

**IN THE COURT OF APPEALS OF IOWA**

No. 3-538 / 12-0366  
Filed June 26, 2013

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**BRIAN WAYNE KLINE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Hamilton County, Paul B. Ahlers,  
District Associate Judge.

A defendant appeals from an order revoking his deferred judgment and  
the resulting judgment and sentence entered on the underlying charge of third-  
degree burglary. **AFFIRMED.**

Shawn Smith, Ames, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney  
General, Patrick Chambers, County Attorney, and Adria Kester, Assistant County  
Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield, J., and Goodhue, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

**GOODHUE, S.J.**

Brian Wayne Kline appeals from an order revoking his deferred judgment and the resulting judgment and sentence entered on the underlying charge of third-degree burglary.

**I. Background Facts and Proceedings**

The defendant entered a plea of guilty on August 31, 2011, to the charge of third-degree burglary. The defendant was granted a deferred judgment on October 26, 2011. He was placed on probation subject to specific terms and conditions.

On December 7, 2011, an application to impose judgment accompanied by a report of violations was filed by the State. The two alleged violations were predicated on the defendant's commitments made as a part of the terms and conditions of his probation to "keep all appointments with and maintain contact as directed by my probation officer" and "live in a residence approved by my probation officer."

The defendant waived his right to counsel and a hearing commenced on January 18, 2012. At the hearing, the defendant acknowledged receipt of the report of violations, and the court proceeded to determine whether the defendant was admitting or denying the alleged violations. The court conducted a rather extensive colloquy with the defendant, and at the defendant's request permitted an interruption to allow the defendant to speak with the prosecution. After their conference the prosecutor stated it would be her recommendation the defendant's deferred judgment be revoked and a sentence imposed, but that

probation continue. The court and prosecutor made it clear to the defendant that the prosecutor's recommendation would not be binding on the court.

The defendant admitted his failure to maintain contact with the probation officer, but attempted to excuse his failure by asserting he had maintained contact with his parole officer in Des Moines. The defendant had an incomplete and confusing explanation of the residence issue, but his explanation was short of an outright admission. The court was confused by the residence issue, and not completely comfortable with the defendant's admission of the contact issue as qualified by his explanations. The court specifically asked the defendant, "Again to clarify, do you admit that you willfully violated the terms of your probation by failing to keep appointments and maintaining contact with your probation officer as you were required to do?" The defendant answered, "Yes, sir."

The court found a violation of the probation agreement, revoked the deferred judgment, imposed a five-year sentence, suspended the sentence, and placed the defendant on probation for three years, subject to terms and conditions. The conditions imposed on the defendant required that he reside at a residential correctional facility until maximum benefits were received. The court continued its colloquy and advised the defendant he had no right to a direct appeal of the probation revocation, but did have the right to a direct appeal of the sentence imposed. The written order revoking probation and imposing sentence provided, "Defendant has no right to a direct appeal to the Iowa Supreme Court with respect to the decision to revoke Defendant's deferred judgment." The

defendant's stay at the residential facility did not go well, and eventually his probation was revoked.

The defendant appeals from the revocation of his deferred judgment and the sentence imposed. The defendant contends that the State failed to establish that he violated the terms and conditions of his probation, and the court erred in not advising him that he had a right to directly appeal the revocation of his deferred judgment.

## **II. Standard of Review**

### **A. Probation Revocation**

Review is for errors of law. Iowa R. App. P. 6.907. Probation revocations are civil matters that must be supported by a preponderance of the evidence. *State v. Dolan*, 496 N.W.2d 278, 279-80 (Iowa Ct. App. 1992). "The granting of probation and its revocation are not to be overturned unless there has been an abuse of discretion." *State v. Darrin*, 325 N.W.2d 110, 112 (Iowa 1982).

### **B. Errors in Colloquy as to the Right to Appeal**

Interpretations of the Iowa Rules of Criminal Procedure are for correction of errors at law. *State v. Jones*, 817 N.W.2d 11, 15 (Iowa 2012).

## **III. Discussion**

### **A. Probation Revocation**

Probation revocation is a civil proceeding, not a stage of the criminal proceeding, and the rules of criminal procedure do not apply. *State v. Lillibridge*, 519 N.W.2d 82, 83 (Iowa 1994). It is only necessary that proof of a violation of the terms and conditions of a probation agreement be supported by a preponderance of the evidence to justify a revocation. *Rheuport v. State*, 238

N.W.2d 770, 772 (Iowa 1976). A preponderance of the evidence will support the revocation of a deferred judgment, as well as a probation violation, after a conviction. See *State v. Kirby*, 622 N.W.2d 506, 510 (Iowa 2001). Revocations are reviewed for abuse of discretion, and it has been asserted that an admission will satisfy the requirement. *Dolan*, 496 N.W.2d at 279-80. Even the defendant's silence in response to a direct question can be considered as supporting a probation revocation. *Calvert v. State*, 310 N.W.2d 185, 189 (Iowa 1981). In the instant case there was an unqualified admission to the violation made in response to a direct question. The revocation was supported by a preponderance of the evidence, and there was no abuse of discretion.

#### B. Errors in Colloquy as to the Right to Appeal

In its colloquy with the defendant, the court separated the revocation phase from the sentencing phase and accordingly advised the defendant that he did not have a right to direct appeal as to the revocation order, but did have a right of direct appeal to the sentencing phase. There is no right to a direct appeal in an ordinary probation revocation proceeding, but it has been held that in a deferred judgment proceeding that the revocation order inheres in the subsequent judgment. Therefore, the revocation order may be attacked by an appeal from the final judgment. *State v. Farmer*, 234 N.W.2d 89, 91 (Iowa 1975). For purposes of appeal, separation of the revocation hearing and sentencing into two separate phases is not required and a single direct appeal may address both issues. See *State v. Jensen*, 378 N.W.2d 710, 711 (Iowa 1985). The written order revoking probation and imposing the sentence went further than the court

in its colloquy and asserted there was no right of a direct appeal. Nevertheless, the defendant did file a timely appeal.

Iowa Rule of Criminal Procedure 2.23(3)(e) specifically requires the court to advise a defendant of his right to an appeal after imposing a sentence. There is no such court obligation after revoking probation. The judgment and sentence following revocation of the deferred judgment in effect reinstates the applicability of the Iowa Rules of Criminal Procedure and triggers the right to direct appeal. However, the appeal was timely perfected, therefore the claimed error was harmless, and of no consequence. See *State v. Kirchoff*, 452 N.W.2d 801, 806 (Iowa 1990).

**AFFIRMED.**