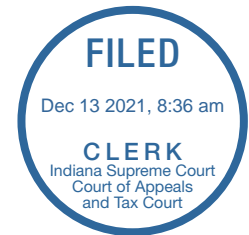


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Daniel Grace,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 13, 2021

Court of Appeals Case No.
21A-CR-1802

Appeal from the Ripley Superior
Court

The Honorable Jeffrey L. Sharp,
Judge

Trial Court Cause No.
69D01-1811-F6-252

Najam, Judge.

Statement of the Case

[1] Daniel Grace appeals the trial court's revocation of his probation and order that he serve the balance of his previously suspended sentence in the Ripley County Jail. Grace presents two issues for our review, which we restate as:

1. Whether the State presented sufficient evidence to demonstrate that he violated his probation by failing to report to the probation department and by committing new offenses.
2. Whether the trial court abused its discretion when it ordered him to serve the balance of his previously suspended sentence in the Ripley County Jail.

[2] We affirm.

Facts and Procedural History

[3] In 2018, the State charged Grace with Level 6 felony auto theft, Level 6 felony resisting law enforcement, and Class A misdemeanor resisting law enforcement. The State alleged he took a vehicle from a landscaping company without permission and then fled when law enforcement attempted to stop him. In 2019, Grace pleaded guilty to auto theft and resisting law enforcement, as Level 6 felonies. The court accepted Grace's plea agreement and ordered him to serve a 910-day sentence with 365 days executed in the Indiana Department of Correction and 545 days suspended to formal probation. Grace was placed on probation on April 30, 2020.

- [4] On July 15, 2020, the Ripley County Court Services (“Court Services”) filed a Probation Violation Affidavit of Probable Cause, alleging that Grace had failed a drug screen. Grace admitted to the violation, and the court revoked 120 days of his previously suspended sentence. Grace was returned to probation.
- [5] On December 3, Grace was scheduled for an in-person appointment with his probation officer, William Belew. The appointment was changed to an appointment by phone. During the phone appointment, Belew told Grace that his next phone appointment was scheduled for February 3, 2021.¹ However, Grace failed to report for the February 3 appointment. On February 26, Grace’s new probation officer, Andrew Campbell, sent Grace a failure to appear letter, directing Grace to report to Court Services on March 10. Grace did not appear for the March 10 appointment. On March 11, Campbell filed a petition with the court requesting that a probation violation hearing be scheduled and a warrant issued for Grace’s arrest. The court issued the arrest warrant on March 15.
- [6] Approximately three months later, on June 16, Lawrenceburg Police Officer Garrett Schmaltz received information from Jason Turner, an off-duty Aurora officer, that Officer Turner had seen Grace at a retail store and knew that Grace was wanted on an active arrest warrant. Officer Schmaltz used his police

¹ William Belew left Court Services on February 2, 2021, and Grace was assigned to a new probation officer.

computer system to confirm that the warrant for Grace's arrest was still active and then proceeded to the store.

[7] When Officer Schmaltz arrived at the store, Officer Turner (who was communicating with Office Schmaltz by phone) told Officer Schmaltz that Grace was the passenger in a white Chevrolet SUV. Officer Schmaltz's partner, Officer Gentry, eventually located the white SUV in an adjacent parking lot and observed Grace sitting inside. Grace exited the SUV, and Officer Gentry, in uniform, exited his fully-marked police cruiser and told Grace to stop. Grace ran from the officer, through two parking lots, across a highway, and onto an embankment, where he tripped and fell. Officer Gentry pursued Grace on foot, and Officer Schmaltz followed in his cruiser. Grace was apprehended by Officer Gentry and was eventually placed in the officer's cruiser.

[8] While Grace was being apprehended, the female driver of the SUV, later identified as Danielle Johnson, began to drive away. Officer Schmaltz's other partner, Officer Cole, stopped the SUV and sought and obtained from Johnson consent to search the vehicle. During the search, Officer Cole found a glass methamphetamine pipe in a baby-seat located behind the passenger seat, six grams of methamphetamine in a plastic bag that was in the middle of the backseat, two plastic baggie corners on the floorboard on the front passenger's side, and \$1,950 in cash in various places throughout the vehicle. The in-car camera located in Officer Gentry's police cruiser captured Grace telling Officer Gentry that "everything in the vehicle was his" and that Johnson did not know "that it was in there." Tr. Vol. 2 at 19. Officer Gentry relayed the information

to Officer Schmaltz, and Officer Schmaltz later reviewed the in-car camera video.

[9] After Grace’s arrest, Court Services filed on June 24, 2021, an amended petition requesting that a probation violation hearing be scheduled. The petition alleged that Grace had been charged with the following new offenses: Level 2 and Level 3 felony dealing in methamphetamine, Level 4 and Level 5 felony possession of methamphetamine, Class A misdemeanor resisting law enforcement, Class B misdemeanor unlawful use of a police radio, and Class C misdemeanor possession of paraphernalia.

[10] On July 21, a factfinding hearing was held on the amended petition. During the hearing, the State called Officer Schmaltz to testify about his June 16 encounter with Grace. He also testified to the information he had received from Officers Turner, Gentry, and Cole. When Officer Schmaltz was asked to testify as to what Officers Turner and Gentry had told him, Grace objected on grounds of hearsay. The State responded by soliciting additional testimony from Officer Schmaltz that he had worked with both officers on a regular basis and that he had been able to “credibly” and “truthfully” rely on the officers’ information in the past. *Id.* at 13, 15. The trial court overruled the objections and explained that reliable hearsay was properly admissible in probation violation hearings. At the conclusion of Officer Schmaltz’s testimony, the trial court reaffirmed its ruling on the hearsay testimony, stating that

in allowing the hearsay, the Court found that it was substantially trustworthy as hearsay based on the fact that Officer Turner and

Officer Gentry had worked with Officer Schmaltz in the past and he relied on their information in the past, that it had been credible in the past, but then also to bolster that, that he corroborated what they had told him based on what he had heard on in-car camera video. So, I just want to make a record of that.

Id. at 22.

[11] Following the hearing, the court found by a preponderance of the evidence that Grace had violated the terms of his probation when he twice failed to report to Court Services and when he committed the new offenses of resisting law enforcement and possession of methamphetamine. The court ordered Grace to serve the balance of his previously suspended sentence, 425 days, in the Ripley County Jail. This appeal ensued.

Discussion and Decision

Standard of Review

[12] Grace appeals the trial court’s revocation of his probation. As our Supreme Court has explained:

“Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled.” *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). It is within the discretion of the trial court to determine probation conditions and to revoke probation if the conditions are violated. *Id.* In appeals from trial court probation violation determinations and sanctions, we review for abuse of discretion. *Id.* An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances, *id.*, or when the trial court misinterprets the law

Probation revocation is a two-step process. First, the trial court must make a factual determination that a violation of a condition of probation actually occurred. *Woods v. State*, 892 N.E.2d 637, 640 (Ind. 2008). Second, if a violation is found, then the trial court must determine the appropriate sanctions for the violation. *Id.*

Heaton v. State, 984 N.E.2d 614, 616 (Ind. 2013). Here, Grace appeals both steps of the revocation process.

Issue One: Revocation of Probation

[13] Grace first asserts that the State failed to present sufficient evidence to support the revocation of his probation. Our standard of review of the sufficiency of the evidence supporting the revocation of probation is similar to our standard of review for other matters: “[W]e consider only the evidence most favorable to the judgment—without regard to weight or credibility—and will affirm if ‘there is substantial evidence of probative value to support the trial court’s conclusion that a probationer has violated any condition of probation.’” *Murdock v. State*, 10 N.E.3d 1265, 1267 (Ind. 2014) (quoting *Braxton v. State*, 651 N.E.2d 268, 270 (Ind. 1995)). One violation of a condition of probation is enough to support a probation revocation. *Hubbard v. State*, 683 N.E.2d 618, 622 (Ind. Ct. App. 1997).

[14] When the alleged probation violation is the commission of a new crime, conviction of the new crime is not required. *Richeson v. State*, 648 N.E.2d 384, 389 (Ind. Ct. App. 1995), *trans. denied*. Instead, the State is required to prove –

by a preponderance of the evidence – that the defendant committed the offense. *Heaton*, 984 N.E.2d at 617.

[15] Grace argues that the State did not produce sufficient evidence to prove that he knowingly failed to report to Court Services and that he committed the new offenses of resisting law enforcement and possession of methamphetamine. We address each argument in turn.

Failure to Report to Court Services

[16] Grace argues that the evidence is insufficient to show that he knowingly or intentionally failed to report to Court Services. According to Grace, (1) he was “not notified that there was a change in which probation officer he was to report to”; (2) he was not notified that “he was to report to a [new] probation officer who started the job the day before [Grace’s] scheduled phone appointment”; and (3) “there was no evidence” that the letter sent to Grace that contained his appointment date and time “was ever delivered [to] or received by Grace.” Appellant’s Br. at 8. However, Grace’s arguments disregard our standard of review and the evidence most favorable to the trial court’s judgment. Belew, the first probation officer assigned to Grace, testified that he conducted an appointment with Grace by phone on December 3, 2020, during which he directed Grace to report on February 3, 2021, for his next phone appointment. Grace did not report for the appointment. The fact that Belew left Court Services on February 2, and, that same day, Campbell was assigned as Grace’s new probation officer is of no moment and did not change the fact that Grace had been directed to report for the appointment.

[17] As for whether sufficient evidence was presented to show that Grace received the letter that directed him to report for his March 10 appointment, Campbell testified that he sent a failure to appear letter to the address listed in Grace's file, that the letter directed Grace to report to Court Services for an appointment scheduled for March 10, and that it was Grace's responsibility to provide an accurate address. Grace's argument that there is no proof that he received the letter is an invitation to reweigh the evidence, which we cannot do. The State presented sufficient evidence that Grace violated his probation by failing to report to Court Services.

Resisting Law Enforcement

[18] Next, Grace argues that the evidence is insufficient to demonstrate that he committed the new offense of resisting law enforcement. Resisting law enforcement occurs when a person knowingly or intentionally "flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop[.]" Ind. Code § 35-44.1-3-1(a)(3).

[19] Grace disputes whether law enforcement told him to stop. Specifically, he contends that there was insufficient evidence to establish which police officer "told [him] to stop or how Officer Schmaltz knew that Grace was told to stop." Appellant's Br. at 11. We conclude that the State presented sufficient evidence to establish that Grace fled after Officer Gentry told him to stop. Officer Schmaltz testified that Grace "ran from Officer Gentry before being

apprehended.” Tr. Vol. 2 at 16. When asked on direct examination whether Grace would have been told to stop, Officer Schmaltz answered, “Yes.” *Id.* at 17. Addressing Grace’s argument to the contrary would require us to reweigh evidence or judge the credibility of the witness – matters that we leave to the trial court. *See Morgan v. State*, 691 N.E.2d 466, 468 (Ind. Ct. App. 1998).

[20] Grace also briefly argues that the trial court’s decision, over Grace’s objection, to allow Officer Schmaltz to testify to what Officer Gentry told Officer Schmaltz was an abuse of discretion as, according to Grace, the testimony was not “credible hearsay.” Appellant’s Br. at 11. In a criminal prosecution, such testimony would have been barred by the rules of evidence on grounds that it constituted hearsay. However, probation revocation hearings are more flexible and hearsay can be admitted if it is substantially trustworthy. *See Reyes v. State*, 868 N.E.2d 438, 440-42 (Ind. 2007).

[21] Here, the State solicited testimony from Officer Schmaltz that Officer Gentry was his partner, that he “frequently [relied] on [Officer Gentry’s] observations and statements in the cour[se] of [his] investigations,” and that he could “truthfully and credibly rely on” information Officer Gentry had relayed to him in the past, as the information had “proven to be true[.]” Tr. Vol. 2 at 15. Officer Schmaltz also testified that Officer Gentry’s in-car camera captured some of the events of the day in question and that Officer Schmaltz was able to corroborate the information he received from Officer Gentry by watching the video. We therefore conclude that Officer Schmaltz’s testimony demonstrated

the hearsay evidence was substantial trustworthy and that the trial court did not abuse its discretion in allowing the evidence.

Possession of Methamphetamine

[22] Grace next contends that there was insufficient evidence to establish that he committed the new offense of possession of methamphetamine. Specifically, he argues that the State failed to prove that he actually or constructively possessed the methamphetamine that was found in the SUV. Grace maintains that he was “neither the owner nor the operator of the vehicle”; he did not have “dominion or control over the vehicle”; and no evidence was presented that he had access to the backseat where the methamphetamine was found. Appellant’s Br. at 10.

[23] Conviction for possession of illegal items “can be based on either actual or constructive possession. Actual possession occurs when a person ‘has direct physical control over’ an item. Constructive possession can be inferred when a person had the capability and intent to maintain dominion and control over the item.” *Grubbs v. State*, 132 N.E.3d 451, 453 (Ind. Ct. App. 2019) (citing *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011)). Where, as here, “possession of the automobile in which drugs are found is not exclusive, the inference of intent must be supported by additional circumstances pointing to the defendant’s knowledge of the nature of the controlled substances and their presence.” *Lampkins v. State*, 682 N.E.2d 1268, 1275 (Ind. 1997), *modified on reh’g*, 685 N.E.2d 698. Our supreme court has identified “various means” of showing the required additional circumstances, including – but not limited to – proof of

(1) incriminating statements by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant.

Henderson v. State, 715 N.E.2d 833, 836 (Ind. 1999).

[24] Here, the intent and capability elements were both met. Officer Schmaltz testified that his partner saw Grace exit the passenger side of the SUV and that Grace led the officers on a chase. The officer further testified that a glass methamphetamine pipe was found in the SUV, in a baby-seat that was located behind the front passenger seat; the methamphetamine was found in plain view in a plastic bag that was in the middle of the backseat; and two corners of plastic baggies were found on the floorboard of the front passenger side of the SUV. Officer Schmaltz also testified that Grace told Officer Gentry that "everything in the vehicle was his." Tr. Vol. 2 at 19. Officer Schmaltz told the court that Grace's statement was recorded by Officer Gentry's in-car camera.

[25] We conclude that the proximity of the methamphetamine to where Grace was seated in the SUV, Grace's flight, and Grace's admission establish that Grace had both the intent and capability to maintain dominion and control over the methamphetamine recovered. *See Henderson*, 715 N.E.2d at 836. Thus the State presented sufficient evidence that Grace possessed methamphetamine and proved by a preponderance of the evidence that Grace committed possession of methamphetamine.

[26] As previously noted, one violation of a condition of probation is sufficient to support a probation revocation. *See Hubbard*, 683 N.E.2d at 622. Here, the State provided sufficient evidence to support multiple violations of Grace's probation. We therefore hold that the State proved by a preponderance of the evidence that Grace violated his probation, and the trial court did not err when it revoked his probation.

Issue Two: Sanction

[27] Grace also asserts that the trial court abused its discretion when it ordered him to serve the balance of his suspended sentence in the Ripley County Jail. But Grace's argument on this issue again is nothing more than a request for this Court to reweigh the evidence, which we cannot do. Moreover, the trial court's decision was within its discretion. After Grace pleaded guilty in 2019 to auto theft and resisting law enforcement, the court placed him on probation. Grace violated his probation for the first time when he failed a drug screen. A portion of his previously suspended sentence was revoked, and he was returned to probation but violated probation for a second time when he failed to report to Court Services and then committed the new offenses of resisting law enforcement and possession of methamphetamine. In announcing the sanction here, the trial court found that the sanction was warranted as Grace had a prior criminal history, had twice violated probation, and had violated his most recent probation twice – by failing to report to Court Services and by committing new offenses. *See Tr. Vol. 2 at 28*. The court also found Grace to be a poor candidate for probation. As we have noted, probation is not a right but a

matter of grace. Under the circumstances of this case, we cannot say the trial court abused its discretion when it ordered Grace to serve the balance of his previously suspended sentence in the Ripley County Jail.

Conclusion

[28] In sum, we affirm the trial court's revocation of Grace's probation and its order that he serve the balance of his previously suspended sentence in the Ripley County Jail.

[29] Affirmed.

Vaidik, J., and Weissmann, J., concur.