

James M. Schwartz appeals the revocation of his probation. We affirm.

FACTS AND PROCEDURAL HISTORY

Schwartz wrote eight bad checks to a Pizza Hut restaurant. On March 10, 2008, Schwartz pled guilty to eight counts of Class A misdemeanor check deception.¹ On each count, the court sentenced Schwartz to 365 days, with all but ninety days suspended to probation. The court ordered the sentence to be served consecutive to a sentence Schwartz was then serving on parole. The court ordered Schwartz to pay \$590.07 in restitution to Pizza Hut and imposed a fine of \$1.00 in each case and court costs of \$160.00.

On November 5, 2008, a probation violation report alleged Schwartz had not paid his fines or court costs. It also alleged Schwartz had been charged with fraud and theft on July 7, 2008, and charged with another theft on July 8, 2008. According to the report, Schwartz was sentenced for all three offenses on October 27, 2008.

At a hearing on June 29, 2009, Schwartz admitted he had violated his probation. He confirmed he had been arrested and charged with theft on July 7, 2008, and convicted of Class C felony theft. The court then found Schwartz had violated the conditions of his probation.

While considering the appropriate sanction, the court asked Schwartz if he had paid the restitution to Pizza Hut. Schwartz indicated that he had not. He explained he had been laid off from his job, and prior to being laid off, he had been behind on his child support payments. The prosecutor recommended Schwartz be ordered to serve his sentence, but

¹ Ind. Code § 35-43-5-5.

stated he had no objection to the court considering a sentence modification in the event Schwartz paid the restitution. The court ordered Schwartz to serve 365 days, with credit for forty-six days. The court stated Schwartz could serve his sentence on work release if accepted into that program and indicated it would consider a sentence modification if Schwartz paid the restitution.

DISCUSSION AND DECISION

Schwartz raises two arguments, which we consolidate and restate as whether the trial court abused its discretion by considering his failure to pay restitution when determining whether to revoke his probation.

Probation revocation is a two-step process. *Cox v. State*, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006). First, the court must determine whether a violation of a condition of probation has occurred. *Id.* If so, it may continue the person on probation, extend the probationary period, or order execution of all or part of the sentence that was originally suspended. Ind. Code § 35-38-2-3(g). We review for abuse of discretion the sentencing decision in a probation revocation proceeding. *Podluský v. State*, 839 N.E.2d 198, 200 (Ind. Ct. App. 2005).

First, we note restitution was not mentioned until after Schwartz admitted to committing at least one new offense² and after the trial court found him in violation of his probation. Therefore, we conclude the trial court's basis for that finding was the new offense, and not his failure to pay restitution. Schwartz agrees that restitution was discussed

only in the second phase of the hearing, when the court determined the appropriate penalty for the violation. (*See* Appellant’s Br. at 5.) Schwartz’s argument appears to be that the trial court erred by making his failure to pay restitution a factor in determining what penalty to impose for his probation violation. Schwartz argues this was an abuse of discretion for two reasons: (1) the probation violation report did not allege he had failed to pay restitution;³ and (2) the evidence elicited at the hearing did not establish he was able to pay restitution.⁴

Schwartz has not persuaded us that his failure to pay improperly motivated the trial court’s decision. The commission of a new offense was a sufficient ground on which to revoke probation. *Pitman v. State*, 749 N.E.2d 557, 560 (Ind. Ct. App. 2001), *reh’g denied, trans. denied*. While the court did not dwell on the details of the new offense, we are doubtful the court overlooked the significance of that violation. At the original sentencing, the court told Schwartz it would release him from probation early if he paid his restitution. At the probation revocation hearing, the prosecutor indicated he had no objection to a similar sentence modification if Schwartz paid the restitution, and the court adopted that

² Although the State alleged Schwartz committed three new offenses, only one of them was specifically addressed at the hearing.

³ The defendant is entitled to notice of the alleged probation violations. *Hubbard v. State*, 683 N.E.2d 618, 622 (Ind. Ct. App. 1997). “Basing a probation revocation upon claimed violations for which the defendant had received no notice is error because it violates due process.” *Bussberg v. State*, 827 N.E.2d 37, 44 (Ind. Ct. App. 2005), *reh’g denied, trans. denied*. However, the error is harmless if the probation revocation was also based on a violation for which the defendant did receive notice. *Id.* This is because proof of a single violation of probation is sufficient to support the decision to revoke probation. *Id.*

⁴ *See Szpunar v. State*, 914 N.E.2d 773, 778 (Ind. Ct. App. 2009) (before revoking probation for failure to pay restitution, court must inquire into defendant’s reasons for the failure to pay and determine whether defendant made a *bona fide* effort to acquire the resources to pay); Ind. Code § 35-38-2-3(f) (“Probation may not be revoked for failure to comply with conditions of a sentence that imposes financial obligations on the person unless the person recklessly, knowingly, or intentionally fails to pay.”). At the probation revocation hearing, Schwartz indicated he was unable to pay because he had been behind on child support, and then was laid off

recommendation. We view the court's action not as punishment for Schwartz's ~~for his~~ failure to pay, but as an opportunity for leniency that was consistent with Schwartz's original sentencing order. Therefore, we find no abuse of discretion. *See id.* (trial court found there was probable cause Pitman committed a new offense, and that alone was sufficient to revoke probation).

Affirmed.

KIRSCH, J., and DARDEN, J., concur.

after about three months. However, at the original sentencing hearing, Schwartz had stated his child support obligation was \$67.00 a week and that he thought he could pay the restitution within two months.