted of attempted burglary, but S. Ct. reversed due to insufficient evidence. Justice, 530 N.E.2d 295. Following this reversal, Tr. Ct. held hearing to determine whether to set aside probation revocation, & decided not to. D appealed, arguing that because evidence was found insufficient to support conviction for burglary, it is insufficient to support probation revocation, & that in any case DJ bars its use to revoke probation. D's probation was revoked because he violated condition that he remain on good behavior. To support this revocation, state must prove by preponderance of evidence that D has engaged in unlawful activity. Brown, App., 458 N.E.2d 245. Charges dismissed or discharged pursuant to CR 4 may be considered despite statute of limitations, since revocation proceedings is not prosecution. Similarly, DJ does not bar consideration of charge resulting in acquittal, since revocation proceeding does not go to guilt or innocence on offense charged.

RELATED CASES: Culley, App, 385 N.E.2d 486 (revocation of probation on grounds that probationer, who had been charged but acquitted of marijuana possession, had been in place where drugs were located and that he was associating with persons of harmful character did not constitute double jeopardy).

TITLE: Kuhfahl v. State
INDEX NO.: F.1.d.
CITE: (1st Dist.; 5-6-99), Ind. App., 710 N.E.2d 200
SUBJECT: Probation revocation - sufficient evidence of possession of weapon
HOLDING: There was sufficient evidence that D possessed dangerous weapon in violation of condition of probation. Probation revocation hearing is in nature of civil proceeding &, therefore, need only be proven by preponderance of evidence. King, App., 642 N.E.2d 1389, 1393. Here, condition of probation prohibited D from possessing firearm, destructive device or other dangerous weapon. Although D claimed that he was using knife in his employment as maintenance worker & forgot to remove it from his person before going to courthouse to pay fine, D did not dispute fact that he carried knife with blade about four inches long into courthouse. Because knife could be considered destructive device or dangerous weapon, Tr. Ct. properly revoked D's probation. Held, judgment affirmed.

TITLE: Martin v. State
INDEX NO.: F.1.d.
CITE: (5th Dist., 8-12-04), Ind. App., 813 N.E.2d 388
SUBJECT: Insufficient evidence of probation violation
HOLDING: Tr. Ct. erred in revoking D's probation where the record showed that D did not admit violation but only admitted he was arrested for violation. D said he would waive his right to an attorney & accept the revocation if his "probation violation is just being arrested & that's it," to which the Ct. responded "yes . . . well it's not being arrested, it's having charges filed against you. Either way it's a violation of your probation if it's true." D later indicated he did not know what the new charges were about & the Ct. found insufficient evidence existed that he admitted a violation & the record showed D to be "confused & . . . misinformed by the Ct., as to what constituted a violation of his probation." Held, judgment reversed.

RELATED CASES: Jackson, 6 N.E.3d 1040 (Ind. Ct. App. 2014) (mere fact that D was charged with sex offense in Kentucky was insufficient to revoke probation; State failed to carry burden to prove by preponderance that D actually committed the offense).

TITLE: Matter of J.P. v. State

INDEX NO.: F.1.d.

CITE: (4th Dist., 6-7-02), Ind. App., 770 N.E.2d 365

SUBJECT: Probation revocation - sufficiency; failure to report to probation officer & enroll in education program

HOLDING: Evidence was sufficient to support Tr. Ct.'s determination that juvenile D violated his probation based on his failure to report to his probation officer. D argued that probation officer consistently attempted to contact him through his mother, & that he did not receive messages or know of attempted contact. Although officer left phone messages for D's mother, spoke with his mother, & sent letter addressed to his mother, officer also left one phone message for D. Additionally, letter addressed to D's mother also had D's name on it. Thus, probation officer attempted to contact D directly. Moreover, officer testified that prior to filing probation violation information, she had not spoken to D for approximately one month, & that juveniles on suspended commitment are required to meet & have phone contacts with their probation officers at least once a month. Ct. also held that evidence was insufficient to support Tr. Ct.'s conclusion that D failed to enroll in education program, as record did not reveal certain time by which D was required to enroll in program. Held, judgment affirmed.

TITLE: Mauch v. State
INDEX NO.: F.1.d.
CITE: (6/10/2015), 33 N.E.3d 387 (Ind. Ct. App. 2015)
SUBJECT: Failure to pay restitution before end of probation - D proved inability to pay
HOLDING: Tr. Ct. abused its discretion by revoking 76 year-old D's probation after finding that he knowingly, intentionally, and willfully failed to pay restitution because he did not apply for and take out a reverse mortgage on his home, an asset that could satisfy the $92,545 balance. D met his burden to show his inability to pay and bona fide efforts to pay, as he could not obtain a reverse mortgage on his home due to his wife's refusal to consent. In addition, D suffers from several health issues that impact his ability to get a job. Held, judgment reversed.

TITLE: May v. State
INDEX NO.: F.1.d.
CITE: (7/29/2016), 58 N.E.3d 204 (Ind. Ct. App. 2015)
SUBJECT: Probation revocation reversed where D mistakenly released on parole
HOLDING: When Ds complete their terms of imprisonment, they are released to parole or probation. Ind. Code § 35-50-6-1. In this case, Tr. Ct. ordered D to return to probation when he completed his sentence. But upon D's release, the DOC mistakenly placed him on parole instead of probation. Although D complied with the terms of his parole, his probation was revoked because he failed to submit to monthly drug tests (which was a condition of his probation but not parole).

Even in the face of a probation violation, Tr. Ct. may nonetheless exercise its discretion in deciding whether to revoke probation. Lack of volition is a factor for Tr. Ct. to consider when deciding whether to revoke probation. Woods v. State, 892 N.E.2d 637 (Ind. 2008). Given Ind. Code § 35-50-6-1, the fact the DOC placed D on parole, and D complied with the terms of his parole, it was reasonable for him not to report to probation. Thus, Tr. Ct. abused its discretion in revoking D's probation and sentencing him to serve the remaining balance of his previously suspended sentence in the DOC. Held, judgment reversed and remanded.

TITLE: M.J.H. v. State
INDEX NO.: F.1.d.
CITE: (2nd Dist., 2-18-03), Ind. App., 783 N.E.2d 376
SUBJECT: Probation revocation - insufficient evidence; status offender
HOLDING: Evidence was insufficient to support probation revocation. State presented evidence in effort to prove D's violation of school attendance requirement of his probation. Evidence consisted solely of computer printout entitled "Student Absence Information." Attached to printout was "Affidavit for Probable Cause" in which an assistant principal at junior high school stated he had access to official records of school attendance indicating that D was absent from school without excuse & then referred to attached printout. Printout designated certain days with abbreviated notations, but there was no "AU" (unexcused absence) notations on days in question. Held, judgment reversed & remanded with instructions to set aside disposition order.

RELATED CASES: Figures, 920 N.E.2d 267 (Ind. Ct. App. 2010) (error in admission of probable cause affidavit was harmless because D's admissions that he failed to report to probation department & to complete any court-ordered community service work was sufficient to revoke his probation).

TITLE: Monday v. State
INDEX NO.: F.1.d.
CITE: (5th Dist., 10-4-96), Ind. App., 671 N.E.2d 467
SUBJECT: Probation revocation - failure to consider alternatives to incarceration
HOLDING: Tr. Ct. did not violate D's fundamental right to liberty under Article I, Section I of Ind. Constitution when it revoked his probation without considering alternatives to incarceration. D's probation was "conditional liberty" different from unconditional liberty enumerated in Art. I, Sec. I of Ind. Constitution. Thus, D was entitled only to those procedural protections afforded under Ind. Code 35-38-2-3. Upon showing of probation violation, statute gives Tr. Ct. discretion to revoke any conditional liberty granted through probation & order incarceration. Consideration & imposition of any alternatives to incarceration is "matter of grace" left to Tr. Ct.'s discretion. Million, App., 646 N.E.2d 998. Written statement indicating reasons for imposing incarceration & consideration of alternatives to incarceration is not necessary. Black v. Romano, 471 U.S. 606 (1985). Held, judgment affirmed.

RELATED CASES: Johnson, App., 692 N.E.2d 485 (although D who was ordered to in-patient treatment when he violated probation only received outpatient treatment, Tr. Ct. did not err by ordering incarceration after subsequent probation violation).

TITLE: Montgomery v. State

INDEX NO.: F.1.d.

CITE: (8/4/2016), 58 N.E.3d 279 (Ind. Ct. App. 2015)

SUBJECT: Res judicata did not bar probation revocation following revocation of D's placement in community transition program

HOLDING: Doctrine of res judicata did not bar Tr. Ct.'s revocation of D's probation after previously revoking his placement in a community transition program. The matter at issue before Tr. Ct. during probation revocation proceeding (i.e., D's placement on probation) was simply not the same matter in issue before court during revocation proceedings on his placement in the transition program. Placement on probation and placement in community transition program are not one and the same, and court's consideration of those options is not mutually exclusive. Rather, those options are two of many tools in Tr. Ct.'s toolbox for court's use in administration and supervision of a D's sentence, over which the court has continuing jurisdiction. Held, judgment affirmed.

TITLE: Morgan v. State

INDEX NO.: F.1.d.

CITE: (4th Dist., 2-5-98), Ind. App., 691 N.E.2d 466

SUBJECT: Probation revocation - authority to initiate revocation proceeding after probation transferred

HOLDING: Although D's probation was transferred to Georgia, Indiana probation officer had authority to initiate proceedings to revoke D's probation. Probation officer has authority to initiate proceedings to revoke probation. Noethtich, App., 676 N.E.2d 1078. Although each receiving state will assume duties of visitation of & supervision over probationers, duly accredited officers of sending state may enter receiving state & apprehend & retake any person on probation. Ind. Code § 11-13-4-1(2), (3). Here, while on probation in Indiana, D filed petition to transfer probation to Georgia, which Tr. Ct. granted & probation officer completed. Later, D ended up not moving to Georgia & probation officer filed notice of violation of probation because D committed battery & failed to report to probation officer. If D would have stayed in Georgia, probation officer would have had authority to go to Georgia & retake D & Georgia would have been required to notify Indiana regarding any recommendations that it was making concerning disposition. Thus, it follows that probation officer also had authority to initiate probation revocation proceedings while D was in-state. Held, judgment affirmed.

RELATED CASES: Johnson, 957 N.E.2d 660 (Ind. Ct. App. 2011) (Tr. Ct. had jurisdiction to revoke D's probation even if he did not have a probable cause hearing in Michigan, the "receiving state," before extradition to Indiana; "[A] transfer of supervision of a probationer to a different state under the Interstate Compact is not a transfer of jurisdiction to that state"; lack of probable cause hearing does not vitiate Tr. Ct.'s jurisdiction).

TITLE: Mosley v. State
INDEX NO.: F.1.d.
CITE: (5-21-21), Ind. Ct. App., 171 N.E.3d 1031
SUBJECT: Probation revocation reversed -void no-contact order issued to protect a dead person
HOLDING: Because a no-contact order cannot be issued to protect a dead person, trial court abused its discretion for revoking Defendant's probation based on violation of that void order. Six months after Defendant was imprisoned for fraud, he sent an apology letter to one of his victims. A no-contact order imposed as a condition of his probation barred that contact. Unbeknownst to the parties, the victim had died about two years before Defendant's sentencing, when the trial court entered the no-contact order. Nonetheless, the trial court found Defendant violated the terms of his probation by writing to the deceased woman, consequently revoked three years of Defendant's probation, and ordered him to spend those years in prison. Court of Appeals held that the no-contact order was void and could not support either a prosecution for attempted invasion of privacy or a probation revocation based on Defendant's commission of that offense. The purpose of a no-contact order imposed as a condition of probation pursuant to Ind. Code § 35-38-2-2.3(a)(18) -- to protect the victim of an offense from the perpetrator-- is not served where, as here, the victim already has died. The only reasonable interpretation of "individual" in that statutory context is "a living person." Reading "individual" to include dead people would be illogical and even absurd, both results to be avoided in statutory construction. As the trial court lacked authority under Indiana Code § 35-38-2-2.3(a)(18) to issue a no-contact order barring Defendant's contact with victim, given her earlier death, the order was void at the outset. Court rejected State's argument based on Indiana's attempt statute (I.C. § 35-41-5-1(b)) that the impossibility defense should be unavailable in this context, noting that the State is requesting revocation for attempting to violate a no-contact order that the State should never have sought, and the trial court should never have entered as to a victim who no longer needed protection. Regardless, a probation revocation cannot be based on the violation of a void condition of probation. See, e.g., Foster v. State, 813 N.E.2d 1236, 1239 (Ind. Ct. App. 2004) (reversing probation revocation based on violation of term of probation void for vagueness). Held, judgment reversed.

TITLE: Overstreet v. State
INDEX NO.: F.1.d.
CITE: (11-13-19), Ind. Ct. App., 136 N.E.3d 260
SUBJECT: Effect of psychiatric condition on probation revocation
HOLDING: While on probation, Defendant tested positive for methamphetamine, amphetamine, and marijuana, on three separate occasions. Despite a three-month delay between the positive drug test results and the filing of petition to revoke probation, during which time Defendant was referred to treatment and did not have any other violations, trial court did not abuse its discretion in ordering him to serve the balance of his suspended sentence in the Department of Correction.

TITLE: Patterson v. State
INDEX NO.: F.1.d.
CITE: (2nd Dist., 12-21-95), Ind. App., 659 N.E.2d 220
SUBJECT: Effect of psychiatric condition on probation revocation
HOLDING: Probationer's mental state must be considered in dispositional determination of probation revocation proceeding. In so holding, Ct. *overruled* its previous decision in Mitchell v. State (1993), Ind. App., 619 N.E.2d 961, to extent that it is inconsistent with this decision. At probation revocation hearing after State presented evidence, D testified that he was insane at time of second offense. Notwithstanding D's evidence of asserted mental illness. Ct. concluded that circumstances surrounding probation violation indicated knowing or intentional course of conduct. Tr. Ct. was not compelled to find that probation violation was excused or mitigated by D's alleged mental condition. Held, probation revocation affirmed; Frielander, J., concurring & dissenting.

RELATED CASES: Gaddis, 177 N.E.34d 1257 (Ind. Ct. App. 2021) (clarifying Patterson to require consideration of probationer's mental health only where: (1) the State alleges the probationer has violated probation by committing a new crime and (2) the probationer's mental health issues affect the probationer's degree of culpability concerning that new crime); Hill, 28 N.E.3d 348 (Ind. Ct. App. 2015) (Tr. Ct. did not abuse discretion by revoking D's placement in home detention program for unexcused absences despite sister's testimony that he had a mental defect).

TITLE: Phipps v. State
INDEX NO.: F.1.d.
CITE: (10-07-21), Ind. Ct. App. 2021, 177 N.E.3d 123
SUBJECT: Insufficient evidence defendant violated two probation conditions
HOLDING: After molesting his brother, Defendant was forbidden from having contact with his victim's family. The intertwining of his and his brother's family trees led Defendant to be confused as to which limbs were forbidden to him. After helping his uncle move, Defendant attended a goodbye dinner with his uncle's family, including minors who sat at a different table. Construing these acts as a violation of his probation, the trial court revoked Defendant's probation and returned him to prison for 10 years. The Court held that the probation condition prohibiting contact with the victim's "family" was overly broad and vague in the context of the case, given one of the victims was Defendant's brother. The Court also held that evidence was insufficient to find Defendant violated the condition prohibiting contact with minors. The word "contact" did not clearly apply to Defendant's behavior as alleged because he did not touch or communicate with children at the family dinner.

TITLE: Podlusky v. State
INDEX NO.: F.1.d.
CITE: (2nd Dist., 12-16-05), Ind. App., 839 N.E.2d 198
SUBJECT: Probation revocation - execution of statutory minimum sentence
HOLDING: In Stephens v. State, 818 N.E.2d 936 (Ind. 2004), Ct. held that Tr. Ct's. have statutory authority to order executed time following revocation of probation that is less than length of sentence originally suspended, so long as, when combined with executed time previously ordered, the total sentence is not less than the statutory minimum. Here, after revoking D's probation, Tr. Ct. ordered her to serve her entire two-year sentence, which was originally suspended & is statutory minimum for a Class C felony. Under Stephens, Tr. Ct. could have ordered D to serve the originally suspended, minimum two-year sentence. However, Ct. in no way construes Stephens to mean that Tr. Ct. was required to impose the entire suspended sentence or that sentencing formula announced in Stephens must so rigidly apply in every probation revocation. Ind. Code 35-38-2-3(g) was amended in 2005 to provide that Tr. Ct. may "order execution of all or part of the sentence that was suspended at the time of initial sentencing." Judges must be afforded flexibility to use & terminate probation when appropriate & to order a sentence that they deem proper in particular circumstances. Ct. voiced its hope that S. Ct. will clarify--and modify, if necessary-- its holding in Stephens, particularly in light of amended version of Ind. Code 35-38-2-3(g)(3). Held, judgment affirmed; Mathias, J., concurring in result, believes that Stephens is unambiguous & that Tr. Ct. must impose at least statutory minimum sentence when it revokes a D's probation.

TITLE: Porter v. State
INDEX NO.: F.1.d.
CITE: (12/31/2018), 117 N.E.3d 673 (Ind. Ct. App. 2018)
SUBJECT: No abuse of discretion in revoking probation
HOLDING: In revoking probation, Tr. Ct. was not required to treat D's admission as a guilty plea and accord it mitigating weight. Ind. Code § 35-38-2-3 imposes no requirement to balance aggravating and mitigating circumstances and issue a sentencing statement when imposing a sanction for violation of probation.

TITLE: Sanders v. State
INDEX NO.: F.1.d.
CITE: (4th Dist., 04-22-05), Ind. App., 825 N.E.2d 952
SUBJECT: Probation revocation sentence - reviewable under abuse of discretion standard
HOLDING: Although some of language used in Stephens v. State, 818 N.E.2d 936 (Ind. 2004), suggests that Ind. Appellate Rule 7(B) may be used as standard when reviewing whether a D's probation revocation sentence was unreasonable, Ct. held that abuse of discretion should be used as standard of review. Ct. has held that it will review a Tr. Ct.'s decision to revoke probation & a Tr. Ct.'s sentencing decision in a probation revocation proceeding for an abuse of discretion. Marsh v. State, 818 N.E.2d 143 (Ind. Ct. App. 2004). S. Ct. has also held that a D may not collaterally challenge his sentence on appeal from his probation revocation. Schlichter v. State, 779 N.E.2d 1155 (Ind. 2002). Thus, given this case law, Ct. will review D's sentence on revocation for an abuse of discretion. Here, Tr. Ct. had ample basis to order that D serve her five-year suspended sentence & did not abuse its discretion in doing so. See also Ind. Code § 35-38-2-3(g)(3)(providing that one of options available to a Tr. Ct. when revoking probation is to order execution of sentence that was suspended at time of initial sentencing). Held, judgment affirmed.

RELATED CASES: Puckett, 956 N.E.2d 1182 (Ind. Ct. App. 2011) (Tr. Ct. abused its discretion by relying on multiple improper sentencing factors, such as the leniency of D's original plea, when revoking D's entire suspended sentence); Prewitt, 878 N.E.2d 184 (probation revocation sentences are reviewed for abuse of discretion); Jones, App., 838 N.E.2d 1146 (Tr. Ct. did not abuse its discretion by ordering D to serve 30 years of his previously 40-year suspended sentence instead of ordering continuing probation).

TITLE: Shumate v. State
INDEX NO.: F.1.d.
CITE: (5th Dist.; 10-27-99), Ind. App., 718 N.E.2d 1133
SUBJECT: Probation revocation - barred by res judicata
HOLDING: Res judicata, but not double jeopardy, barred second probation revocation following reversal of first revocation due to insufficient evidence. Second probation revocation hearing, based on same alleged violation that resulted in revocation of probation that was later set aside, does not violate prohibition against double jeopardy. Childers, App., 656 N.E.2d 514. However, res judicata bars relitigation of claim after final judgment has been rendered, when subsequent action involves same claim between same parties. In order to prove relitigation is barred by res judicata, four elements must be satisfied: (1) former judgment must have been rendered by Ct. of competent jurisdiction; (2) former judgment must have been rendered on merits; (3) matter now in issue was or could have been determined in prior action; & (4) controversy adjudicated in former action must have been between same parties to present suit or their privies. Here, appellate Ct. decision reversing probation revocation due to insufficient evidence was judgment on merits for purposes of res judicata. Thus, any further proceedings relating to revocation of D's probation, based on same violation of probation at issue in first revocation proceeding, were barred by res judicata. Held, judgment reversed.

RELATED CASES: Dexter, 991 N.E.2d 171 (Ind. Ct. App. 2013) (even if four-pronged test from Shumate applies, Indiana Supreme Court's decision reversing D's habitual-offender enhancement was not a final judgment on the merits, thus State was not barred from retrying him under doctrine of res judicata).

TITLE: Sims v. State
INDEX NO.: F.1.d.
CITE: (2d Dist. 1/22/90), Ind. App., 549 N.E.2d 53
SUBJECT: Probation revocation - based on uncounseled conviction
HOLDING: Conviction which may be subject to collateral attack can be used as basis for revoking D's probation. D challenges revocation on appeal, arguing that record did not show that he properly waived right to counsel when pleading guilty to public intoxication. In Burgett v. Texas (1967), 389 U.S. 109, 88 S. Ct. 258, 19 L.Ed.2d 319, U.S. S. Ct. held that presumption arises that prior felony conviction is constitutionally infirm if record does not affirmatively show on its face that D was represented by counsel or knowingly & intelligently waived right to counsel. Court also held that constitutionally infirm prior felony conviction may not be used to support guilt or sentence enhancement under recidivist statutes. D argues that it is inappropriate to allow probation revocation on basis of conviction which may be constitutionally infirm. However, Court of Appeals *cites* Lewis v. US, (1980), 445 U.S. 55, 100 S. Ct. 915, 63 L.Ed.2d 198, in which U.S. S. Ct. held that uncounseled conviction could be used to support conviction for possession of firearm by one convicted of a felony. Court held that focus of firearms act was on preventing possession of firearms by those who had been convicted, & that nothing on face of statute evidenced intent to limit coverage to persons whose convictions are not subject to collateral attack. Similarly, Indiana legislature has provided that probation may be revoked if probationer commits additional crime. Ind. Code 35-38-12-1(a). Prohibited conduct need not result in conviction, it need only occur, & it need be proved only by preponderance of evidence. Boyd, App., 481 N.E.2d 1124. Therefore, uncounseled conviction may be used as evidence to establish criminal conduct in probation revocation proceeding. Held, revocation affirmed. Sullivan, J., CONCURS SEPARATELY, arguing that invalid conviction should not be used for any purpose, but finding that guilty plea was not uncounseled.

TITLE: Snowberger v. State
INDEX NO.: F.1.d.
CITE: (12-10-10), Ind. Ct. App., 938 N.E.2d 294
SUBJECT: Probation revocation - insufficient evidence of willful failure to pay child support
HOLDING: Ind. Code 35-38-2-2.3 provides in part that as a condition of probation, Tr. Ct. may require a person to "...[s]upport the person's dependents and meet other family responsibilities." Ind. Code 35-38-2-3(f) provides that probation may not be revoked for failure to comply with conditions of a sentence that impose financial obligations on the person unless the person recklessly, knowingly, or intentionally fails to pay.

Here, D's plea agreement to nonsupport of a dependent child required the State to show his failure to pay child support to be willful and he has the ability to make payments before his probation could be revoked. Court held that evidence was insufficient to support revocation of D's probation. Although D's ex-wife testified regarding several statements made by her children and that she was not aware of any inability of D to support his children, her testimony did not establish that D did have the ability to pay his support obligation or that his failure to pay was willful. D had filed a petition to modify child support prior to date he entered into plea agreement which was pending at time State filed its violation of probation. D testified that his failure to pay was "not at all" willful, that he was not employed, had suffered a work-related injury and applied for social security disability. Moreover, probation officer assigned to D's case testified that he did not make any investigation as to whether D had the ability to make support payments and whether his non-payment was willful, but "work[ed] on the assumption that it was." Held, probation revocation reversed.

TITLE: Stephens v. State

INDEX NO.: F.1.d.

CITE: (12-10-04), Ind., 818 N.E.2d 936

SUBJECT: Probation violation - authority to order D to serve less than entire amount of previously suspended sentence

HOLDING: When a Tr. Ct. revokes a D's probation, it may order less than the entire amount of the sentence originally suspended. Here, Tr. Ct. revoked D's probation & ordered him to serve three years in prison, despite fact that his original sentence included a four-year suspended sentence. Probation revocation statute provides that after finding a probation violation, Tr. Ct. may: (1) continue the person on probation, with or without modifying or enlarging the conditions; (2) extend the person's probationary period for not more than one year beyond the original period; or (3) order execution of the sentence that was suspended at the time of the initial sentencing. Ind. Code 35-38-2-3(g).

Rejecting Ct. App.' interpretation that entire suspended sentence must be imposed if Tr. Ct. revokes probation, Ct. noted that statutory scheme reflects Legislature's intent that Tr. Ct's. have flexibility to permit a Tr. Ct. to order the same amount of executed time following a probation violation whether or not it actually revokes probation. Thus, Tr. Ct. has statutory authority to order executed time following probation revocation that is less than length of sentence originally suspended, so long as, when combined with executed time previously ordered, the total sentence is not less than the statutory minimum.

Ct. also held that a D is entitled to dispute on appeal the terms of a sentence ordered to be served in a probation revocation proceeding that differ from those terms originally imposed. Held, transfer granted, Ct. App.' opinion at 801 N.E.2d 1288 vacated, judgment of Tr. Ct. affirmed.

RELATED CASES: Rivera, (Ind. Ct. App. 2014) (following rationale set forth in Stephens, Ct. held that when revoking placement in community corrections, Tr. Ct. had authority to sentence D to time served, which was less than the length of sentence originally suspended but not less than the statutory minimum for the offense; see full review at E.6.k); Sandlin, 823 N.E.2d 1197(Absent a fairly explicit statement to the contrary, Ct. will presume a Tr. Ct. is aware of its authority to order executed time following revocation of probation that is less than the length of the sentence originally imposed); Pugh, 819 N.E.2d 375.

TITLE: Szpunar v. State
INDEX NO.: F.1.d.
CITE: (2nd Dist., 07-16-09), 914 N.E.2d 773 (Ind. Ct. App. 2009)
SUBJECT: Probation violation B insufficient evidence of willful failure to pay restitution
HOLDING: Tr. Ct. abused its discretion by revoking D's probation for failure to pay restitution. In revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the D to imprisonment. If the probationer could not pay despite sufficient bona fide efforts, the court must consider alternate measures of punishment other than imprisonment. Imprisoning a probationer who has made sufficient bona fide efforts to pay would violate due process. Bearden v. Georgia, 461 U.S. 660 (1983).

Here, D was convicted of crimes that bilked investors of $1,387,550. As a condition of probation, D was ordered to pay $1,387,550 restitution at $22,000 per month. Tr. Ct. did not expect full restitution to be paid before discharge. Since discharge, D had a heart attack, other health problems and mental health issues for which he was admitted into a stress center for a week. He had a difficult time finding employment due to his criminal background and worked for his attorney as a paralegal and started a window wiper repair business. D did pay $5,000 in restitution on a different conviction, and $464 towards these convictions. Tr. Ct. abused its discretion by finding D willfully failed to make a good faith effort at paying restitution. Held, judgment reversed.

TITLE: Trammell v. State
INDEX NO.: F.1.d.
CITE: (11/13/2015), 45 N.E.3d 1212 (Ind. Ct. App. 2015)
SUBJECT: Insufficient evidence D violated probation during probationary period
HOLDING: Tr. Ct. abused its discretion in revoking D's probation, where State did not prove by preponderance of evidence that probation violation occurred during his probationary period. D served a concurrent sentence for Class D felony convictions of theft and resisting law enforcement arising from separate causes disposed through a single plea agreement.

On July 17, 2012, D's probation for resisting cause was revoked and he was ordered to serve four months in the DOC, with 47 days of credit for time confined awaiting sentencing. It is not clear from record when D was released from this second period of incarceration to resume what remained of his probation. And Court need not decide whether D's remaining probationary period in theft cause upon his release was the 2.5 months the probation officer stated at revocation hearing, or the five months of his suspended sentence that D had not yet served due to the revocation. The revocation petition for the theft cause alleged D committed his first violation of probation on March 28, 2013. On the face of the record, D's probationary period had ended well before he was alleged to have violated probation.

D did not invite error for admitting to acts alleged and failing to assert during revocation hearing that he was not on probation. D is under no obligation to point out to the State that it has failed to prove its case, and an admission to the conduct is not an admission that he has violated probation by engaging in that conduct. Held, judgment reversed.

Note: In a footnote, Court noted that a document the State offered purporting to show dates D was on probation for theft case could not be judicially noticed as proof that D violated probation, because it was not presented to the Tr. Ct., and bears no date or the signature of the person who prepared it. Court granted D's motion to strike the document.

TITLE: Washington v. State
INDEX NO.: F.1.d.
CITE: (11-30-01), Ind. App., 758 N.E.2d 1014
SUBJECT: Probation revocation - Due Process & sufficiency of evidence
HOLDING: Revocation of D's probation was proper where he received notice of violations & written statement of revocation decided by neutral & detached fact finder. Minimum requirements of procedural due process in context of probation revocation proceedings include written notice of claimed violations, disclosure to probationer of evidence against him, opportunity to be heard & present evidence, right to confront & cross-examine adverse witnesses, right to neutral & detached hearing body, & written statement by fact finder as to evidence relied on & reasons for revoking probation. Long v. State, App., 717 N.E.2d 1238. D received written notice of alleged violations & admitted that he had committed them. There was no indication that Tr. Ct. revoked probation out of personal distaste for D's alcoholism; rather, record shows comments regarding alcoholism were made to explain denial of D's request to again impose same conditions he had ignored in first place. Transcript of revocation hearing was placed in record which suffices as written statement of revocation. Further, there was sufficient evidence that conditions had been violated based on D's candid admission that he committed alleged acts. Held, judgment affirmed.

RELATED CASES: McCauley, 22 N.E.3d 743 (Ind. Ct. App. 2014) (no abuse of discretion in revoking D's probation; D, who had 4 OVWI convictions, consuming alcohol at least twice and was in in arrears on his fees); Cox, App., 850 N.E.2d 485 (where D admitted to probation violation in letter to judge, no error in revoking probation without a hearing on whether D violated conditions); Sanders, App., 825 N.E.2d 952 (Tr. Ct. followed proper procedures when revoking D's probation following her admission of various violations).

TITLE: Watson v. State
INDEX NO.: F.1.d.
CITE: (3rd Dist., 08-29-05), Ind. App., 833 N.E.2d 497
SUBJECT: Erroneous probation revocation - effect of modification agreement
HOLDING: Tr. Ct. improperly revoked D's probation, because State presented no evidence that D violated any of the conditions of his probation after he entered into a "Stipulation of Probation Modification Agreement" which was signed & approved by Tr. Ct. At probation revocation hearing, Tr. Ct. found that D provided verification of his whereabouts on two occasions after modification agreement was in effect. State presented evidence of violations that occurred before date of Stipulation, for which D had already been punished, & Tr. Ct. revoked D's probation.

On appeal, Ct. held that Tr. Ct. was without power to revoke D's probation because it was a party to the Stipulation of Probation Modification, which is akin to a plea agreement. That is, D & the State, through probation department, agreed to a particular punishment, & in turn State agreed to forego revocation proceedings. Tr. Ct. then approved agreement. A plea agreement is contractual in nature, binding the D, the State, & Tr. Ct. Debro v. State, 821 N.E.2d 367 (Ind. 2005). Once Tr. Ct. accepted probation modification agreement, it was bound by its terms, one of which was that there would be no revocation of D's probation if he complied with conditions of his probation. Held, judgment reversed.

TITLE: Wilburn v. State
INDEX NO.: F.1.d.
CITE: (1st Dist., 9-18-96), Ind. App., 671 N.E.2d 143
SUBJECT: Revocation of probation - suspension of sentence & conditional release
HOLDING: When Tr. Ct. suspends remainder of sentence pursuant to sentence modification statute, Ind. Code 35-38-1-17(b), D is released to probation by operation of Ind. Code 35-50-2-2(c). If Tr. Ct. finds that D has violated condition of probation at any time before termination of probationary period, & petition to revoke is filed within probationary period, then Ct. may order execution of sentence that had been suspended. Childers v. State, 656 N.E.2d 514 (Ind. Ct. App. 1995). It is not necessary to advise D to avoid committing additional crime as condition of probation, because such condition is automatically included by operation of law. Ind. Code 35-38-2-1(b)(2). In this case, express terms of D's sentence modification provided that remainder of his 34-year sentence was to be suspended, but not unconditionally reduced or vacated. Any error in Tr. Ct.'s failure to advise D of terms of his probation in this case was harmless, because D's probation was revoked for commission of additional crime. Menifee v. State, 600 N.E.2d 967 (Ind. Ct. App. 1992). Held, probation revocation affirmed.

TITLE: Williams v. State
INDEX NO.: F.1.d.
CITE: (1st Dist., 6-17-98), Ind. App., 695 N.E.2d 1017
SUBJECT: Out-of-state Alford plea - basis for probation revocation
HOLDING: Conviction after out-of-state Alford plea supported revocation of probation. Criminal conviction is prima facie evidence of probation violation & will alone support revocation of probation. Here, D entered Alford plea of guilty to Assault in 4th Degree in Kentucky while he was on probation in Indiana. Although Indiana has declined to accept Alford pleas, which are guilty pleas from Ds who claim to be innocent, Tr. Ct. revoked D's probation based on State's presentation of certified documents showing Alford plea from Kentucky. Because Kentucky law clearly treats Alford pleas as convictions, there is no reason for Indiana Ct's. to treat them any differently for purposes of making determinations on probation revocations. Thus, there was sufficient evidence that D violated his probation. Held, judgment affirmed.

TITLE: Wilson v. State
INDEX NO.: F.1.d.
CITE: (5/5/80), Ind. App., 403 N.E.2d 1104
SUBJECT: Probation revocation -- failure to report to jail
HOLDING: D appealed revocation of his probation, claiming Tr. Ct. abused its discretion in revoking his probation. D contended that Tr. Ct. abused its discretion in ordering sentence executed because D had excuse for not reporting to jail, excuse being that he was hitch-hiking to jail & was forced to turn back because of rain. Further, excuse was that he did not return to jail because of desire to see his older brother. In addition, there was evidence that he made no arrangements to assure his timely presence at jail. Under Ind. Code 35-7-2-2(d), State has burden of proving violation of probation by preponderance of evidence. On appeal, Ct. does not reweigh evidence. Ct. held that there was sufficient evidence on probation violation by not reporting to jail on weekend. Held, probation revocation affirmed.

TITLE: Wright v. State
INDEX NO.: F.1.d.
CITE: (1st Dist., 12-5-97), Ind. App., 688 N.E.2d 224
SUBJECT: Probation revocation - insufficient evidence
HOLDING: Tr. Ct. erred in revoking D's probation because D did not violate "no contact" condition of probation by filing lawsuit. Contact is establishing of communication with someone. Communication occurs when person makes something known or transmits information to another; communication can be indirect or direct & is not limited by means in which it is made known to another person. Here, as condition of probation, D was ordered not to have any contact with his old doctor or doctor's family in order to prevent D from harassing or intimidating doctor. Although D filed lawsuit against doctor, Ct. could not conclude that lawsuit was filed merely to harass doctor absent determination that lawsuit was frivolous, unreasonable or groundless. Thus, D's act of filing lawsuit, without evidence of harassment, did not constitute violation of his probation. Held, probation revocation reversed.

F. PROBATION/ PAROLE/CLEMENCY

F.1. Probation (IC 35-38-2)

F.1.e. Revocation proceedings (IC 35-38-2-3)

TITLE: Abernathy v. State
INDEX NO.: F.1.e.
CITE: (1st Dist., 08-23-06), Ind. App., 852 N.E.2d 1016
SUBJECT: Probation revocation- effect of initial plea agreement
HOLDING: Tr. Ct. did not abuse its discretion by ordering D to serve his three-year suspended sentence after finding D violated probation. A sentence imposed by Tr. Ct. pursuant to plea agreement must be in conformity with the terms of such agreement. Here, D pled guilty to a class C felony sexual misconduct with a minor. The agreement specified that "the executed portion of the sentence in the Indiana Department of Corrections shall not exceed five years." D was sentenced to eight years, with five years executed & three years probation. When D violated probation, Tr. Ct. ordered the three suspended years executed. It was within Tr. Ct.'s discretion pursuant to the plea agreement to order D to serve probation, & D implicitly agreed to comply with the terms of any such probation & to the imposition of sanctions or consequences for violating probation. The mere fact that D had a plea agreement which controlled at the time of initial sentencing in no way modified the Tr. Ct.'s statutory authority under Ind. Code 35-38-2-3(g)(3) to order execution of a suspended sentence following a probation violation. Held, judgment affirmed.

RELATED CASES: Rivera, (Ind. Ct. App. 2014) (following rationale set forth in Stephens, Ct. held that when revoking placement in community corrections, Tr. Ct. had authority to sentence D to time served, which was less than the length of sentence originally suspended but not less than the statutory minimum for the offense; see full review at E.6.k).

TITLE: Brown v. State

INDEX NO.: F.1.e.

CITE: (02-05-21), Ind. Ct. App., 162 N.E.3d 1179

SUBJECT: Abuse of discretion to order execution of entire remaining suspended sentence for technical violation of probation

HOLDING: After revoking Defendant's probation, trial court abused its discretion in ordering Defendant to serve more than sixteen years of his previously suspended 20-year sentence when the evidence before the court showed only that Defendant had missed an undetermined number of meetings with his probation officer. While it is correct that probation may be revoked on evidence of violation of a single condition, the selection of an appropriate sanction will depend upon the severity of the defendant's probation violation. Heaton v. State, 984 N.E.2d 614, 618 (Ind. 2013). Held, judgment remanded to resentence Defendant "in a manner commensurate with the severity of missed appointments with his probation officer, the only violation the State established on this record."

TITLE: Bumbalough v. State

INDEX NO.: F.1.e.

CITE: (2nd Dist., 09-25-07), Ind. App., 873 N.E.2d 1099

SUBJECT: Probation revocation-involuntary waiver of counsel not subject to harmless error analysis

HOLDING: Tr. Ct. erred in allowing D to waive his right to counsel without first determining whether the waiver was voluntary, knowing & intelligent. When a D waives his right to counsel, the record must show that D was made aware of the nature, extent & importance of the right to counsel & to the necessary consequences of waiving such a right. Here, Tr. Ct. showed D an advice of rights video. The Ct. then told D he could either admit or deny the probation violation & refused to answer D's question. D then admitted without counsel. The record was silent as to whether D voluntary & intelligently waived his right to counsel. Although the State argued that probation would have been revoked even with counsel, denials of the right to counsel are not subjected to harmless error analysis. Held, judgment reversed.

RELATED CASES: Silvers, 945 N.E. 2d 1274 (Ind. Ct. App. 2011) (where Tr. Ct. did not accompany any of his inquiries with a clear statement of D's right to counsel and did not present appointed counsel as an option, State failed to prove that D's decision to proceed pro se and admit the probation revocation was voluntary and intelligent); Butler, 951 N.E.2d 255 (Ind. Ct. App. 2011); Cooper, App., 900 N.E.2d 64 (where D unequivocally expressed desire to waive counsel and admit to probation violation, his waiver was knowingly and intelligently made, despite Tr. Ct.'s failure to advise D of the pitfalls of self-representation); Eaton, App., 894 N.E.2d 213 (record did not establish that D waived his right to counsel, and even assuming waiver, he was not adequately advised before doing so).

TITLE: Davis v. State
INDEX NO.: F.1.e.
CITE: (2nd Dist., 2-22-01), Ind. App., 743 N.E.2d 793
SUBJECT: Denial of continuance of probation revocation proceeding - new charges
HOLDING: Tr. Ct. did not err in denying D's request to continue probation revocation hearing until new charges were resolved. Noting that lowered burden of proof in revocation hearings virtually assures revocation in any case in which D does not testify, D argued that allowing revocation hearing to precede trial violated his privilege against self-incrimination. However, there was no governmental compulsion in Tr. Ct.'s denial of continuance. D had option, but was not required, to testify at probation hearing. Lower standard of proof in no way compels D to testify or face certain revocation. In response to D's policy concerns, including potential for State's use of revocation proceeding to gain evidence for subsequent criminal trial, Ct. declined to adopt prospective rule requiring probation revocation hearings based on new charges not proceed until after new charges have been resolved. Held, probation revocation affirmed.

TITLE: Donald v. State
INDEX NO.: F.1.e.
CITE: (07-22-10), 930 N.E.2d 76 (Ind. Ct. App. 2010)
SUBJECT: Probation revocation - due process requires competency
HOLDING: Although a D is not entitled to a competency evaluation under Ind. Code 35-36-3-1, the Due Process Clause of the United States Constitution requires that a D be competent when participating in a probation revocation hearing. A D during a probation revocation hearing is entitled to the minimum requirements of due process, such as an opportunity to be heard and present evidence and the right to confront and cross-examine adverse witnesses. Without competency, the minimal due process rights guaranteed to probationers at revocation hearings would be rendered meaningless. Thus, Court followed other jurisdictions by finding due process requires a competency evaluation if there are reasonable grounds to doubt competency in probation revocations.

Here, D had a history of diabetes that had led to a stroke in the past. D's attorney, based on a thirty - minute consultation on the day of the probation revocation hearing, claimed that D could not assist him. The prosecutor agreed that D was suffering from some kind of condition. Rather than address whether a competency evaluation was warranted, Tr. Ct. found D had no standing to request a competency evaluation in a probation revocation hearing. Because Tr. Ct. never addressed whether there were reasonable grounds to order an evaluation, D should be allowed to address this issue. Held, judgment reversed and remanded for further proceedings consistent with this opinion.

RELATED CASES: Hutchison, 82 N.E.3d 305 (Ind. Ct. App. 2017) (Tr. Ct. did not commit fundamental error by failing to conduct competency evaluation before revoking D's probation), Leedy, 998 N.E.2d 307 (Ind. Ct. App. 2013) (even though uncontested testimony established that Larue Carter Center in Indianapolis was better equipped to treat D's severe brain injury than DMHA facility here (Logansport State Hospital), commitment to DMHA did not violate right to due process because Ind. Code 35-36-3-1 requires commitment to DMHA and the evidence established that the DMHA facility had sufficient expertise to treat D's brain injury).

TITLE: Elston v. State
INDEX NO.: F.1.e.
CITE: (9/1/2022), Ind. Ct. App., 194 N.E.3d 148
SUBJECT: Petition to revoke probation should have been dismissed as untimely
HOLDING: Elston was placed on probation in two cases and the State filed petitions to revoke in each. In the first case, he was on probation for a period that ended on August 20, 2019. On August 9, 2019, the State charged Elston with battery. On October 22, 2019, the state filed a petition to revoke Elston's probation for committing a new offense. By statute, IC 35-38-2-3(a), the State was required to file the petition to revoke not later than "forty-five (45) days after the state receives notice of the violation." Elton argued that the State had 45 days from August 9 to file the petition to revoke, while the State argued that it did not learn of the new offense until the initial hearing was held on October 11. The Court of Appeals agreed with Elston, holding the forty-five-day period under Section 35-38-2-3(a)(2)(B) begins to run when “the state” receives notice of the violation, not when the probation department receives notice. Therefore, the trial court erred in denying the motion to dismiss the petition to revoke in the first case. In the second case, Elston argued that the trial court lost jurisdiction over the petition to revoke once his probationary term expired in June 2020. But the language upon which Elston rested his argument - “once a probationer’s term of probation has expired, the court loses jurisdiction over that person" - came from a case decided in 1992 under a prior version of the revocation statute. The Court held that under the current statute, as long as the alleged violations occurred during the probationary period, and the petition to revoke is timely filed, the court has the authority to adjudicate the petition after the expiration of the probationary period. Therefore, the trial court did not err in denying Elston's motion to dismiss the second case. Held: affirmed in part and reversed in part.

TITLE: Greer v. State
INDEX NO.: F.1.e.
CITE: (5th Dist., 1-27-98), Ind. App., 690 N.E.2d 1214
SUBJECT: Probation revocation - advisements; waiver of right to counsel
HOLDING: Although D in probation revocation proceeding was not advised of pitfalls of self-representation, Tr. Ct. nevertheless properly determined, on record, that D knowingly, intelligently, & voluntarily waived his right to counsel. Probationer who chooses to admit rather than contest his probation violation places himself in situation similar to that of D who chooses to plead guilty to criminal charges. It is unnecessary to warn such person of pitfalls of self-representation, for those pitfalls exist only when confronted with prosecutorial activity which is designed to establish culpability. It is therefore clear that, when probationer who proceeds pro se chooses to admit rather than challenge his alleged probation violation, his knowing, intelligent, & voluntary waiver of counsel may be established even if record does not show that he was warned of pitfalls of self-representation. Held, judgment affirmed.

RELATED CASES: Allen, 86 N.E.3d 391 (Ind. Ct. App. 2017) (Because D did not his waive right to counsel at probation revocation hearing, and because he wasn't advised about dangers of self-representation, the revocation of his probation was reversed), Hammerlund, 967 N.E.2d 525 (Ind. Ct. App. 2012) (as in Greer, record established that D made a knowing, intelligent and voluntary wavier of counsel despite not being warned of the pitfalls of self-representation); Bumbalough, App., 873 N.E.2d 1099 (unconstitutional waiver of counsel is not subject to harmless error analysis); Bell, App., 695 N.E.2d 997 (failure to ascertain voluntariness of decision to proceed without counsel at probation revocation required reversal).

TITLE: Hubbard v. State
INDEX NO.: F.1.e.
CITE: (2nd Dist., 7-16-97), Ind. App., 683 N.E.2d 618
SUBJECT: Probation revocation - writing requirement; due process
HOLDING: Due process requires written statement by fact finder regarding evidence relied upon & reasons for revoking probation. Offinga, App., 637 N.E.2d 190. Placing transcript of evidentiary hearing in record, although not preferred way of fulfilling writing requirement, is sufficient if it contains clear statement of Tr. Ct.'s reasons for revoking probation. Clark, App., 580 N.E.2d 708. Here, Tr. Ct.'s Order of Revocation provided reasons for, & hearing transcript provided evidence underlying, Tr. Ct.'s revocation of D's probation. Both documents provided adequate basis for appellate review & thus were adequate to satisfy separate writing requirement. Ct. also held that D's probation could not be revoked for his refusal to take alcohol test because he received no notice of this claimed violation. However, D was not harmed by this error because Tr. Ct. found that he had violated several probation conditions of which he did receive notice. Held, judgment affirmed.

RELATED CASES: Wilson, App., 708 N.E.2d 32.

TITLE: Huffman v. State
INDEX NO.: F.1.e.
CITE: (1st Dist., 2-21-05), Ind. App., 822 N.E.2d 656
SUBJECT: Admitted probation violation -- no direct appeal
HOLDING: D admitted that she had violated terms of her probation. Finding a violation of probation, the Tr. Ct. released D on her own recognizance to get treatment for addictions. When she failed to appear for treatment, Tr. Ct. issued a warrant for her arrest & once she was apprehended ordered her to serve the remaining three years of her sentence. D subsequently filed a motion to correct error challenging the revocation of her probation based on her guilty plea, which was denied & D subsequently filed a direct appeal. In a case of first impression, Court held that a D cannot challenge a guilty plea to a probation violation by direct appeal, but rather must seek post-conviction relief, *citing* Tumulty v. State, 666 N.E.2d 394 (Ind.1996). Tumulty held as such for a conviction to a criminal charge based on a guilty plea. Court noted that Ind. Post-Conviction Rule 1(1)(a)(5) provided a remedy for D's claim & section (b) of that rule states the rule takes the place of all other common law, statutory or other remedies & shall be used exclusively in place of them. The Court rejected D's claim that post-conviction relief is not an exclusive remedy based on the explicit language of P-C.R.1(1)(b). While agreeing that Ind. Code 35-38-2-3 stipulates that a judgment revoking probation is a final appealable order & therefore may be subject to a direct appeal, this statute is subordinate to P-C.R. 1(1)(b). The Court also rejected D's claim that the civil nature of the proceeding affected the issue, as the civil status of a probation hearing focuses on the level of proof necessary for revocation & not its procedure. Furthermore, Tumulty made clear that a guilty plea brings to close the dispute between the parties much as an agreed judgment does among civil parties. Held, appeal dismissed without prejudice so D can pursue post-conviction relief if she chooses.

RELATED CASES: Kirkland, 176 N.E.3d 986 (Ind. Ct. App. 2021) (issue of whether D waived right to counsel was not properly before the Court in direct appeal, thus Court dismissed the appeal without prejudice to pursue post-conviction relief).

TITLE: Jones v. State
INDEX NO.: F.1.e.
CITE: (05-15-08), Ind., 885 N.E.2d 1286
SUBJECT: Erroneous SVP determination during probation revocation hearing
HOLDING: Indiana's sexually violent predator (SVP) statute, Ind. Code 35-38-1-7.5, does not authorize Tr. Ct. to initiate an SVP determination for the first time during a probation revocation proceeding. Ind. Code 35-38-1-7.5 "applies whenever a court sentences a person for a sex offense...[a]t the sentencing hearing." Focusing on clear and plain language of statute, Court held that SVP determination is authorized only at time of original sentencing and not during a probation revocation proceeding. Court rejected State's argument that the plain meaning of "whenever" applies to a sentence imposed at a probation revocation and that this is consistent with legislative intent and sound public policy. In addition to unambiguous text of statute, Court noted that Section 7.5 is located within Chapter 1, which is titled "Entry of Judgment and Sentencing," and is not located in Chapter 2, "Probation." Furthermore, the action taken by Tr. Ct. in a probation revocation proceeding is not a "sentencing." Neither the plea agreement, which provided only a ten-year registration period for D, nor Tr. Ct.'s sentencing judgment made any reference to D as an SVP. However, D remains subject to ten-year Sex Offender registration period following his release from incarceration. Held, transfer granted, SVP finding and Court of Appeals' opinion at 873 N.E.2d 725 on this issue vacated, revocation affirmed.

NOTE: *Citing* Thompson v. State, 875 N.E.2d 403 (Ind. Ct. App. 2007), Court noted that substantial 2007 amendment to SVP statute, including automatic designation of SVP status to person who commit certain offenses and duty of lifetime registration, "most assuredly has penal implications" and "runs afoul of *ex post facto* considerations." Id. at 409.

TITLE: Layne v. State
INDEX NO.: F.1.e.
CITE: (5th Dist., 2-26-98), Ind. App., 691 N.E.2d 1305
SUBJECT: Probation revocation - failure to inform D of time in which State can revoke probation
HOLDING: Tr. Ct. did not err in revoking D's probation, despite fact that D was not informed at his sentencing of statutory time frame within which revocation petition may be filed. Although Ind. Code § 35-38-2-1 & Ind. Code § 35-38-2-2.3(b) require Tr. Ct. to notify D of time period in which probation may be revoked, failure to comply with statutory notification requirements when placing person on probation is harmless error if there is substantial compliance with intent of statute. Menifee, App., 600 N.E.2d 967. Also, failure to comply with statutory guideline for placing D on probation is harmless error where it does not prejudice D or deny D of fundamental right. Boyd, App., 481 N.E.2d 1124. Here, D was not informed of statutory time limits, but was informed of potential consequences of probation violation & that if he violated any of conditions during probation, Ct. may revoke probation. Thus, Tr. Ct. substantially complied with intent of statute. In addition, because D's probation was actually revoked during his probation & not during 45- day statutory period after expiration of probation, D did not prove how he was prejudiced by Tr. Ct.'s failure to notify him of statutory period following expiration of probation in which probation may be revoked. Held, judgment affirmed.

TITLE: Louth v. State
INDEX NO.: F.1.e.
CITE: (5th Dist., 2-17-99), Ind. App., 705 N.E.2d 1053
SUBJECT: Probation revocation procedure - filing after period; notice of violation
HOLDING: Determination of when State receives notice of alleged probation violation is left to discretion of Tr. Ct., to be reviewed only for abuse of such discretion. Ct. may revoke person's probation if petition is filed before earlier of following: (1) one year after termination of probation; or (2) forty-five days after State receives notice of violation. Ind. Code 35-38-2-3(a)(2). Forty-five day deadline is only triggered in cases where State received notice of violation less than forty-five days before D's probationary term expired or after term expired. Here, probationer called probation officer & told him that he was arrested for crime in another state. Because arrest alone is insufficient to revoke person's probation, probationer's call was not sufficient notice of violation in order to trigger forty-five day period that State had to file petition to revoke. State could wait to file in order to determine what action Michigan was going to take with charges. Thus, State's failure to file petition to revoke within forty-five days from call was not violation of statute. Held, probation revocation affirmed.

NOTE: Ct. also *clarified* that 1990 amendment to Ind. Code 35-38-2-3, permitting State to file petition to revoke probation after probationary period has ended could be applied retroactively to people placed on probation prior to 1990; however, because Ct's. could not have anticipated new legislation &, thus, could not have advised probationers prior to 1990 of possibility that petition could be filed after probationary period, as practice matter, people placed on probation prior to 1990 cannot be revoked by petition filed after probationary period.

RELATED CASES: Sharp, App., 807 N.E.2d 765 (petition to revoke should have been dismissed as untimely because it was filed more than 45 days after end of D's probationary period & Sate had notice of D's violation during his probation).

TITLE: McKnight v. State

INDEX NO.: F.1.e.

CITE: (1st Dist., 4-25-03), Ind. App., 787 N.E.2d 888

SUBJECT: Probation revocation - Fifth Amendment not implicated where questions did not concern pending criminal charges

HOLDING: D's Fifth Amendment right against self-incrimination was not violated when Tr. Ct. compelled him to testify at probation revocation hearing. While probationer may invoke Fifth Amendment privilege with regard to any questions that may incriminate him in subsequent criminal prosecution, he is not entitled to invoke privilege with regard to basic identifying information & any disclosures that are necessary to effectively monitor his probation. Pitman v. State, 749 N.E.2d 557 (Ind. Ct. App. 2001). Here, D's Fifth Amendment right was not implicated by questions asked by State because questions did not elicit answers that could have implicated D in pending criminal matter, as questions concerned only prior arrest & conviction & his probation violations. Held, judgment affirmed.

TITLE: Medicus v. State
INDEX NO.: F.1.e.
CITE: (4-3-96), Ind., 664 N.E.2d 1163
SUBJECT: Probation revocation order requires reasoned statement
HOLDING: Due process requires that reasons for revoking probation be clearly & plainly stated to give D notice of revocation & to facilitate meaningful appellate review. Beginning with Morrissey v. Brewer, 408 U.S. 471 (1972), U.S. S. Ct. decisions have required written statements by fact finders as to evidence relied on & reasons for revoking probation. Here, Tr. Ct.'s statement was "simply too cursory to be helpful." It recited no facts surrounding probation violation & therefore gave neither guidance into Tr. Ct.'s reasons for revoking D's probation nor evidence used in making decision. Held, transfer granted, cause remanded for probation revocation statement consistent with opinion; Dickson, J., dissenting.

RELATED CASES: Collins, App, 639 N.E.2d 653 (Tr. Ct. properly stated its reasons for revoking D's probation and evidence upon which it relied).

TITLE: Mumford v. State
INDEX NO.: F.1.e.
CITE: (2d Dist., 6-15-95), Ind. App., 651 N.E.2d 1176
SUBJECT: Probation revocation - probationary period tolled
HOLDING: Although Tr. Ct. specifically found no probation violations with regard to conduct alleged to have occurred during original probationary period, Tr. Ct. did not err in revoking probation. If D violates probation during original term of probation, probation period is tolled from time of filing revocation petition until its disposition. Phillips v. State, Ind. App., 611 N.E.2d 198. Period is not tolled, however, where D is "faultless" during original term of his probation, Slinkard v. State, Ind. App., 625 N.E.2d 1282. Ct. reviewed record & concluded that D was fugitive for failure to contact probation department & was therefore not entirely faultless during original term of probation. Ind. Code 35-38-2-3(c) precludes probationer from violating terms of probation & fleeing jurisdiction until term of suspended sentence elapses, thereby thwarting State's efforts to revoke probation. Alley v. State, Ind. App., 556 N.E.2d 15. Here, D's disappearance & resultant failure to maintain contact with probation department was responsible for delays in revocation proceedings against him, thus period of probation was tolled until final disposition of future addendum probation violation & amended petition to revoke. Held, judgment affirmed. Sullivan, J., dissenting, argued that period of probation should not be deemed to have been tolled with respect to possible future violations not covered by allegations which trigger tolling of probation period.

TITLE: Murphy v. State
INDEX NO.: F.1.e.
CITE: (10/31/2018), 113 N.E.3d 776 (Ind. Ct. App. 2018)
SUBJECT: Probation revocation procedure - filing after period
HOLDING: Period of probation is not tolled under Ind. Code § 35-38-2-3(c) for violations filed after the probationary period ends. And although Tr. Ct. loses jurisdiction over D when the probation term expires, disposition may occur if the violation occurred during the probation term. Trial court has authority to hold a hearing and enter a revocation determination made in a petition timely-filed under Ind. Code § 35-38-2-3(a) (i.e., within 45 days of State receiving notice of the alleged violation). Moreover, the Tr. Ct.'s failure to issue a warrant or summons after the filing of the petition has no effect on its ability to conduct a hearing on that petition.

Here, the State filed two probation revocation petitions after D's probationary period had already ended. The first revocation petition was timely filed within 45 days of the State receiving notice that the D failed to complete all his probation requirements during his probationary period. But the second revocation petition was untimely because it alleged a violation after D's probationary period had already ended. Held, denial of motion to dismiss second revocation petition reversed and remanded for further proceedings on the first petition.

TITLE: Noethtich v. State
INDEX NO.: F.1.e.
CITE: (2nd Dist., 2-11-97), Ind. App., 676 N.E.2d 1078
SUBJECT: Probation revocation filed by probation officer
HOLDING: Indiana's probation revocation statute, Ind. Code 35-38-2-3, does not specify who is to file petition for probation revocation, but common practice is that it may be filed by either probation officer or prosecuting attorney. Isaac v. State, 605 N.E.2d 14. Here, Tr. Ct. did not err in considering notice of probation violation filed by probation officer. Tr. Ct. did not cease to be neutral & detached hearing body merely because its probation officer initiated, probation revocation proceedings against D. Flexible procedures & narrow inquiry associated with probation revocation hearing allow Tr. Ct. to enforce compliance with its lawful orders. Further, Tr. Ct. did not exercise any of functions of prosecutor but only those of judiciary when it enforced its own orders. Held, probation revocation affirmed; Sullivan, J., concurring in result.

RELATED CASES: Molone, App., 571 N.E.2d 329 (probation officer may notify court about violation of condition by filing petition or motion to revoke probation).

TITLE: Preston v. State (on petition for rehearing)
INDEX NO.: F.1.e.
CITE: (1st Dist. 05/11/92), Ind. App., 591 N.E.2d 597
SUBJECT: Revocation of probation after expiration of probation period
HOLDING: On Petition for Rehearing, Court of Appeals vacates previous decision at 588 N.E.2d 1273 & finds Tr. Ct.'s revocation of D's probation to be erroneous. Ind. Code 35-38-2-1(a)(2) (amended effective 7/1/90), provides that when person is placed on probation, court must advise that if condition of probation is violated during probationary period, petition may be filed 45 days after state receives notice of violation, or one year after probation is terminated, whichever comes first. Before Tr. Ct. may revoke probation under Ind. Code 35-38-2-3(a)(2), it must comply with advisements of Ind. Code 35-38-2-1(a)(2). Because D was placed on probation in 1987, court did not anticipate legislation & did not advise him of possibility of revocation after probationary period. Therefore, revocation under Ind. Code 35-38-2-3(a)(2) was erroneous.

RELATED CASES: Taylor, App., 675 N.E.2d 1128 (D was not advised of possibility of probation revocation after probationary period, & State sought to revoke probation after probationary period had expired; subsequent revocation under Ind. Code 35-38-2-3(a)(2) was erroneous).

TITLE: Puckett v. State
INDEX NO.: F.1.e.
CITE: (11-15-11), 956 N.E.2d 1182 (Ind. Ct. App. 2011)
SUBJECT: Probation - consideration of improper sentencing factors
HOLDING: Tr. Ct. abused its discretion by considering multiple improper factors before requiring D to serve the entirety of his previously suspended sentence. A Tr. Ct.'s sentencing decision in a probation revocation proceeding is reviewed for an abuse of discretion. Although this discretion is broad, it is not boundless. Here, when eighteen-years-old, D had a sexual encounter with a twelve-year-old at a party. D and other party goers believed the girl to be at least sixteen, and the girl admitted she may have told D she was either fourteen, fifteen, sixteen or seventeen. Regardless, D pled guilty to class C felony child molesting and received a four-year suspended sentence. Years later, the State filed a petition to revoke D's probation for failing to register as a sex offender. Approximately four years later, D admitted to the probation violation and Tr. Ct. revoked D's entire suspended sentence despite the evidence of D's positive traits and that he was now married, held a good job, and had a newborn baby. In its sentencing statement, Tr. Ct. expressed its displeasure with D's original plea agreement, the fact that D had sex with the girl which is a more serious crime than the crime for which D was convicted, dismissed probation violations, and his own beliefs regarding the importance of the sex offender registry.

First, the Tr. Ct.'s belief that a sentence imposed under the original plea agreement was "too lenient" was not a proper basis upon which to determine the length of a sentence to be imposed following a revocation of probation. A D who enters into a plea agreement is entitled to the benefits of that bargain, even in a later probation revocation proceeding. Second, it was improper for the Tr. Ct. to find that the D actually committed a more serious crime than the one or ones of which he or she was originally convicted and to rely upon dismissed probation violation allegations. Finally, although the sex offender registry is important, the Tr. Ct.'s discussion of that importance failed to reveal anything particularly egregious about D's failure to register. D was separately punished for that failure to register. Because Appellate Rule 7(B) does not apply to probation revocations, the appellate court lacks the power to revise D's sentence. Rather, the case is remanded for Tr. Ct. to conduct another hearing regarding revocation of probation and to determine an appropriate sanction for D's admitted violation without relying upon the improper facts outlined in the opinion. Held, judgment reversed and remanded for a new sentencing determination.

TITLE: Ripps v. State
INDEX NO.: F.1.e.
CITE: (06-05-12), 968 N.E.2d 323 (Ind. Ct. App. 2012)
SUBJECT: Probation - abuse of discretion to revoke suspended sentence
HOLDING: Tr. Ct. abused its discretion by revoking D's probation and ordering him to serve the entire suspended portion of his sentence for violating terms of his probation. The decision to revoke probation is reviewed for an abuse of discretion. A reviewing court is concerned with the reasonableness of the action in light of the record. Here, D was on probation for child molesting as a Class C felony. D was revoked and served over one year in prison for committing a new crime of residing within 1000 feet of a public park. However, the new conviction was later overturned due to an ex post facto violation. Tr. Ct. revoked D a second time and ordered him to serve the remainder of his sentence in prison for living at an assisted living center which was 980 feet from a library and not informing the home that he was a sex offender. D had tried to register the home with the sheriff and was in the process of moving when he was arrested for the probation violation. At the time of the second revocation, D was sixty-nine years old and suffering from serious health issues, including terminal cancer; he was attempting to adhere to his probation conditions, as evidenced by his going to the sheriff's office to register his new address; although he was initially in violation of the residency restrictions, evidence reveals he was taking steps to correct the violation by finding a new residence; while he did live within 1000 feet of the public library, this was only so by about twenty feet and some ambiguity exists in how this distance was measured; and last, D previously served time in prison for a crime that was later vacated as violative of our constitutional ex post facto provision. Under these circumstances, it was unreasonable for Tr. Ct. to determine D's violation warranted revoking his probation. Held, judgment reversed and Tr. Ct. ordered to release the D immediately even before certification of the opinion.

TITLE: Slinkard v. State
INDEX NO.: F.1.e.
CITE: (1st Dist., 12-20-93), Ind. App., 625 N.E.2d 1282
SUBJECT: No extension of probation period by filing probation violation (PV)
HOLDING: Although State filed notice of PV based on event occurring during probationary period, where Tr. Ct. found no violation based on those events, it could not find violation for events occurring after original probationary period expired. D was placed on probation to expire February 5, 1992. On September 18, 1991, State filed PV petition for events occurring on August 22, 1991. Hearing was set for March 18, 1992, but State was granted continuance. On March 23, 1992, State filed amended petition, based on incidents occurring on March 19, 1992. Hearing was finally held in February 1993, & Tr. Ct. found no PV on August 22, 1991, but did find violation on March 19, 1992, & revoked probation.

Ct. found that because acts complained of occurred outside probation period, there was no probation to revoke. Ind. Code 35-38-2-3(c) provides that issuance of summons or warrant tolls period of probation until final determination of charge & gives Ct's. power to revoke probation when they find violation, even though disposition occurs after original term has expired. Ct. rejected argument that "tolling" meant that, regardless of propriety of allegations of violations & original term of probation, Tr. Ct's. could revoke for any acts constituting violation that occur up until disposition occurs. Ct. distinguished Phillips, App., 611 N.E.2d 198; Hayes, App., 590 N.E.2d 1116, *trans. denied*; & Alley, App., 556 N.E.2d 15, because here Tr. Ct. found no violation during original term of probation, & D complied with probation, attended hearings, & was not responsible for any delay. Where no violations occur during original probationary period, Tr. Ct. cannot revoke probation for events occurring after original term expires, unless there is misconduct in hearing process or D absconds. Held, judgment reversed.

RELATED CASES: Dawson, App., 751 N.E.2d 812 (D's probationary term was not tolled because there was no violation during original term of probation as alleged in original petition upon which to base extension of probationary term).

TITLE: Trammell v. State
INDEX NO.: F.1.e.
CITE: (11/13/2015), 45 N.E.3d 1212 (Ind. Ct. App. 2015)
SUBJECT: Insufficient evidence D violated probation during probationary period
HOLDING: Tr. Ct. abused its discretion in revoking D's probation, where State did not prove by preponderance of evidence that probation violation occurred during his probationary period. D served a concurrent sentence for Class D felony convictions of theft and resisting law enforcement arising from separate causes disposed through a single plea agreement.

On July 17, 2012, D's probation for resisting cause was revoked and he was ordered to serve four months in the DOC, with 47 days of credit for time confined awaiting sentencing. It is not clear from record when D was released from this second period of incarceration to resume what remained of his probation. And Court need not decide whether D's remaining probationary period in theft cause upon his release was the 2.5 months the probation officer stated at revocation hearing, or the five months of his suspended sentence that D had not yet served due to the revocation. The revocation petition for the theft cause alleged D committed his first violation of probation on March 28, 2013. On the face of the record, D's probationary period had ended well before he was alleged to have violated probation.

D did not invite error for admitting to acts alleged and failing to assert during revocation hearing that he was not on probation. D is under no obligation to point out to the State that it has failed to prove its case, and an admission to the conduct is not an admission that he has violated probation by engaging in that conduct. Held, judgment reversed.

NOTE: In a footnote, Court noted that a document the State offered purporting to show dates D was on probation for theft case could not be judicially noticed as proof that D violated probation, because it was not presented to the Tr. Ct., and bears no date or the signature of the person who prepared it. Court granted D's motion to strike the document.

TITLE: Utley v. State

INDEX NO.: F.1.e.

CITE: (04/07/2021), 167 N.E.3d 777 (Ind. Ct. App. 2021)

SUBJECT: Date of arrest is not counted when computing the 15 days a person arrested for a probation violation and not admitted to bail may be held in jail without a hearing

HOLDING: Defendant arrested on a probation violation and held without bond argued he did not have a hearing within fifteen days as required by I.C. 35-38-2-3(d). Considering Trial Rule 6(A) and the general rule that when computing time for performance of an act which must take place within a certain number of days of the triggering event, Court of Appeals held that the day of the triggering event is not included. Here, Defendant had a hearing on the 15th day, excluding the day of his arrest. Held, probation violation affirmed.

F. PROBATION/ PAROLE/CLEMENCY

F.1. Probation (IC 35-38-2)

F1.e.1. Pre-revocation Hearing

TITLE: Curtis v. State
INDEX NO.: F.1.e.1.
CITE: (12/7/77), Ind. App., 370 N.E.2d 385
SUBJECT: Prerevocation hearing - required only for those in custody
HOLDING: Preliminary hearing is required only where probationer is held in custody awaiting final revocation hearing. There is two-stage procedure for probation revocation: preliminary hearing on whether there is probable cause to believe terms of release were violated & subsequent final hearing on merits. Gagnon v. Scarpelli, 411 U.S. 778 (1973). However, purpose behind preliminary hearing is that conditional liberty of probationer or parolee, like more complete liberty of others, cannot constitutionally be infringed without probable cause; the purpose is not to afford probationer notice of charged violation, which could be given through other means. U.S. v. Sciuto, 531 F.2d 842 (7th Cir. 1976). Here, because probationer was not being detained while awaiting probation revocation hearing, purpose of prerevocation hearing was eliminated. Thus, Tr. Ct. did not err by failing to provide prerevocation hearing. Held, denial of post-conviction relief affirmed.

RELATED CASES: Wilson, App., 403 N.E.2d 1104 (no constitutional violation where D was in jail without preliminary hearing); Dulin, App., 346 N.E.2d 746 (no error in failing to hold preliminary suppression hearing).

TITLE: Hammann v. State

INDEX NO.: F.1.e.1.

CITE: (05-11-2023), Ind. Ct. App., 210 N.E.3d 823

SUBJECT: Release, not dismissal, is remedy for violation of statutory time limitations for bail and recognizance in probation revocation proceedings

HOLDING: Ind. Code Section 35-38-2-3(d) requires a probationer to be either admitted to bail or released on his own recognizance if a hearing is not held within the 15 days of incarceration. But the probationer is not entitled to dismissal of the alleged probation violation if he is held longer than 15 days without a fact-finding hearing, admittance to bail, or release on recognizance. As with Criminal Rule 4(A), the probationer would merely be entitled to admittance to bail or release on his own recognizance. The Court also held that a probationer may raise the issue of Indiana Code § 35-38-2-3(d) even after the fifteen days have passed. The remedy is admittance to bail or release on recognizance, not discharge or dismissal of the probation violation allegation. And notwithstanding the State's comments at initial hearing during which failed drug tests were not mentioned, Defendant was not deprived of his due process right to written notice of the claimed violations of probation. The State presented sufficient evidence to demonstrate Defendant violated his probation by committing new offenses and failing multiple drug tests.

TITLE: Wilson v. State
INDEX NO.: F.1.e.1.
CITE: (5/5/80), Ind. App., 403 N.E.2d 1104
SUBJECT: Probation revocation -- effect of failure to hold prerevocation hearing
HOLDING: Due process does not require that probationer benefit from denial of timely prerevocation hearing, but only that no unfairness result therefrom. Accordingly, probationer whose probation has been revoked after properly conducted revocation hearing is not entitled to have revocation set aside unless it appears that failure to accord him prerevocation hearing resulted in prejudice to him at revocation hearing. Where there has been revocation hearing at which it has been found in accord with due process that there has been violation, subsequent preliminary hearing is purely supererogatory, & its absence under these circumstances violates no right of probationer. Here, D's appealed probation revocation, claiming he was denied due process by Tr. Ct.'s failure to hold preliminary hearing. D maintained that in all probation revocation proceedings in which probationer is held in custody, due process demands probable cause preliminary hearing. Ct. held that not only has D failed to demonstrate prejudice, he has not even claimed prejudice. Only contention is that because he was in jail without preliminary hearing, his probation revocation should be reversed. Held, revocation of probation affirmed.

F. PROBATION/ PAROLE/CLEMENCY

F.1. Probation (IC 35-38-2)

F.1.e.2. Revocation hearing

TITLE: Beeler v. State
INDEX NO.: F.1.e.2
CITE: (04-27-11), 959 N.E. 2d 828 (Ind. Ct. App. 2011)
SUBJECT: Probation revocation - D's admission on CCS entry without evidentiary hearing
HOLDING: When a probationer admits to a probation violation, an evidentiary hearing is not necessary. Vernon v. State, 903 N.E.2d 533 (Ind. Ct. App. 2009). Here, even though transcript did not contain such an admission, a chronological case summary (CCS) entry indicated that D admitted to violating the terms of community corrections placement. Majority of Court concluded that this was sufficient to establish an admission and thus waive the requirement of an evidentiary hearing. Court cited Epps v. State, 244 Ind. 515, 192 N.E.2d 459 (1963) and Trojnar v. Trojnar, 698 N.E.2d 301 (Ind. 1998) to support its holding. Held, probation revocation affirmed; Crone, J., dissenting, disagreed that Court should be able to rely on Tr. Ct.'s assertions in its docket to establish the truth of events even when the transcript doesn't specifically verify them. "Given the fundamental due process and liberty interests at stake and given that the transcript actually contradicts the CCS's version of events, I disagree with the State's position," he wrote. "If Beeler admitted to a probation violation off the record--a fact that Beeler does not concede on appeal--it was incumbent upon the State to ensure that the admission was repeated on the record. This it failed to do."

TITLE: Berry v. State
INDEX NO.: F.1.e.2.
CITE: (5th Dist., 04-17-09), 904 N.E.2d 365 (Ind. Ct. App. 2009)
SUBJECT: Sentencing statement not required for probation revocations
HOLDING: Tr. Ct. is not required to issue a detailed sentencing statement when it sentences D on probation revocation. Sentencing statement requirement applies to imposition of an initial sentence (see Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007)), not a sentence imposed following the revocation of probation. Here, Tr. Ct. reinstated a portion of an already imposed sentence, which D cannot collaterally attack. Stephens v. State, 818 N.E.2d 936 (Ind. 2004). D has not established that Tr. Ct. abused its discretion when it reinstated a portion of an already imposed sentence. Held, judgment affirmed.

TITLE: Bussberg v. State
INDEX NO.: F.1.e.2.
CITE: (4th Dist., 05-3-05), Ind. App., 827 N.E.2d 37
SUBJECT: Immunity forces D's admission to probation violation
HOLDING: D challenged his probation revocation based on self-incrimination & chain of custody grounds. At revocation hearing, State asked D if he ingested methamphetamine prior to submitting a urine specimen. State requested & Tr. Ct. granted use immunity to D so that an affirmative answer could not be used against him in a future prosecution. D's counsel objected on self-incrimination grounds which was *overruled* by Tr. Ct. & D answered he had used meth prior to giving the urine specimen. *Citing* Minnesota v. Murphy, 465 U.S. 420 (1984), Ct. determined a probationer only has a limited Fifth Amendment right against self-incrimination. He could only invoke the Fifth Amendment if he were exposed to future prosecution & not if the answer simply is in relation to the alleged probation violation. The granting of use immunity removed the danger of future prosecution against D & thus the Tr. Ct. did not err in ordering D to answer the question. The testimony also did not run afoul of Ind. Code 35-37-3-3, the immunity statute, which states any evidence given Amay not be used in any criminal proceeding against that witness@ as a probation revocation hearing is not a criminal proceeding. Held, judgment affirmed.

RELATED CASES: Williams, App., 883 N.E.2d 192 (no error in failing to advise D at change of placement hearing that admitting to day reporting program rule violation could also amount to a finding that she violated probation conditions).

TITLE: Castillo v. State
INDEX NO.: F.1.e.2.b.
CITE: (1/11/2017), 67/661 (Ind. Ct. App. 2017)
SUBJECT: Court revoking probation not required to explain sanction it imposes
HOLDING: Due process does not require a probation court to explain the sanction it imposes after revoking a person's probation. Black v. Romano, 471 U.S. 606 (1985); Cf. Berry v. State, 904 N.E.2d 365, 366 (Ind. Ct. App. 2009); Monday v. State, 671 N.E.2d 467, 469 (Ind. Ct. App. 1996). Defendant was convicted of sexual misconduct with a minor, with a four-year sentence, two and one half years suspended to probation. One term of probation prohibited Defendant from having contact with persons younger than eighteen absent permission from his probation officer. Two days after Defendant was released to probation, he was found living with his seventeen-year-old girlfriend and her younger brother. Therefore, the trial court revoked Defendant's probation and ordered him to serve his full sentence. It offered no explanation for the penalty it imposed, and none was necessary. See Black, 471 U.S. at 612 (in specifying procedures for probation matters, neither Gagnon v. Scarpelli, 411 U.S. 778 (1973) nor Morrissey v. Brewer, 408 U.S. 471 (1972) held that a probation court must state that alternatives to incarceration were considered and rejected.). Held, judgment affirmed.

TITLE: Dalton v. State
INDEX NO.: F.1.e.2.
CITE: (2d Dist. 10/11/90), Ind. App., 560 N.E.2d 558
SUBJECT: Probation revocation proceedings - due process
HOLDING: Tr. Ct. failed to conduct probation revocation proceedings affording D due process of law. Indiana statutes set out requirements for probation revocation hearing, at Ind. Code 35-38-2-3. In addition, U.S. S. Ct. has set out minimum due process rights which must be afforded before probation can be revoked, resulting in loss of liberty. These include (1) written notice of claimed violations; (2) disclosure of evidence; (3) opportunity to be heard & to present witnesses; (4) right to confront & cross-examine witnesses; (5) neutral & detached hearing body; & (6) written statement by finder of fact as to reasons for revocation. See Gagnon v. Scarpelli (1973), 411 U.S. 778, 93 S. Ct. 1756, 36 L.Ed.2d 656; Morrissey v. Brewer (1972), 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484. Here, all that occurred was discussion between D, his attorney, prosecutor, probation officer, & trial judge. No evidence was introduced, & there is no indication that D was afforded opportunity to present witnesses or to cross-examine any "witness" against him. Failure to hold evidentiary hearing violated D's due process rights & was fundamental error. Reversed & remanded for new proceedings.

RELATED CASES: Watters, 22 N.E.3d 617 (Ind. Ct. App. 2014) (probation revocation violated D's right to due process because documents purporting to show new conviction were not reliable, as they were not certified or supported by affidavit or live testimony); Tillberry, App.,895 N.E.2d 411 (D "hearing," which consisted of an informal conversation between the judge and parties at hearing on State's Notice of Probation Violation did not comport with due process, & State did not provide any evidence to support the revocation or circumstances leading to D's arrest for crime allegedly committed while on probation; see full review, this section); Pope, App., 853 N.E.2d 970 (although D agreed that decision to revoke home detention would be made by Community Corrections rather than Tr. Ct., she did not waive her due process rights when she entered into the agreement); Debro, 821 N.E.2d 367 (same due process rights afforded to Ds in context of probation revocation inure also to benefit of Ds in proceedings to enforce a deferred sentence or withheld judgment); Ferguson, App., 634 N.E.2d 65 (Tr. Ct. must give written reasons & statement of evidence relied on when revoking probation); Eckes, App., 562 N.E.2d 443 (where 3 witnesses simply testified that they would recommend that D serve out his sentence for arson, state did not prove probation violation by preponderance of evidence); Weatherly, 564 N.E.2d 350 (informal conversation between judge and parties present is insufficient under both statutory and due process concepts); Fields, App., 676 N.E.2d 27 (due process not violated when D is represented by counsel during all stages of trial except final hearing revoking probation).

TITLE: Hampton v. State
INDEX NO.: F.1.e.2.
CITE: (3/13/2017), 71 N.E.3d 1165 (Ind. Ct. App. 2017)
SUBJECT: Probation agreement did not take away sentencing discretion
HOLDING: The trial court erred in finding that it was bound by the parties' probation agreement and had no discretion in sanctioning Defendant for her failure to abide by the agreement.

After the State filed a petition to revoke Defendant's probation, she and the State agreed that if she could abide by the terms of her probation for six months, the State would withdraw its request that she serve the remaining 550 days of her sentence. Defendant also agreed that if she did not abide by the terms of the agreement, she would automatically serve the 550-day sentence without a chance to challenge her sanction; there would be no formal hearing, no evidence, and no witnesses to hear or cross-examine. The trial court accepted the agreement. Defendant later violated several terms of her probation. The trial court found that it had no authority to change the Agreement and thus ordered her to serve 550 days, less credit time.

Despite the terms of the agreement, the trial court had continuing authority to consider the gravity of Defendant's violations, and it was required to determine the appropriate sanction to impose. A probation agreement that purports to remove this discretion from a trial court is "constitutionally suspect." See Woods v. State, 892 N.E.2d 637, 641 (Ind. 2008); Sullivan v. State, 56 N.E.3d 1157 (Ind. Ct. App. 2016). Thus, the 550-day sanction is vacated and, on remand the trial court shall determine the appropriate sanction to impose on Defendant. Held, judgment reversed.

TITLE: Hensley v. State
INDEX NO.: F.1.e.2.
CITE: (12/30/91), Ind. App., 583 N.E.2d 758
SUBJECT: Revocation proceeding - duress defense
HOLDING: Duress defense may be asserted by D, who violated probation conditions that he contact probation department, obtain permission to leave state & notify department of any address change. Duress is defense when person who engaged in prohibited conduct was compelled to do so by threat of imminent serious bodily injury to himself or another. Ind. Code § 35- 41-3-8. Compulsion must be such that alternative with which D is faced be instant & imminent. Love, 393 N.E.2d 178. Here, D contended that threats from victim of earlier conviction caused him to be in fear & move to Florida. However, D did not show that compulsion he felt from victim's alleged harassment rose to degree necessary to constitute duress. Even if D's assertion did qualify as duress, D could have reported victim's threats to probation department. Because fleeing state was not D's only alternative, D violated probationary terms by fleeing state. Held, judgment affirmed.

TITLE: Mathews v. State
INDEX NO.: F.1.e.2.
CITE: (2nd Dist.; 06-18-09), 907 N.E.2d 1079 (Ind. Ct. App. 2009)
SUBJECT: Probation revocation - waiver of right to be present
HOLDING: Tr. Ct. did not violate D's due process rights by holding a probation revocation hearing in her absence. The best evidence that a waiver of D's right to counsel is knowing and voluntary is the D's presence in court during the hearing at which the Tr. Ct. sets the date of the D's trial. Under those circumstances, when the D fails to appear for trial and fails to notify the court or provide the court with an explanation for her absence, the Tr. Ct. may conclude the D's absence is knowing and voluntary and may proceed with the trial in absentia. Here, D was present in court when the Tr. Ct. scheduled an initial probation revocation hearing for July 26, 2006. However, D was not present when her attorney filed a motion to continue the probation revocation hearing and when the hearing was rescheduled for September. But, D did not appear on July 26, 2006. Had she done so, she would have known the hearing was rescheduled for September. Under these circumstances, the Tr. Ct. did not err in determining D knowingly and voluntarily waived her right to be present at the probation revocation hearing and proceeding in absentia. Held, judgment affirmed in part and remanded with instructions for Tr. Ct. to explain how it calculated credit time or re-calculate credit time.

TITLE: Million v. State
INDEX NO.: F.1.e.2.
CITE: (1st Dist., 2-23-95), Ind. App., 646 N.E.2d 998
SUBJECT: Community corrections program - revocation hearing & due process
HOLDING: Revocation of D's placement in community corrections program did not comply with due process. Ct. first noted that Ind. Code 35-38-2.6-3(a), which provides that Tr. Ct. "may impose reasonable terms on the probation," does not require that Tr. Ct. give written notice of terms of placement or specify those terms on record. Evidence showed that D received actual notice of terms through oral advisement of rules & standards of conduct governing work release prior to his placement. Revocation of placement in program could be properly based upon rule violation which occurred prior to placement, Asba, App., 570 N.E.2d 937.

However, D in program was entitled to written notice of claimed violation of terms of placement, disclosure of evidence against him, opportunity to be heard, to present evidence & confront adverse witnesses in neutral hearing before Tr. Ct. Isaac, 605 N.E.2d 144. Only Tr. Ct. may revoke placement for violation of terms under Ind. Code 35-38-2.6-5(3), & statute does not provide for administrative hearing & judicial review prior to revocation of placement. Here, record indicates that Tr. Ct. improperly deferred to administrative decision made by community corrections personnel. Held, reversed & remanded.

RELATED CASES: Pope, App., 853 N.E.2d 970 (even if Tr. Ct. subjectively understood D to be waiving her due process rights, it did not advise her that she would be giving up any rights by agreeing to give Community Corrections the authority to revoke her home detention. Thus, even if Community Corrections was the proper decision-making authority, it was required to give her notice & a hearing); Patterson, App., 750 N.E.2d 879 (although State should have introduced direct evidence that D had been advised of rules, there was sufficient evidence to conclude that D was aware that his behavior was in violation of work release center rules); Cox, 706 N.E.2d 547 (due process requirements for probation revocations are also required when Tr. Ct. revokes D's placement in community corrections program); Davis, App., 669 N.E.2d 1005 (despite Tr. Ct.'s disavowal of any intent to sentence D to placement in home detention program under Ind. Code 35-38-2.6, sentencing order committed D to community corrections program; judicial evidentiary hearing required prior to revocation.

TITLE: Mogg v. State
INDEX NO.: F.1.e.2.
CITE: (4th Dist., 12-31-09), (Ind. App. 2009) 918 N.E.2d 750
SUBJECT: Probation revocation - SCRAM data admissible
HOLDING: Tr. Ct. did not abuse its discretion by admitting SCRAM data into evidence at a probation revocation hearing. Expert scientific testimony is admissible in probation revocation proceedings only upon some showing of reliability, which may be established by judicial notice or a sufficient foundation to persuade Tr. Ct. that the relevant scientific principles are reliable. Although Rule 702(b) does not apply to probation revocation hearings, case law regarding Rule 702(b) and the factors articulated in Daubert are helpful to Indiana courts in determining whether expert scientific testimony in probation revocation hearings possesses substantial indicia of reliability and is therefore properly admissible.

Here, as part of D's probation, she was ordered not to consume alcohol and to wear a Secure Continuous Remote Alcohol Monitor ("SCRAM") bracelet. The State filed a petition to revoke D's probation based on two positive SCRAM results indicating she had two drinking events. At the hearing, the State presented testimony of the co-founder and chief technology officer of Alcohol Monitoring Systems, Inc. ("AMS"), where he co-invented the SCRAM system. He testified to how SCRAM works and the error rate based on AMS internal study. The State also presented two published studies: one funded in part by AMS and another by NHTSA. Each of the studies identified an error rate for the SCRAM system that the studies' authors did not regard as problematic with respect to false positive readings. D presented a Michigan Law Journal article, a law blog entry respectively arguing that the system is inadmissible and unreliable and D denied drinking. Even assuming that SCRAM has not gained general acceptance in the community, the facts in the case supported Tr. Ct.'s finding that the SCRAM data was reliable and sufficient to support the revocation.

This holding is based on the record before the Tr. Ct. and expert testimony that was largely uncontroverted by D, thus leaving for another day whether the result would be different upon a different record where the indicia of the SCRAM system's reliability were more closely disputed. The Court cautions that the SCRAM data is not admissible in any type of proceeding or for purposes other than to prove the subject consumed alcohol. Moreover, the State must present sufficient evidence that the monitoring system was functioning reliably, and the probationer should be given the opportunity to cross-examine the expert who analyzed the data and opined consumption. Held, judgment affirmed.

TITLE: Parker v. State
INDEX NO.: F.1.e.2.
CITE: (5th Dist., 2-12-97), Ind. App., 676 N.E.2d 1083
SUBJECT: Probation revocation - effect of admission by attorney
HOLDING: Admission of probation violation by probationer's attorney is binding on probationer.
Ind. Code 35-38-2-3 requires evidentiary hearing on probation revocation & provides for confrontation & cross-examination of witnesses by probationer. However, when probationer admits to violations, these procedural safeguards are not necessary. Instead, Tr. Ct. can proceed to second step of inquiry & determine whether violation warrants probation revocation. Morrissey v. Brewer, 408 U.S. 471 (1972). Here, probationer argued that his rights to procedural due process were violated because no evidence was presented at his revocation hearing. Ct. held that evidence supported finding of probation violation because probationer admitted to violations through his attorney. Because probation revocation proceeding is not criminal proceeding, & probationer is not entitled to full panoply of constitutional rights afforded criminal D, admission by probationer's attorney bound probationer. Held, probation revocation affirmed.

RELATED CASES: Beeler, 959 N.E. 2d 828 (Ind. Ct. App. 2011) (a CCS entry indicating D's admissions to violating probation terms is enough to bypass holding an evidentiary hearing; see full review, this section); Davis, 916 N.E.2d 736 (Ind. Ct. App. 2009) (although D's counsel admitted that D had a new arrest and that he agrees to serve twelve years for the probation violation contingent on the fact that if he beats the new arrest, the admission to the arrest was insufficient to support a probation revocation, and the procedural due process safeguards were still necessary); Terrell, App., 886 N.E.2d 98 (no error in revoking probation without statement of reasons, where D admitted to violations of probation conditions); Cox, App., 850 N.E.2d 485 (where D admitted to probation violation in letter to judge, no error in revoking probation without a hearing on whether D violated conditions); Sanders, App., 825 N.E.2d 952 (Tr. Ct. followed proper procedures when revoking D's probation following her admission of various violations).

TITLE: Sparks v. State
INDEX NO.: F.1.e.2.
CITE: (2/26/2013), 983 N.E.2d 221 (Ind. Ct. App. 2013)
SUBJECT: Probation revocation - hearing; no due process
HOLDING: The Tr. Ct. did not handle the D's probation revocation hearing in a way that comports with D's due process rights. A Tr. Ct.'s failure to hold an evidentiary hearing prior to revoking probation requires reversal even if there is sufficient evidence in the record to support the revocation of probation. An informal conversation between the court and the parties does not constitute an evidentiary hearing and does not comport with a probationer's due process rights. Here, at the D's probation revocation hearing, a short conversation took place in which the State explained that D had left a treatment center he was ordered to attend after just three days, to which the Tr. Ct. responded that "if he is willing to accept responsibility for his actions . . . I was thinking of giving him a four year sentence if he'll do that. Otherwise, if you want to have a hearing, we can have a hearing." D then admitted to the violation, and the Tr. Ct. revoked his entire five-year-sentence. During this exchange, D told the Tr. Ct. that he did not understand that by admitting, his probation would be revoked and that he wanted to talk with the court. While an evidentiary hearing is not required if the D admits to the probation violation, the lack of an evidentiary hearing in this case in light of the Tr. Ct.'s comment and the suspect quality of D's admission constitutes fundamental error. The Court noted that whether a D's admission to a probation violation has to be knowing and voluntary and whether such admission can be challenged on direct appeal are undecided issues in Indiana. Held, judgment reversed and remanded for a new probation revocation hearing.

TITLE: State v. Cass
INDEX NO.: F.1.e.2.
CITE: (3rd Dist., 06-16-94), Ind. App., 635 N.E.2d 225
SUBJECT: Limited self-incrimination (SI) right at probation revocation
HOLDING: Tr. Ct. erred in allowing D to invoke privilege against SI & refuse to answer any questions at probation violation (PV) hearing. While on probation, D committed misdemeanor & State filed PV. At hearing, State called D as witness. After she gave her name, Tr. Ct. advised her of SI right, & she refused to answer question regarding her date of birth. Tr. Ct. certified question of whether State can require probationer to answer questions that do not subject her to further criminal proceedings, but may prove PV.

Extent of 5th Amend. privilege depends in part on type of proceeding where it is claimed. PV proceeding is civil in nature, there is no formal finding of guilt, & violation need only be proved by preponderance. Therefore, probationers are not entitled to full array of trial rights. Ct. concluded that probationer is not entitled to same SI right as D at criminal trial but may invoke privilege concerning any questions whose answers could lead to subsequent prosecution. Probationers can, however, be forced to answer questions that identify them as violators. Because D had already been convicted of crime that violated her probation, she could be made to identify herself as perpetrator of that crime, even though question would lead to PV.

PV proceeding does not deprive individual of absolute liberty, only conditional liberty granted as part of probation. Sanctions imposed flow from original crime, not new criminal allegations, & hearing threatens no punishment other than that to which probationer was already exposed as result of earlier offense. Relying on Minnesota v. Murphy 465 U.S. 420, & State v. Heath, Fla., 343 So.2d 13, Ct. concluded that while probationer can invoke privilege regarding any question that could incriminate him in subsequent prosecution, he cannot invoke it with regard to basic identifying information or disclosures necessary to monitor probation.

RELATED CASES: Bussberg, App., 827 N.E.2d 37 (D could only invoke Fifth Amendment if he were exposed to future prosecution & not if the answer simply is in relation to the alleged probation violation; see full review, this section); McKnight, App., 787 N.E.2d 888 (D's Fifth Amend. right was not implicated as questions concerned only prior arrest & conviction & D's probation violations; see full review at F.1.e).

TITLE: Terpstra v. State
INDEX NO.: F.1.e.2.
CITE: (12-11-19), Ind. Ct. App., 138 N.E.3d 278
SUBJECT: No due process violation in probation revocation hearing
HOLDING: The State alleged Defendant had committed child molesting while on probation for two counts of Class B felony dealing in a narcotic drug. Defendant was arrested but the charges were dropped. At a hearing on the probation violation, after hearing evidence from witnesses, the trial court found by a preponderance of the evidence that Defendant committed child molest. In an effort to expedite the proceedings, the trial court overruled all objections but stated it would ignore any inadmissible evidence in reaching its judgment. The Court of Appeals found sufficient evidence to support the probation violation, and no due process violation in the written order revoking probation. The Court also found the sentence of full backup time was not an abuse of discretion. Although the Court does not encourage trial courts to conduct proceedings where rulings to objections are not provided, there was no due process violation in this case. Vaidik, J., dissenting, believes Defendant was denied due process when the trial court did not rule on objections.

TITLE: Tillberry v. State
INDEX NO.: F.1.e.2.
CITE: (5th Dist., 10-31-08), Ind. App., 895 N.E.2d 411
SUBJECT: Probation revocation - denial of due process
HOLDING: Both federal law and Ind. Code 35-38-2-3 require Tr. Ct. to conduct an evidentiary hearing, the State to prove probation violation by a preponderance of the evidence, and requires evidence be presented in open court to allow confrontation and cross-examination. See Ind. Code 35-38-2-3; Gagnon v. Scarpelli, 411 U.S. 778 (1973). Here, D's "hearing," which consisted of an informal conversation between the judge and parties at hearing on State's Notice of Probation Violation, did not comport with due process. Dalton v. State, 560 N.E.2d 558 (Ind. Ct. App. 1990). Moreover, as in Weatherly v. State, 564 N.E.2d 350 (Ind. Ct. App. 1990), State did not provide any evidence to support the revocation or circumstances leading to D's arrest for possession of marijuana allegedly committed while on probation. To find D "failed to show up for probation appointments," Tr. Ct. had to assume facts that were not in evidence. Although D did not object at revocation hearing to manner in which Tr. Ct. conducted the hearing, deprivation of due process is fundamental error. Goodwin v. State, 783 N.E.2d 686 (Ind. 2003). Held, probation revocation reversed.

RELATED CASES: Watters, 22 N.E.3d 617 (Ind. Ct. App. 2014) (probation revocation violated D's right to due process because documents purporting to show new conviction were not reliable, as they were not certified or supported by affidavit or live testimony); M.T., 926 N.E.2d 266 (Ind. Ct. App. 2010) (even though statute requiring a hearing to modify juvenile dispositional decree does not specify what hearing must include, basic due process principles and fundamental fairness require an evidentiary hearing at which the State presents evidence supporting the allegations listed in the revocation petition); Cooper, 917 N.E.2d 667 *overruled* on other grounds, Heaton v. State, 984 N.E.2d 614 (Ind. 2013) (although D's appeal was untimely, Ct. agreed that Tr. Ct. deprived D of due process when it revoked his probation based solely on probable cause affidavit, without conducting an evidentiary hearing).

TITLE: Woods v. State

INDEX NO.: F.1.e.2.

CITE: (08-27-08), Ind., 892 N.E.2d 637

SUBJECT: Probation revocation - due process; denial of opportunity to explain why D violated terms of probation

HOLDING: A probationer who admits the allegations against him must be given an opportunity to offer mitigating evidence suggesting that the probation violation does not warrant revocation. Here, Tr. Ct. erred in denying D the opportunity to explain why he violated the terms of his probation, despite having previously agreed with State to be placed on "strict compliance" probation. Telling a D he is on "strict compliance" probation is a dramatic way of putting him on notice that he is on a short leash and has been given one final chance to "get his act together." Nonetheless, due process requires that a D be given the opportunity to explain why even this final chance is deserving of further consideration. By denying D this opportunity, the Tr. Ct. erred. However, D is not entitled to relief because he failed to make an offer of proof on direct appeal, on transfer, or more importantly, to Tr. Ct. to explain why he violated the terms of his probation. Wiseheart v. State, 491 N.E.2d 985 (Ind. 1986). Held, transfer granted, Court of Appeals' opinion at 877 N.E.2d 177 vacated, judgment affirmed.

RELATED CASES: Hampton, 71 N.E.3d 1165 (Ind. Ct. App. 2017) (Tr. Ct. erred in finding that probation agreement between D and State precluded it from excercising discretion in sentencing D after she violated terms of agreement); Sullivan, 56 N.E.3d 1157 (Ind. Ct. App. 2016) (Tr. Ct. abused its discretion in revoking D's probation under strict compliance standard - which is "constitutionally suspect" - where D failed to meet deadline to meet with community corrections because he was receiving inpatient care for PTSD and major depression); Vernon, App., 903 N.E.2d 533 (D was given the opportunity to present evidence suggesting that his probation violations did not warrant revocation where he testified at the evidentiary hearing admitting he committed some of the alleged probation violations but denying other violations; this was not a case where court proceeded directly to second step).

F. PROBATION/ PAROLE/CLEMENCY

F.1. Probation (IC 35-38-2)

F.1.e.2.a. Notice

TITLE: Braxton v. State
INDEX NO.: F.1.e.2.a.
CITE: (6-5-95), Ind., 651 N.E.2d 268
SUBJECT: Revocation of probation - due process
HOLDING: Written notice of claimed probation violations together with actual notice that State was seeking revocation of probation satisfied requirements of due process, granting transfer & reversing Ct. App. decision at 638 N.E.2d 440. D was sentenced to 15 years, with one year executed at community detention center, one year on in-home detention, & 13 years probation. After D began her in-home detention, probation filed notice of Violation of Suspended Sentence, alleging various violations. After hearing, Tr. Ct. found D had violated conditions of in-home detention & probation & revoked her probation. Ct. App. reversed revocation of probation on due process grounds, holding that D was not informed that her home detention was condition of probation, that she had violated condition of probation, or that State was seeking to have her probation revoked.

Fourteenth Amend. requires that probationers receive written notice of claimed probation violations, Black v. Romano, 471 U.S. 606; Isaac, 605 N.E.2d 144. Although Tr. Ct. did not inform D that conditions imposed on her home detention were also conditions of her probation, it is always condition of probation that probationer not commit additional crime, Ind. Code 35-38-2-1(a); Atkins, App., 546 N.E.2d 863. Here, notice of Violation of Suspended Sentence plainly charged D with Disorderly Conduct & Possession of Marijuana in violation of conditions of her suspended sentence. Ct. noted that at initial hearing, Tr. Ct. informed D that re-imposition of suspended sentence was at stake. At revocation hearing, prosecutor explicitly argued for revocation of probation. Under these circumstances, Ct. found that D received notice to which due process entitled her. Held, transfer granted, opinion of Ct. App. vacated, & Tr. Ct.'s revocation of probation affirmed, DeBruler, J., dissenting.

RELATED CASES: McCauley, 22 N.E.3d 743 (Ind. Ct. App. 2014) (D received adequate notice of grounds for revocation where State's notice specifically asked Tr. Ct. to revoke both home detention and probation and listed violations applicable to both portions of D's sentence); Piper, App, 770 N.E.2d 880 (D's due process rights were not violated during probation revocation proceedings, despite D's allegations that he was denied right to obtain discovery from State, right to present witnesses & documentary evidence, right to written notice of violation, & right to have access to legal resources); Pavey, App., 710 N.E.2d 219 (filing revocation of probation & work release under one cause number although D was sentenced under 2 cause numbers provided sufficient notice that D's probation & work release periods under both charges were at issue in revocation); Decker, App., 704 N.E.2d 1101 (commission of crime while serving time in community corrections program is always grounds for revocation, even if sentencing Ct. fails to notify D of such condition); England, App., 670 N.E.2d 104 (failure to afford D notice to which he was entitled was fundamental denial of due process, thus issue was not waived by D's failure to raise it at trial); Malone, App, 571 N.E.2d 329 (filing petition or motion to revoke probation constituted sufficient notice to Ct. about violation of condition of probation).

TITLE: Clark v. State
INDEX NO.: F.1.e.2.a.
CITE: (12-05-11), 958 N.E.2d 488 (Ind. Ct. App. 2011)
SUBJECT: Petition to revoke probation - time barred
HOLDING: Tr. Ct. erroneously denied D's motion to dismiss the notice of probation violation because the State did not file it within forty-five days of receiving notice of the violation. A petition to revoke probation must be filed during the probationary period or before the earlier of the following: (A) one year after the termination of probation; (B) Forty-five days after the State receives notice of the violation. Ind. Code 35-38-2-3. When probation is transferred to another county, the receiving county has the duty to notify the sending county of allegations of probation violations and an offender's successful completion of probation.

Here, Madison County ordered D to serve six years of probation and transferred the probation to Tippecanoe County. Although probation was supposed to end November 29, 2010, Tippecanoe County erroneously closed D's probation on September 27, 2007, after which D committed and was convicted of additional crimes in Tippecanoe County. On January 26, 2011, Madison County discovered the probation violations and on February 7, 2011, filed the petition to revoke probation. Although the petition was filed within the year after D's probation ended, the petition was not filed within forty-five days from the State's notice. Although Madison County did not have notice of the violations on January 26, 2011, Tippecanoe County had notice soon after the new offenses occurred. In fact, D's most recent offense was charged in April 2010, which is more than forty-five days before the February 2011 petition. Notice to the receiving court --Tippecanoe County -- is notice to the sentencing court -- Madison County. In other words, because the receiving court had notice of D's violation, "the State" had notice. Because the Sate knew of the violation but did not file the notice of probation violation within forty-five days of receiving notice, the notice of probation violation was untimely. Held, judgment reversed.

TITLE: J.H. v. State
INDEX NO.: F.1.e.2.a.
CITE: (2nd Dist., 11-29-06), Ind. App., 857 N.E.2d 429
SUBJECT: Probation revocation - due process violation
HOLDING: Juvenile probationer's due process rights were violated where he did not receive written notice of claimed violation of his probation that was sufficiently detailed to allow him to prepare an adequate defense. Tr. Ct. revoked D's probation/suspended commitment in Cause No. 655, a child molest case, for accessing the internet & pornographic material. However, at no time did Tr. Ct. inform D that he was to refrain from having an open internet connection or pornography on his computer as a condition of his probation or suspended commitment in Cause No. 655. That condition only applied to D's release in Cause No. 5216, a theft case.

It is error for a probation revocation to be based upon a violation for which the probationer did not receive notice. Bovie v. State, 760 N.E.2d 1195 (Ind. Ct. App. 2002). Ct. rejected State's argument, raised for first time on appeal, that D's actions in accessing the internet & pornographic material were in indirect contempt of Tr. Ct.'s release conditions in Cause No. 5216 & therefore a violation of condition in Cause No. 655 that he "obey all City, County, State, & Federal laws." D did not have written notice of this claimed violation of his probation/suspended commitment in Cause No. 655 that was sufficiently detailed to allow him to prepare an adequate defense. Notice did not allege that D violated the condition of his probation/suspended commitment that he obey all laws by being in indirect contempt of his release conditions in another case. As a result, D was not at all prepared to defend against these allegations. Held, revocation of probation/suspended commitment reversed.

TITLE: Long v. State
INDEX NO.: F.1.e.2.a.
CITE: (4th Dist.; 10-27-99), Ind. App., 717 N.E.2d 1238
SUBJECT: Probation revocation proceeding - inadequate notice of violation
HOLDING: D's probation may not be revoked based upon proof of act that is merely similar in nature to violation charged in written notice. Minimum requirements of procedural due process in context of probation revocation proceedings include written notice of claimed violations of probation. Parker, App., 676 N.E.2d 1083. Here, as condition of probation, D was not to "tamper with, attempt to fix, or allow anyone else to tamper with [ankle] transmitter equipment." State charged D with tampering with his transmitter, but failed to charge him with attempting to fix transmitter. At hearing, D admitted to attempting to fix transmitter after damaging it by falling down stairs. Although Tr. Ct. concluded that State failed to prove that D had intentionally removed transmitter, Tr. Ct. revoked probation because State proved that D attempted to fix transmitter. However, if D had notice that he was also defending against allegation of attempting to fix transmitter, he probably would not have admitted to attempting to fix transmitter. Thus, State's failure to notify D in writing that it intended to seek revocation of probation for attempting to fix his ankle transmitter violated D's right to due process. Held, judgment reversed.

F. PROBATION/ PAROLE/CLEMENCY

F.1. Probation (IC 35-38-2)

F.1.e.2.b. Procedure

TITLE: Brewer v. State
INDEX NO.: F.1.e.2.b.
CITE: (2nd Dist., 10-26-04), Ind. App., 816 N.E.2d 514
SUBJECT: Probation revocation - denial of right to present witnesses
HOLDING: Tr. Ct. abused its discretion in probation revocation hearing when it denied D's due process right to present witnesses. State properly submitted evidence from which Tr. Ct. could find that D had committed another criminal offense. Certified copies of charges against D were admitted in open Ct. without D objecting to their admittance, thus issue was waived on appeal. James v. State, 613 N.E.2d 15 (Ind. 1993). However, D was denied procedural due process when Tr. Ct. clearly refused to allow alleged victim in new criminal case to testify on D's behalf. In probation revocation hearing, probationer has due process opportunity to be heard & present evidence. Cox v. State, 706 N.E.2d 547 (Ind. 1999). Held, judgment affirmed in part, reversed in part & remanded.

TITLE: Castillo v. State
INDEX NO.: F.1.e.2.b.
CITE: (1/11/2017), 67 N.E.3d 661 (Ind. Ct. App. 2017)
SUBJECT: Court revoking probation not required to explain sanction it imposes
HOLDING: Due process does not require a probation court to explain the sanction it imposes after revoking a person's probation. Black v. Romano, 471 U.S. 606 (1985); Cf. Berry v. State, 904 N.E.2d 365, 366 (Ind. Ct. App. 2009); Monday v. State, 671 N.E.2d 467, 469 (Ind. Ct. App. 1996). Defendant was convicted of sexual misconduct with a minor, with a four-year sentence, two and one half years suspended to probation. One term of probation prohibited Defendant from having contact with persons younger than eighteen absent permission from his probation officer. Two days after Defendant was released to probation, he was found living with his seventeen-year-old girlfriend and her younger brother. Therefore, the trial court revoked Defendant's probation and ordered him to serve his full sentence. It offered no explanation for the penalty it imposed, and none was necessary. See Black, 471 U.S. at 612 (in specifying procedures for probation matters, neither Gagnon v. Scarpelli, 411 U.S. 778 (1973) nor Morrissey v. Brewer, 408 U.S. 471 (1972) held that a probation court must state that alternatives to incarceration were considered and rejected.). Held, judgment affirmed.

TITLE: Isaac v. State
INDEX NO.: F.1.e.2.b.
CITE: (2d Dist. 04/20/92), Ind. App., 590 N.E.2d 606
SUBJECT: Ct.'s right to deny dismissal of probation revocation petition
HOLDING: Tr. Ct. has right to deny State's motion to dismiss probation revocation petition, because probation is granted pursuant to Ct. discretion & supervision initially, unlike an indictment or information. State filed 2 petitions to revoke D's probation, & D & State then agreed to disposition. Ct. refused to accept disposition agreement, & State then moved to dismiss petitions. Ct. granted dismissal as to one, but denied as to other. Ind. Code 35-34-1-13, requires Ct. to dismiss indictment or information on motion of State, & grants Ct. no discretion to refuse. Informations & indictments are different from probation revocation petitions because Ct.'s role at that stage of proceeding is simply trier of fact or arbiter of law after charges are filed. Probation, however, is granted at discretion of Ct. & supervised by Ct. from outset, so its role in revocation proceedings is more active than in other criminal proceedings. Ct. therefore declined to extend mandate of Ind. Code 35-34-1-13 to dismissal of revocation proceedings, finding that such intent could have been made manifest in its language. This portion of holding adopted on transfer by Ind. S. Ct. at 605 N.E.2d 144, see separate card. **Note:** In footnote, Ct. discussed just who can file revocation petition in first place & noted lack of clarity of law in this area.

TITLE: Isaac v. State
INDEX NO.: F.1.e.2.b.
CITE: (2d Dist. 04/20/92), Ind. App., 590 N.E.2d 606
SUBJECT: Ct.'s right to deny dismissal of probation revocation petition
HOLDING: Tr. Ct. has right to deny State's motion to dismiss probation revocation petition, because probation is granted pursuant to Ct. discretion & supervision initially, unlike an indictment or information. State filed 2 petitions to revoke D's probation, & D & State then agreed to disposition. Ct. refused to accept disposition agreement, & State then moved to dismiss petitions. Ct. granted dismissal as to one but denied as to other. Ind. Code 35-34-1-13, requires Ct. to dismiss indictment or information on motion of State, & grants Ct. no discretion to refuse. Informations & indictments are different from probation revocation petitions because Ct.'s role at that stage of proceeding is simply trier of fact or arbiter of law after charges are filed. Probation, however, is granted at discretion of Ct. & supervised by Ct. from outset, so its role in revocation proceedings is more active than in other criminal proceedings. Ct. therefore declined to extend mandate of Ind. Code 35-34-1-13 to dismissal of revocation proceedings, finding that such intent could have been made manifest in its language. This portion of holding adopted on transfer by Ind. S. Ct. at 605 N.E.2d 144, see separate card. **Note:** In footnote, Ct. discussed just who can file revocation petition in first place & noted lack of clarity of law in this area.

TITLE: Isaac v. State
INDEX NO.: F.1.e.2.b.
CITE: (12-23-92), Ind., 605 N.E.2d 144
SUBJECT: Probation Violation (PV) hearing - judge's role
HOLDING: It was not error for Tr. Ct. to deny State's Motion to Dismiss PV petition, & to call probation officer & question him when State declined to present any evidence; granting transfer & reversing Ct. App. decision at 590 N.E.2d 606 on second issue. Prosecutor originally filed two PV petitions alleging D had used controlled substance & failed to report to probation officer (PO). Parties agreed that D would admit allegations in exchange for extension of probation, but judge refused to accept agreement. State moved to dismiss both petitions, but judge denied dismissal of petition for failure to report. When prosecutor declined to present any evidence, judge called PO, questioned him & allowed CX, & then found D had violated probation & ordered additional 90 days executed time. Ind. S. Ct. adopted Ct. App.'s holding that Tr. Ct. had authority to refuse to dismiss petition because of special nature of PV. Ct. App. also held, however, that Tr. Ct. violated separation of functions of Ind. Constitution by calling & questioning PO. S. Ct. disagreed, noting that granting probation is discretionary with Tr. Ct. As part of probation supervision, Ct. appoints POs subject to its supervision & orders, & POs are required to notify Ct. when condition of probation is violated. Statute doesn't specify who is to file PV petition, but it is usually done by either PO or prosecutor. Prosecutor has duty to assist Ct. by presenting evidence at PV hearings, & when he/she refuses to do so, Ct. may appoint special prosecutor because of regular prosecutor's disqualification by failure to act. Because of costs & delays in appointing special prosecutor, however, Ct. found that as alternative, Tr. Ct. could call & question PO itself. While trial judge cannot assume adversarial role, he or she can question witnesses if it is done in impartial manner & D is not prejudiced. Tr. Ct. may also initiate & adjudicate certain violations of its orders. Ct. concluded that where matter for decision is immediately within knowledge or view of judge, due process permits judge to deal more directly than where events occurred farther from his or her purview. Ct. found in instant case that judge did not abandon his role as neutral fact finder, & questions were straight forward & simple. Trial judge is not transformed into prosecutor by calling & questioning own PO to determine whether probation order has been violated. When issue of violation involves complex proof, multiple witnesses & assessments of credibility, Tr. Ct. should appoint special prosecutor, but where evidence is simple in nature, like hearing on direct contempt, it is not error or denial of due process to proceed as judge did. Held, PV affirmed.

TITLE: Jones v. State
INDEX NO.: F.1.e.2.b.
CITE: (3/2/2017), 71 N.E.3d 412 (Ind. Ct. App. 2017)
SUBJECT: Probationer's right to allocute upon specific request
HOLDING: Defendant had the right to allocute, even though she wanted to make a statement at a probation revocation hearing, not her earlier sentencing hearing. Defendant pled guilty to battery and was sentenced to three years, with two on home detention and one suspended to probation. Because Defendant violated the terms of her home detention, the trial court revoked her probation. Before the trial court imposed a sentence, Defendant asked to impress the need for alternative sentencing because incarceration at DOC would likely cause her to lose her child. The trial court cut her off.

Ind. Code § 35-38-1-5 requires a trial court, at sentencing, to ask a defendant whether he wishes to make a statement before sentence is pronounced. This mandate does not apply at probation revocation hearings. Vicory v. State, 802 N.E.2d 426, 429 (Ind. 2004). However when, as here, a defendant at a revocation hearing "specifically requests the court to make a statement, . . . the request should be granted." See id. Due process requires this. Id.; Woods v. State, 892 N.E.2d 637, 641 (Ind. 2000). Because Defendant was denied this opportunity, she should be afforded a new and full opportunity for allocution. See Owens v. State, 69 N.E.3d 531, No. 49A02-1605-CR-1142 (Ind. Ct. App. January 31, 2017). Held, judgment reversed and remanded to give Defendant a full and clear opportunity for allocution. Baker, J., concurring, urging Indiana Supreme Court to adopt one rule for allocution that would apply to both sentencing and probation revocation proceedings.

RELATED CASES: Knight, 155 N.E.3d 1242 (Ind. Ct. App. 2020) (09/15/2020) (D waived his claimed violation of his right to allocution during his new probation hearing by failing to object).

TITLE: Sutton v. State
INDEX NO.: F.1.e.2.b.
CITE: (1st Dist., 12-4-97), Ind. App., 689 N.E.2d 452
SUBJECT: Probation revocation - timeliness of petition
HOLDING: State's petition for probation revocation was timely despite fact that it was filed more than forty-five days after State had notice of probation violation. Ct. may revoke person's probation if petition to revoke probation is filed during probationary period or before earlier of one year after termination of probation or forty-five days after State receives notice of violation. Ind. Code 38-5-2-3. Statute does not limit State's ability to file petition during probationary period, but rather permits State to file petition even after probationary term has ended, if it does so within time limits outlined above. Thus, forty-five day time limit does not apply to petitions to revoke probation which are filed within D's probationary period. Held, judgment affirmed.

TITLE: Vicory v. State
INDEX NO.: F.1.e.2.b.
CITE: (5th Dist., 1-29-04), Ind., 802 N.E.2d 426
SUBJECT: D's right to allocution - probation revocation proceeding
HOLDING: D violated a term of his probation & the Tr. Ct. revoked his probation. At revocation hearing, Tr. Ct. denied D's request for permission to read a statement. Ct. held that a judge is not required to ask whether a D wants to make a statement, but when a specific request is made, the request should be granted. Ind. Code 35-38-1-5 provides for a right of allocation prior to a Tr. Ct. "pronounc[ing] sentence." Ct. agreed with the State that this statute did not apply directly to a probation revocation hearing because Tr. Ct. is merely reinstating a suspended sentence, not instituting a sentence. However, Ct. noted the right to allocation has a long history with the common law recognizing it as early as 1682. Ross v. State, 676 N.E.2d 339, 343 (Ind.1996). Further, Art. I, ' 13 of the Indiana Constitution provides that "[i]n all criminal prosecutions, the accused shall have the right ... to be heard by himself & counsel." Sanchez v. State, 749 N.E.2d 509, 520 (Ind. 2001). While Ct. found that a Tr. Ct. should allow a probationer to make a statement, D's substantive rights were not violated in this case because D addressed Ct. directly & had opportunity to tell his side of story during hearing itself. Held, transfer granted, judgment affirmed; Sullivan, J., concurring in result & agreeing with analysis of Ct. App. at 781 N.E.2d 766 (Ind. Ct. App. 2003).

RELATED CASES: Hull, App., 868 N.E.2d 901 (if D asks to make a statement at hearing to revoke suspended sentence, his request should be granted).

F. PROBATION/ PAROLE/CLEMENCY

F.1. Probation (IC 35-38-2)

F.1.e.2.c. Burden of proof/evidentiary rules

TITLE: Bane v. State
INDEX NO.: F.1.e.2.c.
CITE: (1st Dist. 10/22/91), Ind. App., 579 N.E.2d 1339
SUBJECT: Revocation of probation - evidence of new conviction
HOLDING: It was not necessary for state to introduce additional evidence of commission of new crime, where revocation of probation hearing on previous conviction was held in consolidated hearing in same court immediately after sentencing on conviction of new crime. Prohibition against Tr. Ct. judicially noticing its own records in other case previously before court does not apply where 2 hearings are consolidated, are chronologically adjoining phases, are attended by D, are presided over by same judge, & are argued by same counsel. Court finds this kind of consolidation is third type discussed in Russell v. Johnson 46 N.E.2d 219, & that while it involves independent suits, evidence in one is treated as evidence in both, by order of court. Court found ample evidence of new conviction in record of consolidated hearing to support revocation of probation. Held, revocation affirmed.

TITLE: Baxter v. State
INDEX NO.: F.1.e.2.c.
CITE: (9-19-02), Ind. App., 774 N.E.2d 1037
SUBJECT: Investigative report - inadmissible in probation revocation proceeding; not public record
HOLDING: Tr. Ct. erred in admitting probable cause affidavit into evidence at probation revocation hearing. D's probation was revoked based on finding of robbery by preponderance of evidence based solely on admission of probable cause affidavit. The so-called probable cause affidavit was actually entitled "Law Enforcement Incident Report" & was uncertified, unverified, &, contrary to State's representation at revocation hearing – unsigned by either arresting officer or author of report. Further, document was admitted with neither of those individuals present at trial or available for cross examination. State contended that report contained substantial indicia of reliability in that it was prepared by law enforcement officer during course of official investigation. While it is recognized that rules of evidence don't apply in probation revocation proceedings, it is nevertheless observed that, investigative reports by police & other law enforcement personnel, except when offered by accused in criminal case, do not fall within public records exception to hearsay rule. Ind. Evid. Rule 803(8); Hernandez v. State, 716 N.E.2d 601 (Ind. Ct. App. 1999). Ct. concluded that incident report had no substantial indicia of reliability & should not have been admitted into evidence. Held, judgment reversed.

RELATED CASES: Robinson, 955 N.E. 2d 228 (Ind. Ct. App. 2011) (Tr. Ct. abused its discretion in admitting probable cause affidavit that contained multiple levels of hearsay); Figures, 920 N.E.2d 267 (Ind. Ct. App. 2010) (Tr. Ct. abused its discretion in admitting probable cause affidavit as evidence that D violated probation by committing a criminal offense, where affidavit was from a case the State later dismissed& State presented no evidence at revocation hearing to corroborate allegations in affidavit).

TITLE: Black v. State

INDEX NO.: F.1.e.2.c.

CITE: (4th Dist., 8-29-03), Ind. App., 794 N.E.2d 561

SUBJECT: Erroneous exclusion of independent urinalysis from evidence - probation revocation hearing

HOLDING: Tr. Ct. erroneously excluded an independent urinalysis from evidence in D's probation revocation hearing. Although Tr. Ct. initially allowed results of independent test, based on a case cited by prosecution, Tr. Ct. reversed itself. However, case cited by prosecutor had been vacated & superseded by Carter v. State, 685 N.E.2d 1112 (Ind. Ct. App. 1997). Under relaxed procedures of Ind. Evidence Rule 101(c)(2) at a probation revocation hearing, State's toxicology technician's testimony was a sufficient foundation for admission of independent test results. Applying federal harmless error analysis, Ct. held that Tr. Ct.'s reversal of its original statement of the law was not harmless error. Held, judgment reversed.

TITLE: Cain v. State
INDEX NO.: F.1.e.2.c.
CITE: (3/18/2015), 30 N.E.3d 728 (Ind. Ct. App. 2015)
SUBJECT: Probation revocation - D's admission, alone, is sufficent evidence
HOLDING: Tr. Ct. properly revoked probation based solely on probationer's admission to probation officer that he fondled a girl. The Court of Appeals interpreted Schumaker v. State, 431 N.E.2d 862 (Ind. Ct. App. 1982) to hold that a D's statements are admissible in probation revocation hearings absent a corpus deliciti, and are, alone, sufficient evidence of a probation violation. Id.

Here, while on probation for child molesting, probationer told a polygrapher that he had contact with a girl. The next day, probationer told his probation officer that he had fondled the girl three to five times while the two were riding on the bus. No charges were filed, and probationer's assertion that a fondling occurred was never corroborated. However, because the statement was against penal interest and there is no corpus delicti rule in probation revocation hearings, probationer's admission was competent evidence upon which to revoke his probation. Held, judgment affirmed.

TITLE: Dulin v. State
INDEX NO.: F.1.e.2.c.
CITE: (5/20/76), Ind. App., 346 N.E.2d 746
SUBJECT: Revocation proceeding - exclusionary rule
HOLDING: Absent evidence of police harassment or misconduct designed to elicit probation violation, Tr. Ct. will not apply exclusionary rule in probation revocation hearing. Ct. points to many federal courts, district & appellate, & state courts which have held that because of distinction between formal criminal proceedings & probation revocation hearings established in Morrissey v. Brewer, 408 U.S. 471 (1972), it is unnecessary to fully apply exclusionary rule in probation revocation proceedings. However, Ct. warned that this decision is not invitation to impose oppressive probation conditions or to conduct constant, meddling surveillance which unreasonably interferes with probationer's privacy, but to insure that probation revocation decisions are prompt, complete & fair. Thus, Tr. Ct. did not err by failing to hold preliminary suppression hearing. Held, judgment affirmed.

TITLE: Grubb v. State
INDEX NO.: F.1.e.2.c.
CITE: (5th Dist.; 8-21-00), Ind. App., 734 N.E.2d 589
SUBJECT: Probation revocations - admissibility of statements obtained in violation of Miranda
HOLDING: Tr. Ct. properly admitted probationer's un-Mirandized videotaped confession at his probation revocation hearing. Because exclusionary rule is only applicable where deterrence benefits outweigh substantial costs associated with rule, U.S. S. Ct. has repeatedly declined to extend exclusionary rule to proceedings other than criminal trials. Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357, 118 S. Ct. 2014 (1998). Here, although police may have obtained probationer's taped confession to two child molests in violation of Miranda, Tr. Ct. allowed State to use confessions to revoke his probation in another matter. Because costs associated with excluding probationer's statement are high while deterrence effect on police misconduct of excluding statement is minimal given fact that statement cannot be admitted against probationer at criminal trial on molestation charges, Miranda warnings were not prerequisite for confession to be admitted into evidence at probation revocation hearing. Held, judgment affirmed.

TITLE: J.J.C. v. State

INDEX NO.: F.1.e.2.c.

CITE: (2nd Dist., 7-29-03), App., 792 N.E.2d 85

SUBJECT: Probation violation - insufficient evidence; reliability of home detention monitoring system

HOLDING: State did not adequately establish reliability of home detention monitoring system, & evidence was insufficient to support probation revocation. Juvenile had previously been placed on intensive probation, including home detention & electronic surveillance. State alleged four violations of probation, three of which involved electronic monitoring system, & two of which alleged J.J.C. was outside the permitted range of the system. Tr. Ct. made true finding of allegations & sentenced J.J.C. to six months in DOC. On appeal, D argued that evidence from monitoring system was improperly admitted, & that evidence was insufficient to support finding of violation of probation.

At revocation hearing, State admitted printouts of daily activity reports from monitoring system, over objection. Ct. found J.J.C.'s concerns about calibration & reliability of monitoring system were well-founded. There was no evidence as to whether system was set up properly, whether it was checked for appropriate range, whether it was functioning properly, or whether the system used is generally reliable. Ct. found that because of this lack of information, printouts did not bear substantial indicia of reliability, & should not have been admitted. Without printouts, there was no evidence to support violation on two of allegations.

As to third allegation, State had alleged that J.J.C. failed to leave home as soon as he was allowed to & returned home earlier than allowed. Ct. dispatched with this allegation quickly by noting its puzzlement that someone could violate home detention order by leaving home at time later than they were authorized & returning at time earlier than time they were required to be back. Ct. noted he was authorized to be absent on Sundays between 10:00 a.m. & 7:00 p.m. but was not required to be absent during those hours.

The fourth allegation was that the monitor could not be contacted by the main computer after three tries in early morning because the line was tied up. Ct. found there was no explanation as to what could cause this message or why it was a violation of probation. Therefore, this evidence alone was insufficient to support revocation. Held, judgment reversed & remanded for further proceedings not inconsistent with opinion.

Note: This decision appears to provide considerable ammunition for arguments involving the reliability of electronic monitoring equipment, as well as monitoring procedures in general. Those dealing with pre-trial electronic monitoring issues, as well as electronic monitoring sentences are urged to read the decision, which does not appear to be restricted to juvenile situations.

TITLE: Lightcap v. State

INDEX NO.: F.1.e.2.c.

CITE: (5th Dist., 04-04-07), Ind. App., 863 N.E.2d 907

SUBJECT: Probation revocation - admission of former testimony; failure to provide adequate record on appeal

HOLDING: In probation revocation proceeding, D was not denied due process when Tr. Ct. admitted testimony & evidence from D's criminal trial before the same Tr. Ct. Indiana Evidence Rule 804(b)(1) provides that former testimony is allowable in a second proceeding as an exception to hearsay rule if witness has become unavailable. Because Indiana Rules of Evidence do not apply in probation proceedings, Ind. Evid. R. 101(c)(2), Court need not determine whether State's primary witness in criminal trial was "unavailable" to resolve whether Tr. Ct. admitted the testimony. Sworn testimony presented before same Tr. Ct. provided substantial indicia of its reliability. Cox v. State, 706 N.E.2d 547 (Ind. 1999). D was afforded opportunity to cross-examine witnesses & present evidence in his own defense at his criminal trial, & therefore his due process rights were not violated even though he did not have right to cross-examine witnesses at probation revocation hearing. Strowmatt v. State, 686 N.E.2d 154, 158 (Ind. Ct. App. 1997).

Although D was acquitted of sexual misconduct with a minor, Tr. Ct. found that D had unsupervised contact with a child in violation of terms of his probation. By failing to provide Ct. App. with a copy of testimony & evidence presented at criminal trial upon which Tr. Ct. based its decision to revoke his probation, D waived his challenge to sufficiency of evidence. It is appellant's duty to present an adequate record clearly showing alleged error. Jackson v. State, 496 N.E.2d 32 (Ind. 1986). Held, judgment affirmed.

RELATED CASES: Knecht, 85 N.E.3d 829 (Ind. Ct. App. 2017) (State's use of transcript from earlier trial resulting in D's acquittal did not violate D's due process rights because he had the opportunity to confront and cross-examine alleged victim at the earlier trial and transcript bore indicia of substantially trustworthiness).

TITLE: Marsh v. State
INDEX NO.: F.1.e.2.c.
CITE: (4th Dist., 11-24-04), Ind. App., 818 N.E.2d 143
SUBJECT: Crawford v. Washington does not apply to probation revocation hearings
HOLDING: Based on rationale of Isaac v. State, 605 N.E.2d 144 (Ind.1992), Ct. determines that recent decision of Crawford v. Washington, 124 S. Ct. 1354 (2004) historically interpreting the Confrontation Clause does not apply to probation revocation proceedings. Holding in Isaac was premised upon the fact that revocation proceedings are different from the underlying criminal proceedings, triggering different & less stringent procedural requirements & safeguards. Consequently, Ct. does not see a probation revocation hearing as implicating Crawford. Even if it did, the Ct. found that Crawford likely would not be implicated because the hearsay statement here at issue was not testimonial in nature. While not positively stating that Crawford only applies to testimonial statements, the Ct. cited language from that decision which inferred that it very well might. Assuming that Crawford only applies to testimonial statements, Ct. concluded the statement a girl made at school that her father abused her did not fit the understanding of testimonial.

Besides Crawford, Ct. determined that the challenge to the hearsay statement was waived for failing to properly object at trial. Further, Ct. rejected D's claim of ineffective assistance of counsel because D could not show that a proper objection would have been sustained, as the rule against hearsay does not apply in proceedings relating to probation. Cox v. State, 706 N.E.2d 547 (Ind. 1999). In such a proceeding, the reviewing Ct. is to determine whether the evidence was reliable enough to have been admitted over objection & based on several factors, Ct. was satisfied with the reliability of the evidence. Ct. also found sufficient evidence to sustain the revocation. Held, judgment affirmed.

RELATED CASES: Wann, 997 N.E.2d 1103 (Ind. Ct. App. 2013) (no error in admitting urinalysis report showing D tested positive for marijuana at probation revocation hearing, where probation officer testified that department regularly sent samples to facility for testing, and where as condition of probation D agreed that urinalysis reports would be admissible at revocation hearings); Monroe, App., 899 N.E.2d 688 (Crawford does not apply in community corrections revocation placement hearings; hearsay that officers found gun in home where D was staying on home detention was reliable and its admission did not violate the Sixth Amendment).

TITLE: Mateyko v. State
INDEX NO.: F.1.e.2.c.
CITE: (2nd Dist., 02-19-09), 901 N.E.2d 554 (Ind. Ct. App. 2009)
SUBJECT: Improper admission of triple hearsay in probation revocation hearing
HOLDING: Tr. Ct. erred in admitting hearsay testimony into evidence at probation revocation proceeding. Although reliable hearsay bearing some substantial indication of reliability is admissible in probation revocation hearing, "[t]his does not mean that hearsay evidence may be admitted willy-nilly." Reyes v. State, 868 N.E.2d 438 (Ind. 2007). Here, State alleged that D failed to "attend, actively participate in and successfully complete a court-approved sex offender treatment program" after he used vulgar language and became agitated with therapist over therapist's misunderstanding of D's ability to have contact with his children. At probation revocation hearing, Tr. Ct. admitted "triple-hearsay," i.e., hearsay within hearsay within hearsay. The witness, who was not D's supervising probation officer, testified regarding what D's probation officer (Nunn) told her regarding what D's therapist told Nunn regarding what D said to her. There is no indication in record that Tr. Ct. explained why hearsay within hearsay within hearsay was reliable or why any reliability was substantial enough to support good cause for not producing a live witness. Instead, State relied solely upon testimony of a witness who had no direct involvement with D or the events which State alleged constituted a violation of the terms of probation. Without the improperly admitted hearsay evidence, State failed to present sufficient evidence that D failed to comply with condition of probation which State alleged that he had violated. Held, probation violation finding reversed.

RELATED CASES: Robinson, 955 N.E. 2d 228 (Ind. Ct. App. 2011) (Tr. Ct. abused its discretion in admitting probable cause affidavit that contained multiple levels of hearsay).

TITLE: Moore v. State

INDEX NO.: F.1.e.2.c.

CITE: (5/4/2018), 102 N.E.3d 304 (Ind. Ct. App. 2018)

SUBJECT: Taking judicial notice of conviction at probation revocation hearing did not violate right to due process

HOLDING: The Tr. Ct. did not deny D's right to due process when it revoked his probation by taking judicial notice of the conviction Tr. Ct. had just entered. See Morrisey v. Brewer, 408 U.S. 471, 489 (1972); Parker v. State, 676 N.E.2d 1083, 1085 (Ind. 1997); see also Ind. Code § 35-38-2-3(f) (codification of due process rights at revocation hearing). The Tr. Ct. was allowed to take judicial notice of the conviction and sentence. See Indiana Rule of Evidence 201; see also Henderson v. State, 544 N.E.2d 507, 512 (Ind. 1989). D could have objected to the Tr. Ct. taking judicial notice and requested a hearing, but he failed to do so. See Evidence Rule 201(e). Moreover, the Tr. Ct. gave D the opportunity to present evidence and argument at the hearing, but he chose not to, instead only arguing about what sanction the Tr. Ct. should impose. Held, judgment affirmed.

TITLE: Pitman v. State
INDEX NO.: F.1.e.2.c.
CITE: (5th Dist., 5-3-01), Ind. App., 749 N.E.2d 557
SUBJECT: Probation revocation - sufficient evidence; claim of denial of right to confrontation
HOLDING: Evidence that D was arrested for & charged with battery, in form of certified copies of Ct. docket with probable cause finding, police report & charging information, was sufficient to support revocation of D's probation. These documents also provided information indicating that D was intoxicated at time of battery & that she admitted consuming alcohol. Revocation was based upon D's new charge of battery supported by probable cause & her consumption of alcohol. With regard to probation revocation proceedings, Tr. Ct. may consider any relevant evidence bearing some substantial indicia of reliability, including reliable hearsay. Cox v. State, 706 N.E.2d 547 (Ind. 1999). Information in this case was obviously relevant & certification of documents by Ct. provided substantial indicia of their reliability.

Ct. rejected D's argument that certified documents were hearsay & that their admission violated her constitutional right to confront & cross-examine witnesses, as she could not cross- examine documents or documents' author. Rules of evidence do not apply in probation revocation proceedings. Evid. R. 101(c)(2). Assuming, without deciding, that admission of police report was erroneous because D was unable to cross-examine police officer, such error did not require reversal because D's probation could have been revoked on mere fact that she was charged with new offense based upon probable cause in violation of her probation agreement. Held, judgment affirmed.

TITLE: Reyes v. State

INDEX NO: F.1.e.2.c.

CITE: (06-21-07), Ind., 868 N.E.2d 438

SUBJECT: Admissibility of hearsay evidence in probation revocation hearings - "substantial trustworthiness" test

HOLDING: Rather than require that a Tr. Ct. make an explicit finding of good cause every time hearsay evidence is admitted during a probation revocation hearing, Tr. Ct. may instead evaluate the hearsay's substantial trustworthiness. Ideally, Tr. Ct. should explain on record why the hearsay is reliable & why that reliability is substantial enough to supply good cause for not producing live witnesses. United States v. Kelley, 446 F.3d 688 (7th Cir. 2006). If the test of substantial trustworthiness of hearsay evidence is met, a finding of good cause has also implicitly been made.

Here, Tr. Ct. had sufficient information to deem affidavits from Director of toxicology lab substantially trustworthy. Declarant had been director of toxicology lab since 1992 & was a lab supervisor of Indiana State Department of Toxicology. This evidence adequately supports a finding that declarant's affidavits were substantially trustworthy, thus admission of lab report did not violate D's due process right to confront witnesses against him. Held, transfer granted, Ct. App.' opinion at 853 N.E.2d 1278 summarily affirmed in part, judgment affirmed.

RELATED CASES: Withers, 15 N.E.3d 660 (Ind. Ct. App. 2014) (even if not electronically signed, attendance records constitute reliable hearsay evidence for purposes of hearing on termination of participation in Drug Court program); Bass, 974 N.E.2d 482 (Ind. Ct. App. 2012) (affidavit not needed to establish substantial trustworthiness of lab tests where other factors, i.e., case manager's testimony, created substantial guarantee of trustworthiness); Smith, 971 N.E.2d 86 (Ind. 2012) (admission of lab reports at revocation hearing did not violate D's right to due process as even though the reports were hearsay, the accompanying affidavit from the lab supervisor made the reports substantially trustworthy); Williams, 937 N.E.2d 930 (Ind. Ct. App. 2010) (testimony of employee of company that housed D during home detention showed that documents regarding a failed marijuana test and D's failure to comply with electronic monitoring were substantially reliable); Holmes, 923 N.E.2d 479 (Ind. Ct. App. 2010) (although Tr. Ct. did not make detailed statements relating to reliability in admitting urinalysis report in home detention revocation hearing, it determined that report was reliable enough to pass the substantial trustworthiness test outlined in Reyes); Peterson, 909 N.E.2d 494 (Ind. Ct. App. 2009) (witness's comparison of transcript of questions & answers prepared by polygraph examiner to the video of examination was sufficient to establish the reliability of the transcript for purposes of revocation hearing); Carden, App., 873 N.E.2d 160 (introduction of mapping system without any evidence of name of manufacturer of system, how it works & whether it has been updated, was fundamental error in proving D was within 2 blocks of daycare center).

TITLE: Runyon v. State
INDEX NO.: F.1.e.2.c.
CITE: (12-08-10), Ind., 939 N.E.2d 613
SUBJECT: Probation revocation for failing to pay child support B burden of proof
HOLDING: Tr. Ct. did not abuse its discretion in revoking D's probation for failure to make weekly payments on his child support arrearage because D failed to prove he was unable to pay support and had made bona fide efforts to pay. D was convicted and sentenced to eight years (all suspended) for Class C felony Non-support of a Dependent Child. The State later alleged he violated probation by failing to make weekly payments on the arrearage and failing to pay other costs and fees. D admitted the violation, although he had actually paid a significant part of the arrearage but did not continue weekly payments because he was unemployed and had difficulty finding a new job. Because he had a possible job prospect, D sought and obtained a two-week continuance to provide proof of employment. He failed to provide proof at the next hearing, and Tr. Ct. revoked his probation, ordering him to serve six years of his sentence.

Ind. Code § 35-38-2-3(f) does not specify who carries the burden to prove D's ability to pay, but Woods v. State, 892 N.E.2d 637 (Ind. 2009) "in effect . . . imposed on the D the burden of showing his inability and sufficient bona fide efforts to pay." Therefore, D carried the burden to prove he could not pay instead of the State carrying the burden to prove he could pay. He failed to meet that burden. Held, transfer granted, Court of Appeals' opinion at 923 N.E.2d 440 vacated, judgment affirmed.

Sullivan, J., dissenting, agrees with the allocation of burden of proof but disagrees with majority's determination that State met its burden of proving D's failure to pay was "reckless, knowing, or intentional" simply because D admitted to violating the terms of his probation. He also contended D sufficiently established his inability to pay.

RELATED CASES: Mauch, 33 N.E.3d 387 (Ind. Ct. App. 2015) (D met his burden to show his inability to pay $92,545 balance on restitution; see full review at F.1.d); Brandenburg, 992 N.E.2d 951 (Ind. Ct. App. 2013) (no abuse of discretion in probation revocation where D failed to carry burden to show inability to pay child support); Jenkins, 956 N.E.2d 146 (Ind. Ct. App. 2011) (where D did not present any mitigating evidence to explain why he had not paid court costs and probation fees and the State presented evidence that D was employed since he was released from DOC and had "set up" child support for his child, Tr. Ct. did not abuse its discretion by determining by a preponderance of evidence that D violated his terms of probation by failing to pay; Riley, J., dissenting on basis that, without any evidence of D's expenses, State failed to prove that his failure to pay was reckless, knowing or intentional, and even if there were sufficient evidence, returning D to prison for twelve years for a technicality was an abuse of discretion); Smith, 963 N.E.2d 1110 (Ind. 2012) (from testimony presented at revocation hearing, trial judge as fact finder could reasonably conclude that D knowingly failed to pay current child support every week as required by terms of his probation; D made no explicit argument concerning his inability to pay support, thus he failed to carry his burden to show facts related to the inability to pay and indicating sufficient bona fide efforts to pay to persuade Tr. Ct. that further imprisonment should not be ordered).

TITLE: Sandy v. State
INDEX NO.: F.1.e.2.c.
CITE: (3d Dist., 12/22/86), Ind. App., 501 N.E.2d 486
SUBJECT: Probation - revocation; burden of proof; sufficiency
HOLDING: Tr. Ct. erred in revoking D's suspended sentence; evidence presented to Tr. Ct. was insufficient to substantiate arrest in another county. Here, only evidence before Tr. Ct. re D's arrest was affidavit submitted as part of original "Motion to Modify Suspended Sentence." Affidavit simply stated D had been arrested for DWI in another county. Affiant was not arresting officer, nor was he associated with Miami County judiciary. Allegation was not based on personal knowledge & was inadmissible hearsay. Tr. Ct. took judicial notice of arrest & of records of Miami County Superior Court, attaching copies of such records to its order. This action was improper & does not comply with requirements for revocation of suspended sentence. One court cannot take judicial notice of records of another court in an unrelated matter. [Citations omitted.] Due process does not permit an arrest, standing alone, to support revocation of probation for a suspended sentence. Hoffa 368 N.E.2d 250. To justify revocation, Tr. Ct. must conduct hearing & find, by a preponderance of evidence, that arrest was reasonable & that there is probable cause to believe that D has violated a criminal law. Hoffa, *supra*; Boyd, App., 481 N.E.2d 1124; Curtis, App., 370 N.E.2d 385 Held, revocation reversed.

RELATED CASES: Jackson, 6 N.E.3d 1040 (Ind. Ct. App. 2014) (mere fact that D was charged with sex offense in Kentucky was insufficient to revoke probation; State failed to carry burden to prove by preponderance that D actually committed the offense); Christie, 939 N.E. 2d 691 (Ind. Ct. App. 2011) (in probation revocation hearing, Tr. Ct. properly took judicial notice of a new conviction entered in a different Indiana court; see full review at O.2); Morgan, App., 691 N.E.2d 466 (statement of girlfriend that probationer hit her three times was sufficient evidence to revoke D's probation); Richeson, App., 648 N.E.2d 384 (despite error in taking judicial notice of proceedings in other county, sufficient evidence presented at revocation hearing to identify D as person charged with Lake County crime); Smith, App., 504 N.E.2d 333 (court rejects D's contention that, absent corroborating evidence, confession to child molesting was insufficient basis upon which to found probation revocation, *citing* Shumaker, App., 431 N.E.2d 862); Harder, App., 501 N.E.2d 1117 (evidence was insufficient to prove D committed DWI per se or contributing to delinquency of minor; held revocation reversed); Szymenski, App., 500 N.E.2d 213 (Tr. Ct. did not err in taking judicial notice during probation revocation hearing of its own records re conditions of suspended sentence; case contains discussion of applicability of other rules of evidence in revocation hearings); Boyd, App., 481 N.E.2d 1124 (court rejects D's contention that written terms of probation required conviction, rather than simply commission, of offense; furthermore, condition that D refrain from criminal conduct is imposed by operation of law, *citing* Jaynes; see Ind. Code 35-38-2-1 et seq. & Shumaker, App., 431 N.E.2d 862); Jackson, App, 420 N.E.2d 1239 (fact that probationer had been acquitted of offense did not prevent revocation of probation based on commission of that offense).

TITLE: Sheron v. State
INDEX NO.: F.1.e.2.c.
CITE: (2nd Dist., 6-27-97), Ind. App., 682 N.E.2d 552
SUBJECT: Probation revocation - State's use of additional criminal convictions; collateral estoppel
HOLDING: Criminal conviction established by proof beyond reasonable doubt may appropriately be used by State to collaterally estop D from relitigating precise issue in subsequent probation revocation proceeding. Kimberlin v. DeLong, 637 N.E.2d 121 (Ind. 1994). Here, revocation of D's probation was based upon State's un-contradicted & undisputed evidence that D had been convicted of additional felonies. D argued that preponderance of evidence standard prescribed by Ind. Code 35-38-2-3(c) for revocation of probation fails to satisfy due process. Without deciding constitutional challenge, Ct. noted that clear & convincing evidence standard for probation revocation has no support in case law. United States v. Hooker, 993 F.2d 898 (D.C. Cir. 1993). In fact, due process is satisfied in probation revocation proceedings where judge is "reasonably satisfied" that violation has occurred, a standard less stringent than preponderance of evidence standard. Id.; United States v. Torrez-Flores, 624 F.2d 776 (7th Cir. 1980). Held, probation revocation affirmed; Chezem, J., concurring in result.

TITLE: State v. Decoteau
INDEX NO.: F.1.e.2.c.
CITE: 2007 Vt. 94, 940 A.2d 661 (Vt. 2007)
SUBJECT: Hearsay improperly allowed in probation revocation hearing
HOLDING: Vermont Supreme Court held the admission at a probation revocation proceeding of a conclusory discharge summary provided by the probationer's treatment program as well as hearsay allegations made by program staffers violated the probationer's right to due process. State evidence rules do not categorically bar hearsay in probation revocation proceedings, but the Fourteenth Amendment's due process guarantee gives Ds facing probation revocation a right to confront adverse witnesses. Court has previously made it clear that reliability is a key factor in determining the admissibility of hearsay at a probation revocation proceeding. In present case, Court found that the discharge-summary report and the PO's testimony did not bear sufficient indicia of reliability to be admissible. First, there was no evidence to corroborate the hearsay allegations regarding D's misbehavior. The PO testified about what he had heard from D's caseworker, but no non-hearsay testimony supported the accounts of D's behavior or the measures that the staff took to address it. Furthermore, Court noted the evidence consisted of judgments and conclusions, not objective facts. It added that a treatment report is subjective and less inherently reliable than other kinds of reports, such as lab reports. Also, the allegations contained in the hearsay statements were general, not factually detailed. Compare to: Reyes v. State, 868 N.E.2d 438 (Ind. 2007)

TITLE: Sutton v. State
INDEX NO.: F.1.e.2.c.
CITE: (1st Dist., 12-4-97), Ind. App., 689 N.E.2d 452
SUBJECT: Probation revocation proceeding - hearsay
HOLDING: Hearsay is admissible at probation revocation proceedings. Although it has previously been held that hearsay is inadmissible at probation revocation hearing, Payne, App., 515 N.E.2d 1141, this holding was enunciated prior to adoption of Indiana Rules of Evidence and, therefore, is no longer controlling. Pursuant to Ind. R. Evid. 101(c)(2), rules prohibiting admission of hearsay do not apply in probation revocation hearings. Even if there is erroneous admission of hearsay, it constitutes harmless error if it is merely cumulative of other evidence. Here, hearsay was properly admitted into evidence at probation revocation proceeding, but even if it were erroneously admitted, admission was harmless because plenty of other evidence was introduced to prove same fact for which hearsay was introduced. Held, judgment affirmed.

RELATED CASES: Cox, 706 N.E.2d 547 (Ind. Rules of Evidence in general & rule against hearsay in particular do not apply in proceedings relating to sentencing, probation, parole, or in community corrections placement revocation hearings; see full review at O.9.a); Jones, App., 689 N.E.2d 759 (majority decline to follow Sutton, but held that State presented sufficient non-hearsay testimony to establish probation violation).

TITLE: Thornton v. State
INDEX NO.: F.1.e.2.c.
CITE: (5th Dist., 7-29-03), Ind. App., 792 N.E.2d 94
SUBJECT: Acquittal does not prevent probation revocation based on same facts
HOLDING: Tr. Ct. did not abuse its discretion in revoking his probation for resisting law enforcement after a jury had acquitted him of criminal charge of resisting law enforcement based upon same facts. As Ct. noted in Jackson v. State, 420 N.E.2d 1239 (Ind. Ct. App. 1981), the appropriateness of revocation in each case must be decided on basis of evidence presented at revocation hearing, because in many instances of acquittal on criminal charge, the State may not be able to meet its preponderance burden.

Here, State presented sufficient evidence to support revocation of D's probation by preponderance of evidence, based on D's commission of crime of resisting law enforcement. At time police officer activated his siren & lights, he was seven or eight car lengths behind D's truck, & no other cars were on street with them. Officer drove seventy or seventy-five miles per hour & managed to get within four car lengths of D's truck before D disregarded stop sign, ramped an intersection, & fled from officer, whose car had stalled when he ramped same intersection. Held, judgment affirmed.

RELATED CASES: Dokes, 971 N.E.2d 178 (Ind. Ct. App. 2012) (acquittal of new criminal charge did not prevent probation revocation on same facts because of State's lower burden of proof in revocation proceedings).

TITLE: United States v. Perez
INDEX NO.: F.1.e.2.c.
CITE: 526 F.3d 543 (9th Cir. 2008)
SUBJECT: D had right to cross lab tech at revocation hearing
HOLDING: Ninth Circuit Court of Appeals held an offender on supervised release had a right to cross-examine a laboratory technician who tested a urine sample admitted at a revocation hearing, in a case in which the test report stated that the sample had been combined with another liquid at some point before or during the testing, the evidence showed that D had no opportunity to adulterate the sample, and the result of the urinalysis was critical to support a finding that D had used illegal drugs. Court held that the D had a due process right under the Fifth Amendment to cross-examine the technician who handled and tested the sample. Because such cross-examination was not allowed, the urinalysis should not have been admitted, and the revocation had to be reversed. Court stressed that its holding was tied to the unique facts in this case, in which the illegal drug found in the tested sample could have come only from D's urine, an added substance, or another liquid, and because the validity of the urinalysis was the critical issue in determining whether release would be revoked. It made clear that it was not holding that a person on supervised release always has a right to cross-examine the technician who tested a urine sample. This is not a case where additional evidence was offered in support of revocation, or where multiple urine samples each tested positive. Further, the report itself showed the sample had been adulterated. Given that fact, Court declared the test results to be "ineluctably unreliable."

TITLE: Whatley v. State
INDEX NO.: F.1.e.2.c.
CITE: 847 N.E.2d 1007 (Ind. App. 2nd Dist., 05-23-06)
SUBJECT: Judicial notice of probable cause affidavit - probation revocation proceeding
HOLDING: In probation revocation proceeding, Tr. Ct. did not err when it took judicial notice of a probable cause affidavit from a criminal proceeding filed against D in same Ct. for dealing in & possession of cocaine. The rule barring a Tr. Ct. from taking judicial notice of other cases previously before that Ct. has not been applied to probation revocation proceedings. See Henderson v. State, 544 N.E.2d 507 (Ind. 1989).

D also argued that Tr. Ct. erred in taking judicial notice of probable cause affidavit because it was hearsay & lacked sufficient indicia of reliability. Probable cause affidavit was hearsay because it was an out-of-Ct. statement offered into evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Nevertheless, Evidence Rule 101(c)(2) provides that the rules of evidence do not apply in proceedings relating to probation, & trial judges may consider any relevant evidence bearing some substantial indicia of reliability, including reliable hearsay. Cox v. State, 706 N.E.2d 547 (Ind. 1999). Distinguishing Baxter v. State, 774 N.E.2d 1037 (Ind. Ct. App. 2002), Ct. noted that probable cause affidavit here was prepared & signed under oath by the same officer who was listed as the affiant, & contained relevant evidence concerning D's violation of his probation by dealing in & possession of cocaine. Therefore, probable cause affidavit prepared by officer bears substantial indicia of reliability such that Tr. Ct. did not err in taking judicial notice of it. Held, judgment affirmed.

RELATED CASES: Moore, (5/4/2018), (Ind. Ct. App. 2018) (taking judicial notice of conviction at probation revocation hearing did not violate D's right to due process; see full review, this section); Christie, 939 N.E. 2d 691 (Ind. Ct. App. 2011) (in probation revocation hearing, Tr. Ct. properly took judicial notice of a new conviction entered in a different Indiana court; see full review at O.2); Figures, 920 N.E.2d 267 (Ind. Ct. App. 2010) (Ct. declined to extend Whatley to case where probable cause affidavit was from a dismissed case); Cooper, 917 N.E.2d 667, *overruled* on other grounds, 984 N.E.2d 614 (2013) (Tr. Ct. deprived D of due process when it revoked his probation based solely on probable cause affidavit, without conducting an evidentiary hearing).

F. PROBATION/ PAROLE/CLEMENCY

F.1. Probation (IC 35-38-2)

F.1.e.3 Reinstatement/Modification

TITLE: Collins v. State
INDEX NO.: F.1.e.3.
CITE: 897 A.2d 159 (Del. 2006)
SUBJECT: Probation Revocation -- Hearsay Alone Insufficient
HOLDING: The Delaware Supreme Court has held that hearsay evidence that a probationer committed another crime, coupled with evidence that a crime occurred, was not sufficient to justify revoking probation. Probation revocation proceedings were instituted against the probationer based on an allegation that he broke into his ex-girlfriend's apartment and caused considerable damage. At his probation revocation proceedings, a police officer testified that the probationer's ex-girlfriend told him the probationer had broken into and damaged her apartment, and also that he had observed the damage. This testimony, without non-hearsay evidence linking the probationer to the criminal incident that occurred, was not sufficient to support probation revocation.

TITLE: Prewitt v. State
INDEX NO.: F.1.e.3.
CITE: (12-18-07), Ind., 878 N.E.2d 184
SUBJECT: Probation revocation sentence- can modify conditions & order executed sentence
HOLDING: Despite the plain language of Ind. Code 35-38-2-3, Tr. Ct. had authority to order D to serve part of his previously suspended sentence & add a new condition of probation. The courts have the power to change & will change "&" to "or" & vice versa, whenever such conversion is required by the context, or is necessary to harmonize the provisions of a statute & give effect to all of its provisions, or save it from unconstitutionality, or in general, to effect the obvious intention of the legislature. Ind. Dept. of State Rev. v. Stark-Wetzel & Co., 276 N.E.2d 904 (Ind. Ct. App. 1971). Thus, although Ind. Code 35-38-2-3(g) lists three sentencing options in the disjunctive (using an "or") when a D's probation is revoked, the courts interpreted Ind. Code 35-38-2-3(g) in the conjunctive, using an "&." This interpretation allows judges to sentence offenders using any one of or any combination of the enumerated options & serves the public interest by giving judges the ability to order sentences they deem to be most effective & appropriate for individual Ds who violate probation.

Here, upon a third probation violation, Tr. Ct. ordered that D serve two years of his previously suspended sentence & that he receive post-incarceration treatment at Richmond State Hospital as a new condition of probation. Ordering execution of part of the previously suspended sentence along with a new condition of probation was proper.

Moreover, a sentence for a probation revocation is reviewed for an abuse of discretion, not appropriateness. Held, transfer granted, Ct. App.' opinion at 865 N.E.2d 669 vacated, judgment affirmed.

TITLE: Sharp v. State

INDEX NO.: F.1.e.3.

CITE: (5th Dist., 11-17-04), Ind. App., 817 N.E.2d 644

SUBJECT: Probation revocation - cannot modify term & conditions & also extend probationary period

HOLDING: Tr. Ct. exceeded its statutory authority under Ind. Code 35-38-2-3(g) when at probation violation hearing it modified the term & conditions of D's probation. Statute gives Tr. Ct. authority to do one of the following: 1) continue probation with or without modifications; 2) extend the probationary period; or 3) order execution of suspended sentence. Here, Tr. Ct. both continued D's probation with modifications under subsection (g)(1) & also extended probationary period for not more than one year under subsection g(2). Tr. Ct. only had statutory authority to do one of the three options in Ind. Code 35-38-2-3(b), not two of the options. Ct. also held that because D's original probationary period was two years, Tr. Ct. did not have statutory authority to extend D's probationary period to six years, but could only extend it to three years. Held, judgment reversed & remanded for resentencing on probation violations.

RELATED CASES: Prewitt, App., 865 N.E.2d 669 (Tr. Ct. erroneously ordered execution of part of sentence that was suspended at time of initial sentencing under subsection (g)(3) while simultaneously modifying D's conditions of probation under (g)(1) by ordering D to enter Richmond State Hospital upon his release).

F. PROBATION/ PAROLE/CLEMENCY

F.1. Probation (IC 35-38-2)

F.1.f. Interstate compact (IC 11-13-4-1)

TITLE: King v. State
INDEX NO.: F.1.f.
CITE: (3rd Dist., 12-6-94), Ind. App., 642 N.E.2d 1389
SUBJECT: Interstate probation compact
HOLDING: Probation of Ind. D residing in Minnesota under interstate probation contact was properly revoked. Minnesota properly conditioned its acceptance of D's transfer upon his consent to submit to urinalysis drug testing on demand. State moved to revoke probation after learning that D flunked periodic drug tests, failed to contact his probation officer for six weeks, & failed to supply his current address. D was aware of & agreed to additional drug testing condition, which did not operate as improper modification of Ind.'s probation conditions. By voluntarily consenting to drug screening, D waived right to contest admissibility of results of drug screening tests as illegal search. Evidence was sufficient to support Tr. Ct.'s findings. Held, probation revocation affirmed.

F. PROBATION/ PAROLE/CLEMENCY

F.2. Parole (IC 35-50-6-1, Ind. Code 11-13-3)

TITLE: Aguilar v. State
INDEX NO.: F.2.
CITE: (12/31/20), Ind. Ct. App., 162 N.E.3d 537
SUBJECT: Plea agreement calling for consecutive sentences in two causes did not prevent Defendant's release to parole while also on probation
HOLDING: Defendant entered into a plea agreement concerning two separate cause numbers: a single offense under cause FB-10 with a sentence of twenty years in the DOC, and several offenses under FB-12 with a sentence of ten years in the DOC with all the time suspended to probation. The agreement summarized the sentence by specifying the "combined sentence" across both causes was "30 years to the [DOC], 20 served, 10 suspended." After serving time in DOC and accruing credit time in FB-10, Defendant was placed on parole. He was also placed on probation in cause FB-12. A violation of probation led to an agreement that Defendant would serve 2,370 days in the DOC and have no further probationary period in FB-12. After he began serving that sentence, the parole board held a hearing and revoked ten years of Defendant's credit time in FB-10, arranged so he would serve the balance of his sentence in FB-10 before that in FB-12. Defendant filed a petition for post-conviction relief that the trial court denied. On appeal, Defendant argued he should have bypassed parole in FB-10 and moved straight to his term of probation in FB-12, citing Ind. Code 35-50-6-1(a).

The Court of Appeals concluded because it is not possible under Indiana's sentencing scheme to receive a single "sentence" across counts, let alone across causes, Defendant cannot demonstrate he was improperly placed on parole in FB-10 because of a suspended sentence in FB-12. Even if it were possible to negotiate a plea agreement that calls for bypassing parole, the instant plea agreement did not do so and calls for a standard sentencing scheme which did nothing to prohibit the parole board from placing Defendant on parole under FB-10. The court further noted that even if the Defendant should not have been on both probation in FB-12 and parole in FB-10, the trial court still had the authority to revoke his probation at any time after sentencing. Held, no error in granting summary disposition of PCR petition to the State.

TITLE: Duckworth v. Williams
INDEX NO.: F.2.
CITE: (3d Dist. 7/3/86), Ind. App., 494 N.E.2d 368
SUBJECT: Parole/clemency hearings - access to confidential files
HOLDING: Upon request, Tr. Ct. must conduct *in camera* inspection of offender's file to determine respective interests of Department of Correction (DOC) & offender on document-by-document basis.

Here, counsel requested permission to inspect offender's confidential file in preparation for parole or clemency hearings. Petitioning offenders contended access was necessary to determine whether documents contained errors or had been erroneously classified as confidential. Tr. Ct. ordered full access to files, but prohibited attorney from divulging any information from files to offenders or to anyone else without obtaining court authorization on document-by-document basis. Ind. Code 11-13-3-3 provides that, in accordance with Ind. Code 11-8-5-2, person being considered for parole shall be given access to records & reports considered by parole board in making its decision. Ind. Code 11-8-5-2(a) enables DOC to classify certain documents as confidential. DOC promulgated rules under Ind. Code 11-8-5-2. See 210 IAC 1-6-2(B). Court finds it is unnecessary to require showing of erroneous classification in order to gain access to records. After concluding that Tr. Ct's. are capable of balancing interests of DOC/offenders, court sets forth examples of documents that should not be revealed to offender, because they could threaten another person's safety. Held, remanded for *in camera* inspection.

TITLE: Komyatti v. State
INDEX No.: F.2.
CITE: (07-28-10), 931 N.E.2d 411 (Ind. Ct. App. 2010)
SUBJECT: Parole revocation - sufficient evidence
HOLDING: Sufficient evidence supported revocation of probation even though Parole Board's written findings were partial excerpt from boilerplate form. Form indicated that D's parole was revoked for some reasons that were not at issue for D, such as being newly convicted of a crime or failing an alcohol or drug test Court has reversed a parole revocation where Parole Board used boilerplate form, but the form in that case failed to indicate that the Board relied on evidence that State claimed on appeal supported the revocation. See Pierce v. Martin, 882 N.E.2d 734, 737-38 (Ind. Ct. App. 2008). Here, however, the form indicated that Board relied on probation violation report, which included D's confession that he violated terms of probation by driving a car alone even though he only had a learner's permit. Evidence listed in form that Parole Board did not consider was surplusage and does not require reversal. Cf. CSL Cmty. Ass'n Inc. v. Jennings Nw. Reg'l Utils., 794 N.E.2d 567, 569 (Ind. Ct. App. 2003). Nevertheless, Court "explicitly discourages the Board from continuing to use this boilerplate form, or if it is to be used, it must be individually tailored to each case to accurately reflect what evidence was actually presented and considered at the parole revocation hearing. Not to do so invites confusion and escalates the chance of reversal." (emphasis added). Held, judgment affirmed.

TITLE: State v. Hernandez
INDEX NO.: F.2.
CITE: (07-30-09), 910 N.E.2d 213 (Ind. 2009)
SUBJECT: Persons serving life sentences prior to 1979 not eligible for parole
HOLDING: D, who is serving two life sentences for his 1975 murder convictions, is not eligible to seek parole under the statutes in effect at the time the murders took place, but can seek clemency through the Indiana Parole Board as many individuals have successfully done. Following White v. Ind. Parole Board, 713 N.E.2d 327 (Ind. Ct. App. 1999), Court noted that those inmates serving life sentences were not explicitly and specifically identified as eligible for parole by statute until 1979. Thus, a person under a life sentence in 1975 was not eligible to be considered for parole. To the extent that Johnston v. Dobeski, 739 N.E.2d 121 (Ind. 2000), held that a life sentence was indeterminate and that a prisoner serving a life sentence was eligible for consideration for parole, it is *overruled*. However, Court reaffirmed its holding in Johnston that the agreement between the prisoner and county prosecutor was valid. Held, post-conviction court affirmed in part, reversed in part, and remanded with instructions to enter judgment in favor of State.

TITLE: Swarthout v. Cooke
INDEX NO.: F.2.
CITE: (01-24-11), 131 S. Ct. 859 (U.S. 2010)
SUBJECT: Prisoners have no constitutional right to parole
HOLDING: Per Curiam. A state's decision to create a system of parole is a state liberty interest. There is no federal constitutional right to be released before a state sentence is fully served and states have no duty to offer parole to their prisoners. The federal Constitution only requires that any created parole procedures are fair--providing an opportunity to be heard and a statement of reasons for parole denial. Moreover, no decision of the Supreme Court converts the California procedure--requiring "some evidence" to support a denial of parole--into a substantive federal requirement allowing habeas relief. Federal courts have no constitutional authority to look into the evidence and decide whether it supports the denial of parole. Here, Ninth Circuit erroneously second-guessed the California parole board and state courts for denying parole to inmate who was convicted of attempted murder in 1991. Held, Ninth Circuit Court of Appeals' opinion reversed; Ginsburg, J., CONCURRING.

TITLE: Wilkinson v. Dotson
INDEX NO.: F.2.
CITE: 544 U.S. 74; 125 S.Ct. 1242; 161 L.Ed.2d 253 (2005)
SUBJECT: State parole procedure, federal habeas corpus, ' 1983 actions
HOLDING: State prisoners may bring a federal action challenging the constitutionality of state parole procedures under ' 1983.

F. PROBATION/ PAROLE/CLEMENCY

F.2. Parole (IC 35-50-6-1, Ind. Code 11-13-3)

F.2.a. Eligibility

TITLE: Goodlow v. State
INDEX NO.: F.2.a.
CITE: (2nd Dist., 12-19-74), Ind. App., 319 N.E.2d 866
SUBJECT: Parole eligibility - constitutionality
HOLDING: Fact that person serving five year determinate or "flat" sentence with good-time off would be entitled to discharge after serving three years & nine months, while person such as D convicted of aggravated assault & battery, serving one to five year indeterminate sentence was not parole consideration, did not violate equal protection clause of 14th Amendment to U.S. Constitution & Art. 1, § 23 of Indiana Constitution because measure in determining whether penalty for one crime was greater than another was maximum duration of penalty, not possible duration of imprisonment. Held, judgment affirmed.

RELATED CASES: Adams, 575 N.E.2d 625 (parole eligibility statute which differentiated between life prisoners who committed murder & other life prisoners did not violate equal protection); Davis, App., 297 N.E.2d 450 (fact that person serving determinate sentence of 10 to 20 years might be eligible for discharge earlier than person serving indeterminate sentence did not contravene state constitutional provision that all penalties be proportional to nature of offense); Averhart, 618 F.2d 479 (Indiana state prisoners do not have protectible interest in being paroled).

TITLE: Hackett v. State
INDEX NO.: F.2.a.
CITE: (4th Dist., 2-21-96), Ind. App., 661 N.E.2d 1231
SUBJECT: Parole eligibility - concurrent life sentences
HOLDING: Statute which bars parole consideration for persons who receive more than one life sentence did not violate D's federal or state constitutional rights. In challenging Ind. Code 11-13-3-2(b)(3), D argued that there is no rational basis to treat concurrent life sentences differently than single life sentence. Ct. rejected identical argument in Bean v. Bayh, App., 562 N.E.2d 1328, & concluded that there is nothing irrational about legislative judgement to deny parole to any individual who has committed two felonies generating life sentences. Fact that D is excluded from parole eligibility while persons convicted under new penal code receive determinate sentences does not raise equal protection concerns. Rivera v. State, 179 Ind. 295, 385 N.E.2d 455 (1979). Held, denial of PCR affirmed.

RELATED CASES: Johnson, App., 654 N.E.2d 788 (individual serving two sentences of life imprisonment upon conviction of more than one felony is not eligible for parole consideration).

TITLE: Hatton v. State
INDEX NO.: F.2.a.
CITE: (9/1/82), Ind., 439 N.E.2d 565
SUBJECT: Parole - eligibility
HOLDING: Tr. judge's recommendation that D never be eligible for parole is inappropriate but does not constitute error unless D establishes that he was harmed or prejudiced by the recommendation. Such a recommendation is not binding on the parole board. Mott 402 N.E.2d 986; Ind. Code 11-1-1-7 (repealed); Ind. Code 11-9-1-2. Here, D failed to prove prejudice. Held, no error.

RELATED CASES: State ex rel. Goldsmith, 419 N.E.2d 109 (fact that acceptance of plea bargain agreement by trial judge forecloses subsequent judicial discretion by such judge to suspended sentence does not affect statutory discretion which is within purview of parole board or department of corrections under law).

TITLE: Page v. State
INDEX NO.: F.2.a.
CITE: (1st Dist., 1-12-88), Ind. App., 517 N.E.2d 427
SUBJECT: Parole - Eligibility; effect of credit time
HOLDING: Parolee's eligibility for release on parole after serving seven years of 14-year sentence & after earning one day of credit for each day of incarceration could not constitute completion of sentence & would not entitle parolee to discharge. Credit time statute only applied to determining eligibility for parole. Held, judgment affirmed.

TITLE: Propes v. State
INDEX NO.: F.2.a.
CITE: (3-6-92), Ind., 587 N.E.2d 1291
SUBJECT: Eligibility - parole board's discretion
HOLDING: Sentencing Ct.'s statement that life sentence imposed for murder should not exceed sixty years could in no way be considered mandatory upon Department of Corrections ("DOC"). Manner in which sentence is served when prisoner has been committed to DOC is matter of discretion of that department together with parole board & clemency commission & their interactions with governor. Thus, sentencing judge's statement could be considered only gratuitous recommendation that appellant not serve more than sixty years on his life sentence. Held, judgment affirmed.

RELATED CASES: State Ex Rel. Goldsmith, 419 N.E.2d 109 (foreclosure of judicial discretion in suspending executed sentence provided for in accepted plea bargain has no effect on statutory discretion which is within purview of Parole Board or Department of Corrections).

TITLE: Varner v. Indiana Parole Bd.
INDEX NO.: F.2.a.
CITE: (03-10-10), 922 N.E.2d 610 (Ind. 2010)
SUBJECT: Parole eligibility need not be determined by all five board members
HOLDING: Supreme Court denied petition for writ of mandamus asking Court to compel entire five-member parole board to rule on request for parole, even though Ind. Code 11-13-3-3(b) requires "full parole board" to vote on such requests. Vote by four board members on Varner's request resulted in a 2-2 tie. Board ignored Varner's request for rehearing by entire board. Court held that "full board" requirement is satisfied if majority of board participates in decision.

Indiana Code does not define "full parole board." Allowing decision by majority is consistent with rules of statutory construction. "Words importing joint authority to three or more persons shall be construed as a majority of the persons . . . ." Ind. Code 1-1-4-1(2). Because parole board has three or more persons, Ind. Code 11-9-1-2(a)(2) confers joint authority on three board members to vote parole request. This interpretation is also supported by 220 Ind. Admin. Code ' 1.1-2-2(a)(3)-(4), which defines a quorum as three board members and requires at least three members to vote for parole. This approach is also consistent with long-standing deference to agency's interpretation of statute that it enforces. Court also found instructive workers compensation cases upholding votes by majority but less than full board, even though relevant statute requires full workers compensation board to make final decisions. See, e.g., ACLS v. Bujaroski, 904 N.E.2d 1291, 1292 (Ind. Ct. App. 2009).

Because Ind. Code 11-13-3-3(b) was susceptible to more than one interpretation, Court could consider consequences of particular construction of statute. Requiring full board to participate in each parole vote would limit board's ability to discharge its duties. Whenever a board member would take sick leave, vacation, family medical leave, or even resign, the board would come to a standstill, as it hears 50 parole requests per month. Held, request for writ of mandamus denied.

F. PROBATION/ PAROLE/CLEMENCY

F.2. Parole (IC 35-50-6-1, Ind. Code 11-13-3)

F.2.b. Conditions

TITLE: Bleeke v. Lemmon
INDEX NO.: F.2.b.
CITE: (4/16/2014), 6 N.E.3d 907 (Ind. 2014)
SUBJECT: Parole conditions unconstitutional
HOLDING: Parole conditions aimed at restricting parolee from being near, communicating with, or associating with, children were not reasonably related to his successful reintegration into the community, where there was no evidence parolee poses a risk or threat to any minor. Evidence in this case showed that parolee is affirmatively not a threat to children, nor is he likely to be. Held, transfer granted, Court of Appeals' opinion at 982 N.E.2d 1040 vacated, judgment affirmed in part and reversed in part with instructions to enjoin Parole Board from enforcing those conditions.

RELATED CASES: Lacy, 2015 U.S. Dist. LEXIS 132678 (U.S. District Court, S. Ind. 2017) (Requirement of SOMM program that incarcerated sex offenders admit their guilt for both offense for which they were convicted and other uncharged crimes - or lose earned credit time - violates 5th Amendment right to be free from compelled self-incrimination; see full review, this section)

TITLE: Bleeke v. Lemmon
INDEX NO.: F.2.b.
CITE: (4/16/2014), 6 N.E.3d 907 (Ind. 2014)
SUBJECT: SOMM program constitutional – no compulsion to participate
HOLDING: Requirements of Sex Offender Management and Monitoring program (SOMM) that parolee admit his guilt to the underlying conviction and answer potentially incriminating questions about his prior sexual history or face re-incarceration, do not violate the Fifth Amendment's privilege against self-incrimination. While incarcerated, the State was permitted to present Bleeke—and all SOMM inmates—with a constitutionally permissible choice: participate in the SOMM program and maintain a more favorable credit status and/or privileges within the prison system or a favorable assignment in a community transition program, or refuse to participate and instead serve out the full term for which he had been lawfully convicted. Court agreed with other state and federal courts applying McKune v. Lile, 536 U.S. 24 (2002), and holding that this form of disciplinary response does not constitute a "penalty" such that Bleeke would have been compelled to yield his Fifth Amendment privilege. The SOMM program is a valuable tool aimed at the legitimate purpose of rehabilitating sex offenders before they are fully released from State control. Held, transfer granted, Court of Appeals' opinion at 982 N.E.2d 1040 vacated, judgment affirmed in part and reversed in part.

TITLE: Harris v. State
INDEX NO.: F.2.b.
CITE: (5th Dist., 10-18-05), Ind. App., 836 N.E.2d 267
SUBJECT: Revocation of parole affirmed
HOLDING: Indiana Parole Board did not improperly revoke post-conviction petitioner's parole for breaking special conditions as a parolee. Petitioner previously pled guilty to child molesting & special parole stipulations signed by him included to not use any "on-line computer service, which included e-mail; to not use his employment as a means to acquire new victims & to get approval of any employment through his parole agent; & to not possess any items that attract children or that may be used to coerce children to engage in inappropriate or illegal sexual activities." He also signed the standard parole stipulation for sex offenders which included only having one residence & mailing address at a time. While working as a casting director at a film production company he incorporated, Petitioner wrote a letter to a casting agent seeking actors, including children, for different projects with many carrying teenage alienation themes. He sought a co-writer for a project dealing "with an occurrence of sexual molestation, between a man & a boy ... not a stranger abduction thing but ... a long term relationship that had many positives." Parole violations were filed for unauthorized use of the Internet; advertising a video in an attempt to entice children; engaging in unapproved employment; & maintaining more than one residence & mailing address.

Petitioner challenged the additional conditions imposed under Ind. Code 11-13-3-4(b) as not being reasonably related to his reintegration into society, being unconstitutionally vague and N.E.2d or overbroad, & unduly infringing upon his free speech & association rights under the First Amendment. Ct. found that the condition to not possess any items that attract children or may be used to coerce children to engage in appropriate or illegal sexual activities was unconstitutionality vague, but all other conditions were upheld. Internet restriction was appropriate in relation to concerns of re-offending, considering facts related to Petitioner's previous conviction (although computer was not involved) & "Static 99 Assessment" that placed Petitioner at a "medium-high level of risk to reoffend. Ct. also found no freedom of speech problems as to restrictions involving Internet or employment, as a parolee's First Amendment rights may be restricted, as long as such restriction is reasonably related to achieving the goals of parole. The one residence restriction was also not unduly vague & served the Board's obligation to supervise Petitioner & help reintegrate him into society.

Ct. also rejected Petitioner's argument that his parole conditions did not comply with Ind. Code 4-22-2-19.5 because they were not narrowly tailored to his specific behavioral flaws & offensive behavior for failure to provide cogent argument as to how the conditions failed to achieve the Board's regulatory goals in the least restrictive manner. Further, the procedural methods utilized in revoking Petitioner's parole did not violate Petitioner's due process rights & met the standards established in Morrissey v. Brewer, 408 U.S. 471 (1972). The use of hearsay evidence against Petitioner did not violate his confrontation rights as other independent evidence of the violations existed &, like probation, a parole revocation hearing is not to be equated with an adversarial criminal proceeding. See Cox v. State, 706 N.E.2d 547 (Ind.1999). Ct. also noted Ind. Evid. Rule 101(c)(2) states the evidence "rules, other than those with respect to privileges, do not apply in" parole proceedings. Ct. also found sufficient evidence to support the revocation based on a preponderance of the evidence. Finally, Ct. rejected Petitioner's claim that the revocation deprived him of his earned credit time as credit time statutes are only applied to determine when felons are eligible for parole & while on parole the parolee remains in legal custody &, in legal effect, remains imprisoned. Held, judgment affirmed.

TITLE: Lacy v. Keith Butts

INDEX NO.: F.2.b.

CITE: (9/27/2017), 2015 U.S. Dist. LEXIS 132678 (U.S. District Court, S. Ind. 2017)

SUBJECT: SOMM program violates 5th Amendment privileged against compelled self-incrimination

HOLDING: The requirement of the Indiana SOMM program that incarcerated sex offenders admit their guilt for both the offense for which they were convicted and other uncharged crimes - or lose earned credit time and be assigned to a less favorable credit class - violates their Fifth Amendment right to be free from compelled self-incrimination.

The petitioners filed a habeas class action. They are Indiana inmates who have lost earned credit time and/or been demoted in credit earning class based on their refusal to participate in the SOMM program.

In 2014, the Indiana Supreme Court agreed that the disclosure requirements create a risk of self-incrimination. See Bleeke v. Lemmon, 6 N.E.3d 907 (Ind. 2014). Indeed, requiring such disclosures is "starkly incriminating." See United States v. Antelope, 395 F.3d 1128, 1138 (9th Cir. 2005). However, because good time credits are not "constitutionally required," Bleeke ruled that taking away credit time does not violate the privilege against compelled self-incrimination; the adverse consequences an inmate faces for not participating in the SOMM program "are related to the program's objectives and do not constitute significant hardships in relation to the ordinary incidents of prison life." See McKune v. Lile, 536 U.S. 24, 37-38 (2002).

Bleeke was wrong to conclude that deprivation of credit time is not a significant hardship. Taking away credit time, and foreclosing the opportunity to earn credit time in the future, poses a significant hardship; it greatly increases the term of an inmate's incarceration. Further, depriving inmates of credit time impinges on their liberty interest in credit time. This is a liberty interest because credit time is a matter of statutory right; a trial court has no discretion to deny credit time to a person who is in a credit-eligible class. Held, petitioners' motion for summary judgment granted and Department of Correction must vacate disciplinary actions against the petitioners.

TITLE: Page v. State
INDEX NO.: F.2.b.
CITE: (1st Dist. 1/12/88), Ind. App., 517 N.E.2d 427
SUBJECT: Parole conditions - D's refusal to sign agreement
HOLDING: D was bound by conditions of his parole agreement, despite his refusal to sign it. Ind. Code 11-13-3-4(c) requires that parolee be given written statement of parole conditions. D refused to sign his statement, believing he was being discharged, not paroled. D argues that his signature was required to render agreement enforceable, & that he should not have been released without signing it. Contract may be binding despite lack of party's signature. Parrish v. Terre Haute Savings Bank (1982), App., 431 N.E.2d 132; 6 I.L.E. Contracts Section 53. D concedes he was aware of agreement & violated it. D could not be denied parole because of refusal to sign agreement. Ind. Code 11-13-3-3(a). D knew of agreement, was advised of terms, & received benefits. Agreement was binding on D. D also argues that revocation deprived him of credit time earned, because he had already served his sentence. Felons are released to parole or probation, not completely discharged. Ind. Code 35-50-6-1(a). Parolees remain in legal custody. Overlade v. Wells, 127 N.E.2d 686. Thus, D had not yet served his sentence & been discharged. Held, parole revocation was not unlawful.

F. PROBATION/ PAROLE/CLEMENCY

F.2. Parole (IC 35-50-6-1, Ind. Code 11-13-3)

F.2.c Duration of Term

TITLE: Garner v. Jones

INDEX NO.: F.2.c.

CITE: 529 U.S. 244, 120 S. Ct. 1362, 146 L.Ed.2d 236 (2000)

SUBJECT: Retroactive application of a change in frequency of parole hearings

HOLDING: Retroactive application of a change in the frequency of parole hearings did not violate the ex post facto clause. D was serving two life sentences, having committed one murder after escaping from prison for an earlier murder. Under Georgia law at the time of his crime, the parole board's rules required it to consider him for parole every three years. While D was serving his sentence, the board amended its rules to provide for review every eight years. D brought an action under 42 U.S.C. § 1983, claiming a violation of the ex post facto clause. Held, the rule amendments did not inherently create a significant risk that D's punishment would be increased, nor was such a risk shown by the record.

TITLE: Hobbs v. Butts
INDEX NO.: F.2.c.
CITE: (8/31/2017), 83 N.E.3d 1246 (Ind. Ct. App. 2017)
SUBJECT: Parolee not "turned over" -- properly ordered to complete sentence
HOLDING: A "turn-over" eliminating a parole obligation occurs when the Parole Board explicitly states such and has the intent to discharge the sentence. Here, D was on probation for theft when he committed residential entry, battery, and criminal deviate conduct. He was paroled in March 2013 but remained in prison to serve his two-year sentence for the theft charge since he violated his probation by committing the other crimes. D was released from the DOC in December 2013 and placed on parole for a previous sex offense. After violating his parole twice, D was sent back to prison. *Citing* Meeker v. Ind. Parole Bd., 794 N.E.2d 1105 (Ind. Ct. App. 2003), D argued that because the State did not collect his signature on State Form 23R, he was "turned over" to begin serving his sentence on the theft charge, free of the parole obligation for residential entry, battery and criminal deviate conduct. However, no evidence was presented that Parole Board intended to discharge D's sentence for his prior criminal deviate conduct sentence. There was no "turn over" language used by Parole Board. Thus, D failed to show he is being illegally restrained and Tr. Ct. did not err in denying his petition for writ of habeas corpus. Held, judgment affirmed.

RELATED CASES: Arnold, 92 N.E.3d 1123 (Ind. Ct. App. 2018) (following Hobbs and also rejecting argument that IC 35-50-6-1 violates the separation of powers doctrine under the Indiana Constitution).

F. PROBATION/ PAROLE/CLEMENCY

F.2. Parole (IC 35-50-6-1, Ind. Code 11-13-3)

F.2.d. Due Process/Reason for Denial

TITLE: Hawkins v. Jenkins
INDEX NO.: F.2.d.
CITE: (4-6-78), Ind., 374 N.E.2d 496
SUBJECT: Parole - violation of due process
HOLDING: Parole Board is not required to appoint counsel in each case & to have full blown trial on every charged parole violation. It is sufficient if Board notifies parolee of hearing & its purpose, affords him opportunity to speak & renders written decision informing parolee of outcome. Discretion of Parole Board is not subject to supervision or control of Cts. However, exercise of discretion can only occur after consideration of relevant facts & hearing. Although Parole Board must in all parole revocations & abeyance cases conduct hearing in accordance with statute, once Board has fulfilled those minimum requirements, it has almost absolute discretion in making its decision. Nevertheless, parolees who are not told of specific reasons of parole revocation hearing or allegations against them, who are given no time to prepare or to have witnesses appear on their behalf, & who are not given opportunity to speak at hearings are deprived of their constitutional rights to due process of law. Here, parolee, who was not notified that parole revocation & sentence abeyance would be determined at hearing & who was denied opportunity to speak & present evidence at hearing, was deprived of his constitutional rights to due process of law & was thus entitled to post-conviction relief. Held, judgment affirmed.

TITLE: Holleman v. State
INDEX NO.: F.2.d.
CITE: (3/20/2015), 27 N.E.3d 344 (Ind. Ct. App. 2015)
SUBJECT: Errors in parole denial were harmless
HOLDING: The Parole Board committed, at most, harmless error when it denied D's request for parole (1) without ordering an updated mental health evaluation and (2) without allowing D to attend his public parole release hearing. Also, Parole Board did not deny D due process in denying his parole request with no more explanation than *citing* the "nature and seriousness of the crime." See Murphy v. Indiana Parole Bd., 397 N.E.2d 259, 264 (1979); Young v. Duckworth, 394 N.E.2d 123, 127 (1979). Held, judgment affirmed. Barnes, J., concurring, wrote that for this type of prisoner, one of less than 200 "lifers" in the DOC, mostly older than 60, "[t]he least the parole board could do would be to have a psychological report on the prisoner that is relatively recent... I do think the parole board should do better than it did here."

TITLE: Huggins v. Indiana Parole Bd.
INDEX NO.: F.2.d.
CITE: (2nd. Dist., 12-30-92), Ind. App., 605 N.E.2d 229
SUBJECT: Reason for denial - reformation as one consideration
HOLDING: Parole board properly denied murder D's release on parole, notwithstanding D's claim that he was reformed after twenty-eight years of imprisonment. Penal code shall be founded on principles of reformation & not on vindictive justice. Ind.Const. art. 1, § 18. Parole board must consider, when making parole release determination, nature & circumstances of crime for which offender is committed, offender's prior record, offender's conduct & attitude during commitment & offender's parole plan. Ind. Code § 11-13-3-3(h). Although parole board balanced these factors & determined that seriousness of offense & prior criminal history supported denying parole, D contended that, in order for penal code to be based on principles of reformation & not vindictive justice, reformation should be sole criterion to be considered in determining whether parole should be granted. However, terms of parole are matter of legislative policy, & nothing in constitution required board to consider solely reformation & ignore other factors mandated by legislature. Thus, Tr. Ct. properly granted parole board's motion to dismiss for failure to state a claim upon which relief can be granted. Held, judgment affirmed.

TITLE: Murphy v. Indiana Parole Board
INDEX NO.: F.2.d.
CITE: (11-27-79), Ind., 397 N.E.2d 259
SUBJECT: Parole - Due process / reason for denial
HOLDING: Although there is no right to appeal from decision of Indiana Parole Board, due process requires that judicial review be available to ensure that requirements of due process have been met & that Parole Board has acted within scope of its powers. Because there is no constitutional or inherent right to parole release, if inmate in Indiana has any rights with regards to such release, they must emanate from parole release statute itself. In addition, to ensure that state-created parole systems served public interest of rehabilitation & deterrence, State may be specific or general in defining conditions for release & factors that should be considered by parole board. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979). Here, parole statute was not unconstitutional in that it failed to give Indiana Parole Board reasonable & adequate guidelines for reaching its parole release determinations. Held, judgment affirmed.

RELATED CASES: Swarthout v. Cooke, 131 S.Ct. 859 (there is no federal constitutional right to be released before a state sentence is fully served and states have no duty to offer parole to their prisoners); Young v. Duckworth, 408 N.E.2d 1253 (person who has been denied parole has no right to appeal from adverse decision by parole board on merits of denial; even if procedures used in parole hearings were found to be unconstitutional, D would not have been entitled to immediate discharge but, at most, would have been entitled to new parole hearing); Averhart v. Tutsie, 618 F.2d. 479 (7th Cir.) (Indiana state prisoners do not have protectible interest in being paroled).

TITLE: Russell v. Douthitt
INDEX NO.: F.2.d.
CITE: (12-28-73), Ind., 304 N.E.2d 793
SUBJECT: Parole - Due process; parolee entitled to have counsel at parole hearing
HOLDING: Probable cause existed for arrest of D & case was remanded to Tr. Ct. for hearing as to whether D, whose parole had been revoked, was entitled to have counsel at parole hearing & as to whether procedural steps required, for purpose of satisfying due process, were followed. Counsel should be provided in cases where, after being informed of his right to request counsel, probationer or parolee makes such request, based on timely & coverable claim that he has not committed alleged violation or that, even if violation is matter of public record or is uncontested, there are substantial reasons which justified or mitigated violation or make revocation inappropriate & that reasons are complex & otherwise difficult to develop. In addition, Ct. must consider whether probationer or parolee is capable of speaking effectively for himself. Gagnon v. Scarpelli, 411 U.S. 778 (1973). Held, case remanded; Hunter & Prentice, JJ., concurring.

TITLE: Sweeney v. Parke
INDEX NO.: F.2.d.
CITE: 113 F.3d 716 (7th Cir. 1997)
SUBJECT: Parole - due process requirements; loss of good time
HOLDING: District Ct. did not err by denying inmate's petition for writ of habeas corpus. Inmate is entitled to due process protection if disciplinary proceedings could result in loss of his good-time credits, which would inevitably affect duration of sentence. Although inmate is entitled to documentary evidence & is permitted to call witnesses in his behalf at disciplinary hearing as long as documentary evidence or calling witnesses is consistent with institutional safety & correctional goals, inmate is only entitled to twenty-four hours to plan defenses. Here, inmate argued that he was not afforded due process because he was not granted continuance to inspect cell block's logbook & he was not permitted to call witnesses on his own behalf. However, inmate was given more than twenty-four hours to prepare for disciplinary hearing & did not request witnesses to testify on his behalf until day of hearing, which was too late. Thus, inmate received process he was due with regard to witnesses & documentary evidence. Held, denial of petition for writ of habeas corpus affirmed.

TITLE: Young v. Duckworth
INDEX NO.: F.2.d.
CITE: (9-12-79), Ind., 394 N.E.2d 123
SUBJECT: Parole - Due process / reason for denial
HOLDING: Parole determination by parole board requires consideration of entire record, including gravity of offense, behavior records & opportunity for inmate to appear to ensure that records relate to his case & to allow him opportunity to present any special considerations. Parole determinations do not require parole board to specify particular evidence, upon which their discretionary determination is based. Parole board procedure which affords opportunity to be heard &, when parole is denied, informs inmate in what respects he falls short of qualifying for parole, affords due process. Here, reason given by parole board for denying parole, seriousness of offense, was sufficient reason for denial of parole & did not otherwise establish arbitrariness or deprivation of due process. D appeared before board on three occasions, was given hearings at which he was present & had opportunity to speak & received written statement of reasons for denial of parole approximately one week after hearing. Held, judgment affirmed.

RELATED CASES: Murphy v. Ind. Parole Bd., 397 N.E.2d 259 (seriousness of D's offense was adequate & sufficient reason for denial of parole).

F. PROBATION/ PAROLE/CLEMENCY

F.2. Parole (IC 35-50-6-1, Ind. Code 11-13-3)

F.2.e. Violations (IC 35-38-2-3)

TITLE: Boyd v. Broglin
INDEX NO.: F.2.e.
CITE: (2-23-88), Ind., 519 N.E.2d 541
SUBJECT: Parole - violation's effect on earned credit time
HOLDING: Parole Board's reincarceration of parolee pursuant to finding of parole violation did not deny parolee due process by depriving him of credit time that he had earned while incarcerated. Parolee received benefit of his earned credit time when he was released on parole & remained obligated to State until either his fixed term expired, he successfully completed one year on parole, or Parole Board acted to discharge him. Held, judgment affirmed.

RELATED CASES: Majors v. Broglin, 531 N.E.2d 189 (felon who has served fixed time less credit time is by operation of law on parole until Parole Board acts to discharge; discharge must occur within one year of release unless parole is revoked).

TITLE: Harris v. State
INDEX NO.: F.2.e.
CITE: (5th Dist., 10-18-05), Ind. App., 836 N.E.2d 267
SUBJECT: Revocation of parole affirmed
HOLDING: Indiana Parole Board did not improperly revoke post-conviction petitioner's parole for breaking special conditions as a parolee. Petitioner previously pled guilty to child molesting & special parole stipulations signed by him included to not use any "one-line computer service, which included e-mail; to not use his employment as a means to acquire new victims & to get approval of any employment through his parole agent; & to not possess any items that attract children or that may be used to coerce children to engage in inappropriate or illegal sexual activities." He also signed the standard parole stipulation for sex offenders which included only having one residence & mailing address at a time. While working as a casting director at a film production company he incorporated, Petitioner wrote a letter to a casting agent seeking actors, including children, for different projects with many carrying teenage alienation themes. He sought a co-writer for a project dealing "with an occurrence of sexual molestation, between a man & a boy ... not a stranger abduction thing but ... a long term relationship that had many positives." Parole violations were filed for unauthorized use of the Internet; advertising a video in an attempt to entice children; engaging in unapproved employment; & maintaining more than one residence & mailing address.

Petitioner challenged the additional conditions imposed under Ind. Code 11-13-3-4(b) as not being reasonably related to his reintegration into society, being unconstitutionally vague and/or overbroad, & unduly infringing upon his free speech & association rights under the First Amendment. Ct. found that the condition to not possess any items that attract children or may be used to coerce children to engage in appropriate or illegal sexual activities was unconstitutionality vague, but all other conditions were upheld. Internet restriction was appropriate in relation to concerns of re-offending, considering facts related to Petitioner's previous conviction (although computer was not involved) & "Static 99 Assessment" that placed Petitioner at a "medium-high level of risk to reoffend. Ct. also found no freedom of speech problems as to restrictions involving Internet or employment, as a parolee's First Amendment rights may be restricted, as long as such restriction is reasonably related to achieving the goals of parole. The one residence restriction was also not unduly vague & served the Board's obligation to supervise Petitioner & help reintegrate him into society. Ct. also rejected Petitioner's argument that his parole conditions did not comply with Ind. Code 4-22-2-19.5 because they were not narrowly tailored to his specific behavioral flaws & offensive behavior for failure to provide cogent argument as to how the conditions failed to achieve the Board's regulatory goals in the least restrictive manner. Further, the procedural methods utilized in revoking Petitioner's parole did not violate Petitioner's due process rights & met the standards established in Morrissey v. Brewer, 408 U.S. 471 (1972). The use of hearsay evidence against Petitioner did not violate his confrontation rights as other independent evidence of the violations existed &, like probation, a parole revocation hearing is not to be equated with an adversarial criminal proceeding. See Cox v. State, 706 N.E.2d 547 (Ind.1999). Ct. also noted Ind. Evid. Rule 101(c)(2) states the evidence "rules, other than those with respect to privileges, do not apply in" parole proceedings. Ct. also found sufficient evidence to support the revocation based on a preponderance of the evidence. Finally, Ct. rejected Petitioner's claim that the revocation deprived him of his earned credit time as credit time statutes are only applied to determine when felons are eligible for parole & while on parole the parolee remains in legal custody &, in legal effect, remains imprisoned. Held, judgment affirmed.

TITLE: Receveur v. Buss
INDEX NO.: F.2.e.
CITE: (4th Dist.; 01-25-10), 919 N.E.2d 1235 (Ind. Ct. App. 2010)
SUBJECT: Parole conditions - polygraph examinations
HOLDING: D's parole revocation for failure to submit to a polygraph examination, as he had earlier agreed, was not based on constitutionally impermissible *ex post facto* application of Ind. Code 11-13-3-4(g) (2004), because the statute does not even mention polygraph examinations as a condition of probation. D's parole was revoked because of a condition authorized by section (b) of the same statute, which allows the parole board to "adopt . . . additional conditions to remaining on parole." D's petition did not argue parole board lacked authority under section (b) of the statute to require polygraph testing. He also did not argue that applying section (b) of statute violated prohibition on ex post facto laws, nor could he because section (b) of statute was passed in 1979, thirteen years before D was convicted for rape and three other felonies. Held, denial of writ of habeas corpus affirmed.

F. PROBATION/ PAROLE/CLEMENCY

F.2. Parole (IC 35-50-6-1, Ind. Code 11-13-3)

F.2.f. Revocation proceedings

TITLE: Mills v. State
INDEX NO.: F.2.f.
CITE: (2nd Dist., 01-10-06), Ind. App., 840 N.E.2d 354
SUBJECT: Parole violation occurred within parole period - no habeas relief
HOLDING: Tr. Ct. properly denied D's petition for writ of habeas corpus. Because D alleged he was entitled to immediate release & that his parole was unlawfully revoked, either habeas or post-conviction would have been appropriate remedy. As in Partlow v. Superintendent, Miami Correctional Facility, 756 N.E.2d 978 (Ind. Ct. App.2001), Court concluded Tr. Ct.'s improperly re-designating the petition as PCR did not affect its jurisdiction over the case.

D contended that the Parole Board improperly revoked his parole because he was discharged from the burglary conviction from which parole resulted. He relied on Meeker v. Ind. Parole Bd., 794 N.E.2d 1105 (Ind. Ct. App.2004), where Court held that when the Board "turned over" the D to begin serving other sentences from subsequent convictions, it effectively discharged the D from the original sentences. Unlike Meeker, D presented no evidence that the Board took action to discharge or "turn over" his burglary sentence. Moreover, D's release on parole & discharge is governed by Ind. Code 35-50-6-1(a)(1), which requires a D to be "released on parole for not more than twenty-four (24) months, as determined by the parole board" upon completion of his fixed term of imprisonment less earned credit time. Further, Ind. Code 35-50-6-1(b) states "the parole board shall discharge him after [the twenty-four month period] or the expiration of [his] fixed term, whichever is shorter." Court noted D still had to serve a consecutive sentence for failure to appear after completing his time for burglary. The parole statutes make no specific provision for dealing with consecutive sentences. Hannis v. Deuth, 816 N.E.2d 872 (Ind. Ct. App.2004). As in Hannis, D completed his burglary sentence & started serving a parole term of 24 months, with part of that parole period served while he remained in prison serving his consecutive sentence. Court found that D's 24-month parole term had not expired when he moved without permission, failed to report, & was arrested for resisting law enforcement. D attempted to distinguish Hannis because his consecutive sentences were from unrelated convictions, but Court determined the principles enunciated in Hannis apply here. Held, judgment affirmed.

TITLE: Parker v. State
INDEX NO.: F.2.f.
CITE: (4th Dist., 2-15-05), 822 N.E.2d 285 (Ind. Ct. App. 2005)
SUBJECT: Parolee not "turned over" -- properly ordered to complete sentence
HOLDING: Parole board properly revoked Petitioner's parole & ordered him to serve his remaining sentence. Petitioner's parole was revoked just under two years after he was released on parole after his conviction for operating as a habitual traffic offender & battery & after having several urine screens test positive for drugs. In Meeker v. Indiana Parole Board, 794 N.E.2d 1105 (Ind. Ct. App.2003), the parole board "turned over" the parolee to serve sentences on the new convictions that formed the basis of the violation of parole. A few years later, Meeker was released on parole again based on the first convictions. A year later, he was revoked again & ordered to serve the remainder of his first convictions. On appeal, Ct. concluded "the parole board could not effectively suspend Meeker's parole on one set of sentences until after he served the sentences on the other unrelated convictions."

Here, distinguishing Meeker, Ct. determined that Petitioner did not have his parole revoked after having been paroled twice on the same convictions & he was never "turned over" to another sentence immediately by the parole board. Without two unrelated convictions, the Ct. found Petitioner's situation more similar to Hannis v. Deuth, 816 N.E.2d 872 (Ind. Ct. App.2004), where no evidence existed that the parole board discharged the parolee's sentence as required by Ind. Code 35-50-6-1(b). (Ct.'s emphasis). Held, judgment affirmed.

RELATED CASES: Pallett, 901 N.E.2d 611 (Ind. Ct. App. 2009 (where Parole Board checked "Granted Parole" & not "Granted Turnover" on D's paperwork when he was being released on parole, D was not discharged but remained on parole when he committed a subsequent violation); Metcalfe, App., 852 N.E.2d 585 (where Parole Board "turned over" parolee from life sentence to theft sentence, parolee was not discharged from life sentence because Board included language "life sentence preserved."

TITLE: Tewell v. State
INDEX NO.: F.2.f.
CITE: (2nd Dist., 11-05-07), Ind. App., 876/337, adopted by 878/1250
SUBJECT: Parolee not discharged from life sentence
HOLDING: Under certain circumstances, when the Parole Board attempts to "turn over" a D's sentence to begin serving other sentences from subsequent convictions, it effectively discharges the sentence. Meeker v. Indiana Parole Board, 794/1105 (Ind. Ct. App. 2004). Whereas in Meeker, the sentences that were turned over were two concurrent twelve-year terms, here, the Parole Board turned over D's life sentence. Ind. Code 11-13-3-5(a)(3) provides that "[a] person released on parole from a term of imprisonment remains on parole for life, except that the parole board may discharge him at any time after his release on parole." D had not been released on parole for his life sentence before the Parole Board turned it over; consequently, the Parole Board could not have discharged the sentence. Further, only when there is no other evidence of Parole Board's intent will the courts construe a vote to "turn over" as a vote to discharge. State v. Metcalf, 852/585 (Ind. Ct. App. 2006). Although Parole Board did not include any language in the turnover order explicitly indicating its intent not to discharge D's life sentence, record was replete with documents clearly establishing Parole Board's intent not to discharge D from his life sentence. Held, denial of petition for writ of habeas corpus affirmed.

RELATED CASES: Baldi, 908 N.E.2d 639 (Ind. Ct. App. 2009) (fact that D's probation was revoked did not illustrate he was "turned over" or discharged from his parole on an unrelated conviction).

F. PROBATION/ PAROLE/CLEMENCY

F.2. Parole (IC 35-50-6-1, Ind. Code 11-13-3)

F.2.f.2.b. Procedure

TITLE: Morrissey v. Brewer
INDEX NO.: F.2.f.2.b.
CITE: 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972)
SUBJECT: Parole - Revocation hearing; procedure
HOLDING: Revocation of parole is not part of criminal prosecution, & thus, full panoply of rights due to D does not apply to parole revocations. Whether any procedural protections are due depends not on whether governmental benefit is characterized as "right" or as "privilege," but whether D will be condemned to suffer grievous loss. Question is not merely weight of D's interest but whether nature of interest is one within language of Fourteenth Amendment. Once it is determined that due process applies, there is flexibility in determining what procedural protections are demanded by particular situation. Here, State properly subjects parolee to many restrictions not applicable to other citizens. Informal hearing structured to assure that finding of parole violation will be based on verified facts & that exercise of discretion will be informed by accurate knowledge of parolee's behavior is required by due process. On arrest for parole violation, due process also requires inquiry in nature of preliminary hearing to determine whether there is probable cause or reasonable grounds to believe that parolee committed acts which would constitute violation of parole conditions. Such inquiry should be conducted at or reasonably near place of alleged parole violation or arrest & as promptly as convenient after arrest, by someone, not necessarily judicial officer & not directly involved in case. Thus, minimal requirements include: (a) written notice of claimed parole violations; (b) disclosure of evidence against him; (c) opportunity to be heard in person & to present witnesses & documentary evidence; (d) right to confront & cross-examine adverse witnesses, unless hearing officer specifically finds good cause for not allowing confrontation; (e) "neutral & detached" hearing body such as traditional parole board; & (f) written statement by factfinders as to evidence relied on & reasons for revocation. Final parole revocation hearing should be flexible enough for consideration of evidence including letters, affidavits, & other material which would not be admissible in adversary criminal trial. Held, judgment reversed & remanded; Brennan & Marshall, JJ., concurring in result; Douglas, J., dissenting in part.

RELATED CASES: Grayson, 58 N.E.3d 998 (Ind. Ct. App. 2016) (where Tr. Ct. corrected its earlier finding that D's new crime violated his parole for an earlier attempted robbery conviction by finding it actually violated parole for another conviction, it denied D's right to due process by doing so without holding a hearing); Hardley, App., 893 N.E.2d 740 (if D was not given advance notice of conditions of parole he allegedly violated, the revocation of D's parole violates due process); Jenkins v. Harvey, App., 367 N.E.2d 1 (Morrissey v. Brewer not applicable retroactively).

F. PROBATION/ PAROLE/CLEMENCY

F.3. Clemency

F.3.a. Eligibility

TITLE: Daniels v. State
INDEX NO.: F.3.a.
CITE: (12-29-88), Ind., 531 N.E.2d 1173
SUBJECT: Clemency - Eligibility; plea agreement
HOLDING: While it may be that eligibility for clemency or parole would occur at same time in both first & second degree murder, one convicted of second degree murder would be more likely to receive clemency or become paroled than would one convicted of first degree murder. Here, D pleaded guilty to second degree murder & appealed, arguing he was coerced to do so to avoid death penalty. D also argued that he received no benefits in exchange for his guilty plea. However, plea agreement provided D benefit of increased possibility of earlier clemency or parole. Held, judgment affirmed.

TITLE: Harbison v. Bell

INDEX NO.: F.3.

CITE: 129 S.Ct. 1481 (2009)

SUBJECT: Right to federally-appointed counsel for offenders seeking state clemency

HOLDING: Indigent death row inmates who failed in their attempts to obtain federal habeas corpus relief are entitled to federally-provided counsel to pursue state clemency claims. Court interpreted 18 U.S.C. ' 3599 to authorize federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation. A certificate of appealability pursuant to 28 U.S.C. ' 2253(c)(1)(a) is not required to appeal an order denying a request for federally appointed counsel under ' 3599 because ' 2253(c)(1)(a) governs only final orders that dispose of a habeas corpus proceeding's merits. Held, Sixth Circuit Court of Appeals' opinion at 503 F.3d 566 reversed. Roberts, C.J., and Thomas, J., CONCURRING with separate opinions; Scalia, J., joined by Alito, J., CONCURRING IN PART AND DISSENTING IN PART, agreed that D is not required to obtain a certificate of appealability, but disagreed with majority's interpretation of statute to provide federally-appointed counsel to pursue state clemency.

TITLE: Jennings v. State
INDEX NO.: F.3.a.
CITE: (5-17-79), Ind., 389 N.E.2d 283
SUBJECT: Clemency - Eligibility; life imprisonment
HOLDING: Clemency commission will not consider petition for clemency from inmate sentenced to life imprisonment until that inmate has been incarcerated for at least ten years. Held, judgment affirmed.

RELATED CASES: Lock, 403 N.E.2d 1360 (sentence to serve term of D's "natural life" was proper, despite contention that statute provided for sentence of "life" & that use of term "natural life" would cause clemency commission to believe that D should never be granted clemency).

F. PROBATION/ PAROLE/CLEMENCY

F.3. Clemency

F.3.b. Procedure

TITLE: Colvin v. Bowen
INDEX NO.: F.3.b.
CITE: (3rd Dist., 2-4-80), Ind. App., 399 N.E.2d 835
SUBJECT: Clemency - Procedural requirements; discretion
HOLDING: Parole board was not required to promulgate specific guidelines for reaching clemency determination or to articulate specific reasons for its decision to deny clemency. Board is not mandated to conduct hearing even though it is empowered to hold one & to subpoena witnesses. In addition, statutes governing clemency do not require Parole Board to allow petitioner access to its files on him. Held, cause remanded with instructions to Tr. Ct. to re-enter judgment for dismissal.

F. PROBATION/ PAROLE/CLEMENCY

F.4. DOC Release Programs

F.4.a. Work Relese

TITLE: Cox v. State

INDEX NO.: F.4.a.

CITE: (3-3-99), Ind., 706 N.E.2d 547

SUBJECT: Revocation of work release - due process requirements; confrontation & cross-examination

HOLDING: Due process requirements for probation revocations are also required when Tr. Ct. revokes D's placement in community corrections program. Thus, D in community corrections program is entitled to representation by counsel, written notice of claimed violations, disclosure of opposing evidence, opportunity to be heard & present evidence, and right to confront and cross-examine witnesses in neutral hearing before Tr. Ct. Isaac, 605 N.E.2d 144. Here, D argued that admission of testimony concerning urinalysis results denied him his due process right to confront and cross examine all witnesses against him. In affirming revocation of D's placement in work release center, Ct. held that use in revocation hearing of regular urinalysis report prepared by company whose professional business it is to conduct such tests does not infringe upon D's confrontation rights. United States v. Bell, 785 F.2d 640 (8th Cir. 1986). Held, transfer granted, Ct. App.' opinion at 686 N.E.2d 181 vacated, revocation of placement in work release center affirmed. See O.9.a for Ct.'s holding regarding inapplicability of evidence and hearsay rules to probation/work release revocation hearings.

Note: As to general question of when hearsay evidence introduced at revocation hearing violates confrontation rights, Ct. did not adopt particular approach or test Tr. Ct. should use when deciding whether to admit proffered hearsay evidence. However, judges may consider any relevant evidence bearing some substantial indicia of reliability, including reliable hearsay.

RELATED CASES: Monroe, App., 899 N.E.2d 688 (Crawford does not apply in community corrections revocation placement hearings; hearsay that officers found gun in home where D was staying on home detention was reliable and its admission did not violate the Sixth Amendment); McQueen, App., 862 N.E.2d 1237 (in light of D's own testimony that he illegally took OxyContin & as a result tested positive for oxycodone in violation of Work Release Center rules, there was no prejudice to him in admission of hearsay testimony regarding results of toxicology report); C.S., App., 817 N.E.2d 1279 (Ct. rejected juvenile's claim that his confrontation rights to cross-examine his accuser were violated because the testing information was presented by a probation officer without knowledge of the testing procedures employed).

TITLE: Davis v. State
INDEX NO.: F.4.a.
CITE: (3rd Dist., 8-2-96), Ind. App., 669 N.E.2d 1005
SUBJECT: Work release - D entitled to hearing regarding violation
HOLDING: D was committed to county correction program of either work release or detention for service of consecutive three-year & one-year sentences imposed following his convictions for operating vehicle while intoxicated & possession of marijuana. D was entitled to evidentiary hearing before Tr. Ct. which accorded minimal due process in connection with revocation of D's placement in home detention program & transfer to Department of Corrections following D's subsequent arrest. Held, judgment reversed & remanded; Riley, J., dissenting.

TITLE: Kuhfahl v. State
INDEX NO.: F.4.a.
CITE: (1st Dist.; 5-6-99), Ind. App., 710 N.E.2d 200
SUBJECT: Work release community corrections program – credit for time served
HOLDING: Only D who is on home detention through direct commitment to community corrections program, & not D who is on work release through community corrections program as condition of probation, will receive day-for-day credit for time actually served on program when probation is later revoked. Person who is placed in community corrections program is entitled to earn credit time under Ind. Code 35-50-6 unless person is placed in person's home. Ind. Code 35-38-2.6-6(a). Upon violation of terms of community corrections placement, placement should be revoked & remainder of sentence should be ordered served. Ind. Code 35-38-2.6-5(3). Because Ind. Code 35-38-2.6-5(3), unlike Ind. Code 35-38-2.6-6(a), does not differentiate between home detention & other types of community corrections placements, Ds who are sentenced to home detention through direct commitment to community corrections program are entitled to credit for time actually served in program. Purcell v. State, 700 N.E.2d 815 (Ind. Ct. App. 1998), *trans. pending*. Here, D conceded that he was not entitled to credit time (two-for-one) for time spent on work release because he was placed in his home; rather, he contended that he was entitled to time actually spent (one-for-one) on work release. In Purcell, D was sentenced to direct commitment to community corrections. In instant case, D's work release was condition of probation, & thus, D was never confined & did not "serve time." Tr. Ct. properly denied D credit for time spent in post-conviction work release community corrections program as condition of his probation. Held, judgment affirmed; Kirsch, J., dissenting on basis that Purcell entitles D to credit for time actually served.

RELATED CASES: Peterink, 982 N.E.2d 1009 (Ind. 2013) (D who is on home detention as a condition of probation receives credit time).

TITLE: Million v. State
INDEX NO.: F.4.a.
CITE: (1st Dist., 2-23-95), Ind. App., 646 N.E.2d 998
SUBJECT: Community corrections / Work release - advisement of rules & requirement of hearing
HOLDING: Tr. Ct. which placed D in community corrections program was not required at sentencing to give written notice to D of program's work release rules. D could be advised orally of conditions of placement after sentencing & before placement began. In addition, Tr. Ct. could revoke D's placement in community corrections program for conduct occurring before commencement of placement. Here, D was adequately advised of terms of his placement in community corrections program, where D was informed at sentencing that he would be placed in program with all components & was orally advised of rules governing his participation on work release program prior to his placement.

Tr. Ct. violated D's right to due process by deferring to administrative decision made by community corrections personnel. Although D was not entitled to serve his sentence in community corrections program because, as with probation, placement in program is matter of grace & conditional liberty that is favor, not right, D had due process right to plenary hearing before D's placement in community corrections program could be revoked. Thus, judicial review of administrative decision to revoke D's placement did not comply with community corrections statute (Ind. Code 35-38-2.6-2, 35-38-2.6-5(3)). Held judgment reversed & remanded.

RELATED CASES: Tommey, App., 887122 (although D had no notice of specific terms of home detention, he admitted he failed to return to Community Corrections for four days and that violation was grounds for revocation of home detention); Patterson, App., 750 N.E.2d 879 (although State should have introduced direct evidence that D had been advised of rules, there was sufficient evidence to conclude that D was aware that his behavior was in violation of work release center rules); Cox, 706 N.E.2d 547 (due process requirements for probation revocations are also required when Tr. Ct. revokes D's placement in community corrections program).

F. PROBATION/ PAROLE/CLEMENCY

F.4. DOC Release Programs

F.4.d. Home detention

TITLE: Brock v. State
INDEX NO.: F.4.d.
CITE: (2nd Dist., 8-20-90), Ind. App., 558 N.E.2d 872
SUBJECT: Home detention - conditions upheld
HOLDING: D failed to demonstrate he was prejudiced by conceded failure of home detention order to include statutory conditions or by D's failure to be advised of those conditions at sentencing hearing. To extent D was not released from period of home detention ordered, Tr. Ct. would be required on remand to enter home detention order in compliance with probation statute. Tr. Ct. could forbid D to have visitors in his home during his period of home detention imposed for possession of marijuana, though that specific condition was not contained in probation statute (IC 35-38-2-2(a)(14)). Tr. Ct.'s order that during home detention D not associate with anyone having prior criminal conviction, "whether it be family or not," did not violate Eighth Amendment, though as consequence of order D could not visit with his father for one year. Held, judgment affirmed in part, reversed in part, & remanded with instructions.

TITLE: Davis v. State
INDEX NO.: F.4.d.
CITE: (3rd Dist., 8-2-96), Ind. App., 669 N.E.2d 1005
SUBJECT: DOC release programs - Community correction / home detention
HOLDING: D placed in community corrections is entitled to written notice of claimed violation of terms of D's placement, disclosure of evidence against D, opportunity to be heard & present evidence, & right to confront & cross-examine adverse witnesses in neutral hearing before Tr. Ct. Here, D was placed in home detention program. D did not return to his home from work & was observed driving while under influence of alcohol & with suspended license. Home detention program returned D to custody & terminated D's participation in program. Tr. Ct. signed order finding D violated terms of conditional release to home detention program & remanded D to Department of Corrections. Because D did not have evidentiary hearing, order finding D in violation of home detention must be reversed. Held, judgment reversed & remanded; Riley, J., dissenting.

RELATED CASES: Franklin, 685 N.E.2d 1062 (D in pretrial home detention was not "confined" &, therefore, was not entitled to credit for time spent in home detention).