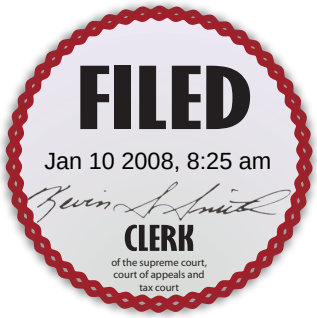

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IN THE
COURT OF APPEALS OF INDIANA

EMANUEL MARTINEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A04-0706-CR-301
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Roderick McGillivray, Judge
Cause Nos. 03D02-0411-FC-01504 & 03D02-0607-CM-01052

January 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Emanuel Martinez ("Martinez") appeals the trial court's revocation of his probation and imposition of his previously-suspended sentence imposed as a result of a 2005 Class C felony conviction. Specifically, Martinez claims that the trial court abused its discretion by revoking his probation and violated his due process rights by failing to issue a detailed statement explaining its reasons for imposing his suspended sentence. He also appeals the False Informing conviction that led to the revocation, contending that the trial court abused its discretion by not appointing Martinez counsel and in sentencing him. Concluding that the trial court followed proper procedures in revoking Martinez's probation, that a detailed statement explaining its reasons for imposing a suspended sentence is not required, that Martinez waived his right to counsel, and that the trial court did not err in sentencing him, we affirm the judgment of the trial court.

Facts and Procedural History

On November 12, 2004, the State charged Martinez with Operating a Motor Vehicle Without Ever Receiving a License, a Class C misdemeanor, and with Causing Death When Operating a Motor Vehicle With a Schedule I or II Controlled Substance in the Blood as a Class C felony under Cause Number 03D02-0411-FC-01504 ("Operating Causing Death"). On April 27, 2005, the State and Martinez entered into a plea agreement whereby Martinez pled guilty to the Class C felony in exchange for an eight-year sentence, with four years suspended to probation. The State dismissed the other charge. On June 19, 2006, Martinez was released from prison. Within two days of his release from prison, Martinez was at a friend's house when a conflict arose, which

resulted in police involvement. In response to the police asking Martinez to identify himself, Martinez provided the police with false identifying information and indicated that he had consumed alcohol. A portable breath test registered his alcohol level at .187.

On July 26, 2006, the State charged Martinez with False Informing[1] as a Class B misdemeanor under Cause Number 03D02-0607-CM-01052 ("False Informing"). On October 30, 2006, the State filed a verified petition to revoke Martinez's probation for the Operating Causing Death conviction. The State's petition alleged that Martinez violated his probation by giving the police falsified information and by consuming alcohol. On November 6, 2006, an initial hearing was held on the False Informing charge, and Martinez requested that the trial court appoint him a public defender. The trial court instructed Martinez that before it would provide him with a public defender he had to complete an indigency questionnaire, return it to the court by January 2, 2007, and then appear for an indigency hearing on January 8, 2007. The trial court informed Martinez that if he failed to complete and return the questionnaire or appear at the hearing, it would deny his request for a public defender. Martinez acknowledged that he understood the trial court's instructions. The trial court also informed Martinez that his bench trial for False Informing was set for February 28, 2007, and if he did not appear "we will hold the trial in your absence." Tr. p. 25.

Martinez did not complete and return the questionnaire as instructed or appear for his January 8, 2007, indigency hearing. As a result, the trial court denied Martinez's

[1] Ind. Code § 35-44-2-2(d)(1).

request for a public defender. On January 31, 2007, Martinez appeared at a pre-trial conference on the False Informing charge but did not renew his request for counsel.

On February 19, 2007, Martinez hired a private attorney to appear for his initial probation revocation hearing.[2] On February 27, 2007, one day before his False Informing trial, Martinez filed a letter with the trial court stating, "I have no court appointed lawyer. I have recently talked to Sean Thomasson and I already have him as a lawyer[.] I was curious as to if I might be able to just take [Thomasson] on as my lawyer now." Appellant's App. p. 91. The next day, Martinez did not appear for his bench trial. As a result, the trial court found him guilty of False Informing, *in absentia*, and issued a warrant for his arrest. Later that same day, Martinez appeared in court, and the trial court recalled the warrant it had issued for his arrest. While in court, Martinez referenced the letter he had filed with the court the day before and stated, "I was going to see because I already have Sean Thomasson on a case of mine . . . if he [sic] could go ahead and just appoint me Sean Thomasson." Tr. p. 36. Thereafter, the trial court appointed Thomasson to represent Martinez at his sentencing hearing to be held on April 27, 2007.

On March 26, 2007, Martinez, with counsel, waived his right to a fact-finding hearing and admitted to violating his probation in the Operating Causing Death case by committing the offense of False Informing and by consuming alcohol. Both parties agreed to consolidate the probation revocation and False Informing proceedings for disposition and sentencing ("Sentencing/Dispositional hearing") on April 27, 2007. At his Sentencing/Dispositional hearing, Martinez testified that he provided the police

[2] On January 4, 2007, Sean Thomasson ("Thomasson") entered his appearance to represent Martinez in his probation revocation proceeding.

officer with falsified information because he "had just gotten out [of prison] and . . . didn't want to get in any trouble . . . ." *Id*. at 44. Martinez also explained that his consumption of alcohol was a "dumb mistake." *Id*. at 47. At the conclusion of this hearing, the trial court ordered Martinez to serve his previously-suspended four-year sentence and to serve an additional sixty days for the False Informing conviction. Martinez now appeals.

Discussion and Decision

On appeal, Martinez raises four issues, which we restate as follows: (1) whether the trial court abused its discretion by revoking his probation and violated his due process rights by failing to include a detailed statement explaining its reasons for implementing his previously-suspended sentence; (2) whether the trial court abused its discretion by not appointing Martinez counsel for his False Informing trial, and (3) whether the trial court abused its discretion in sentencing Martinez for False Informing.

I. Probation Revocation

Martinez makes two arguments with regard to his probation revocation. First, he argues that the trial court abused its discretion in determining that his violations of probation warranted an imposition of his previously suspended sentence. Second, he contends that the trial court violated his due process rights by not issuing a detailed statement of what factors it relied upon when sentencing him. We address each argument in turn.

Martinez first argues that the trial court abused its discretion by imposing his previously-suspended four-year sentence because his character and attitude indicated that

he was unlikely to commit another violation, he made a "dumb mistake," Appellant's Br. p. 10, he is likely to respond well to probation, imprisonment would result in undue hardship to him or his dependents, and the trial court did not detail the facts it relied upon nor did it disclose whether it considered any aggravating or mitigating factors.[3]

A trial court's decision to revoke probation is reviewed for an abuse of discretion. *Abernathy v. State*, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006). We will not find an abuse of discretion unless "the trial court's decision is against the logic and effect of the facts and circumstances before the court." *Id*.

Here, the record shows that within two days of being released from prison for his Operating Causing Death conviction, Martinez violated two terms of his probation by lying to a police officer and by consuming alcohol. A portable breath test registered Martinez's alcohol level at .187. Martinez additionally admitted to consuming alcohol even after the date of his violation. These violations are not Martinez's first probation violations. When Martinez was convicted of Operating Causing Death, he was on probation in three separate causes and petitions to revoke had been filed. Those probation revocation proceedings, however, were dismissed as part of his plea agreement. The trial court's decision is not against the logic and effect of the facts and circumstances before the court. Accordingly, the trial court did not abuse its discretion by imposing his suspended sentence.

[3] Martinez does not make an argument under Indiana Appellate Rule 7(B), which provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Even had he done so, "[w]e have held that we review a trial court's decision to revoke probation and a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion." *Sanders v. State*, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), *trans. denied*.

Martinez next argues that the trial court violated his due process rights by failing to issue a detailed statement indicating the factors it relied upon when imposing Martinez's suspended sentence. Here, Martinez does not complain that his procedural due process safeguards were violated when the trial court found he had violated the terms of his probation. Indeed, because he admitted to the violations, the procedural due process safeguards and an evidentiary hearing are not necessary. *See Sanders*, 825 N.E.2d at 955. Rather, Martinez asks us to find that his due process rights were violated when the trial court failed to set forth the specific reasons for imposing his suspended sentence.

"Because probation revocation deprives a defendant of only a conditional liberty, he is not entitled to the full due process rights afforded during a criminal proceeding." *Cox v. State*, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006). The minimal due process rights to which a probationer is entitled include the following:

> (a) written notice of the claimed violations of probation; (b) disclosure to the probationer of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a written statement by the factfinder as to the evidence relied on and reasons for revoking probation.

Id. (citing *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)).

Here, Martinez was presented with an opportunity at his dispositional hearing to introduce evidence that explained and mitigated his violations. In doing so, he essentially asked for the trial court's leniency and another chance at probation, which the trial court rejected. To the extent that Martinez is alleging that the trial court must produce a separate, written statement regarding why it chose to impose his previously-suspended

sentence, as opposed to continuing probation, Martinez directs us to no requirement that the trial court explain why it chose execution of the sentence over the other statutory options available. *See* Ind. Code § 35-38-2-3(g). Indeed, the due process requirements listed in *Morrissey* refer only to a written statement as to the evidence relied upon and the reasons for revoking probation. *See Cox*, 850 N.E.2d at 488 (citing *Morrissey*, 408 U.S. at 489). Requiring an additional statement "would merely be duplicative and unnecessary in light of the lessened due process rights afforded a defendant during a probation revocation proceeding." Appellee's Br. p. 9. Therefore, the trial court did not violate Martinez's due process rights by not issuing a detailed statement explaining why it imposed his suspended sentence.

In another part of his brief, Martinez argues that in order to minimally protect his due process rights the trial court should delineate aggravating and mitigating circumstances when imposing a sentence in a probation revocation. But the trial court is not required to delineate mitigating and aggravating circumstances when imposing a sentence in a probation revocation. *See* I.C. § 35-38-2-3(g); *Cox*, 850 N.E.2d at 488. Thus, the trial court did not violate Martinez's due process rights by not delineating the aggravating and mitigating circumstances when imposing his suspended sentence.

II. Appointment of a Public Defender

Martinez next argues that the trial court violated his rights under the Sixth Amendment to the United States Constitution and Article I, § 13 of the Indiana Constitution by refusing to appoint him a public defender. Both the Sixth Amendment to the United States Constitution and Article I, § 13 of the Indiana Constitution guarantee

indigent criminal defendants the right to representation by legal counsel. Ind. Const. art. I, § 13; U.S. Const. amend. VI. "The guarantee of the right to be represented by counsel includes the right for an indigent defendant in a criminal prosecution to have counsel provided for him at state expense." *Moore v. State*, 273 Ind. 3, 401 N.E.2d 676, 678 (1980). "It is a judicial function to determine whether counsel shall be appointed at public expense, and this determination is within the sound discretion of the trial judge." *Mitchell v. State*, 417 N.E.2d 364, 368 (Ind. Ct. App. 1981) (citations omitted).

To be entitled to counsel at public expense, a defendant does not have to be completely without means. *Graves v. State*, 503 N.E.2d 1258, 1260 (Ind. Ct. App. 1987). If a defendant legitimately lacks financial resources to employ counsel without imposing a substantial hardship upon himself or his family, counsel must be provided. *Id*. A determination of indigency cannot be based on a superficial examination of the defendant's income and property. *Id*.

Martinez maintains, "by virtue of the Trial Court appointing [him] a public defender based upon [his] letter, the Trial Court has made a tacit admission that it should have appointed Martinez a public defender upon receipt of the letter and prior to the bench trial." Appellant's Br. p. 16. The State, however, argues that "[u]nder these circumstances, where [Martinez] affirmatively precluded the trial court from determining his need for counsel at public expense, the trial court was not required to appoint him counsel." Appellee's Br. p. 11-12. We agree with the State that "[b]y his own actions, [Martinez] thwarted the court's attempt to assess his indigent status . . . ." *Id*. at 11.

In an effort to assess his indigent status, the trial court instructed Martinez to complete an indigency questionnaire, return it to the court by January 2, 2007, and appear for an indigency hearing on January 8, 2007. The trial court warned Martinez that if he failed to complete and return the questionnaire and/or failed to appear at the indigency hearing, it would deny his request for a public defender. Martinez acknowledged that he understood the trial court's instructions. Thereafter, Martinez did not complete and return the questionnaire or appear for his indigency hearing, thereby precluding the trial court from assessing his indigent status.

Moreover, on January 4, 2007, Martinez hired Thomasson to represent him in his probation revocation hearing, a factor that suggests that he was not indigent and therefore able to retain private counsel for the False Informing trial. Even more, the letter Martinez penned to the trial court the day before his False Informing trial, which he claimed was a renewed request for the trial court to appoint him a public defender, stated, "I have no court appointed lawyer. I have recently talked to Sean Thomasson and I already have him as a lawyer[.] I was curious as to if I might be able to just take [Thomasson] on as my lawyer now." Appellant's App. p. 91. It is far from clear that this letter renewed his request for a public defender.

The trial court did not have sufficient information regarding Martinez's ability to pay for counsel because he did not complete and return his indigency questionnaire and did not appear at his indigency hearing. Thus, it was Martinez's own actions that precluded the trial court from assessing his indigent status and therefore the trial court did not abuse its discretion by not appointing him a public defender.

III. Sentencing

Finally, Martinez argues that the trial court abused its discretion in sentencing him for False Informing by failing to consider as mitigators that he is unlikely to commit another crime and that imprisonment would result in undue hardship to him or his dependents. Indiana Code § 35-50-3-3 governs sentences imposed upon convictions for Class B misdemeanors, and states, in relevant part, "A person who commits a Class B misdemeanor shall be imprisoned for a fixed term of not more than one hundred eighty (180) days." This statute does not provide a presumptive or advisory sentence but rather a maximum allowable sentence. "A trial court . . . is not required to articulate and balance aggravating and mitigating circumstances before imposing sentence on a misdemeanor conviction." *Creekmore v. State*, 853 N.E.2d 523, 527 (Ind. Ct. App. 2006), *clarified on denial of reh'g by Creekmore v. State*, 858 N.E.2d 230 (Ind. Ct. App. 2006) (on unrelated issue). Thus, the trial court did not abuse its discretion by failing to identify mitigating circumstances when sentencing Martinez to sixty days for False Informing.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.