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

Kisare Oteno Makori,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 6, 2022

Court of Appeals Case No. 22A-CR-1503

Appeal from the St. Joseph Superior Court

The Honorable John M. Marnocha, Judge

Trial Court Cause Nos. 71D02-1804-F6-333 71D02-1807-F5-154

Tavitas, Judge.

Case Summary

[1] Kisare Makori appeals the trial court's order finding that he violated the conditions of his community corrections placement and the imposition of fifty-four months of his previously suspended sentences. Makori argues that the State presented insufficient evidence to support a finding that he violated the conditions of his community corrections placement and that the trial court abused its discretion by imposing fifty-four months of his previously suspended sentences as a sanction. We affirm.

Issues

[2] Makori raises two issues on appeal, which we restate as:

I. Whether the State presented sufficient evidence to support a finding that Makori violated the conditions of his community corrections placement.

II. Whether the trial court abused its discretion by imposing fifty-four months of Makori's previously suspended sentences.

Facts

[3] On April 16, 2018, the State charged Makori with two counts: Count I, operating a vehicle as an habitual traffic violator; and Count II, synthetic identity deception, both Level 6 felonies, in Cause No. 71D03-1804-F6-333 ("Cause No. F6-333"). On July 30, 2018, the State charged Makori with two counts: Count I, intimidation; and Count II, battery by means of a deadly weapon, both Level 5 felonies, in Cause No. 71-D01-1807-F5-154 ("Cause No.

F5-154"). On March 20, 2019, the State amended its information in Cause No. F5-154 to add Count III, intimidation, a Level 6 felony.

[4] That same day, Makori and the State executed a plea agreement wherein: (1) in Cause No. F5-154, Makori pleaded guilty to Count III, intimidation, a Level 6 felony, and the State dismissed Counts I and II; and (2) in Cause No. F6-333, Makori pleaded guilty to Count I, operating a vehicle as an habitual traffic violator, and the State dismissed Count II.

[5] The trial court held a sentencing hearing on May 13, 2019. The trial court entered judgments of conviction on Count III in Cause No. F5-154 and Count I in Cause No. F6-333. The trial court sentenced Makori to two consecutive thirty-month sentences in the Department of Correction ("DOC"), all suspended to probation.

[6] On February 19, 2021, the State charged Makori with three counts: Count I, invasion of privacy, a Class A misdemeanor; Count II, residential entry, a Level 6 felony; and Count III, conversion, a Class A misdemeanor, in Cause No. 71-D02-2102-F6-174. On March 3, 2021, the State filed a petition to revoke probation, which alleged that Makori violated his probation in Cause Nos. F6-333 and F5-154 by committing these new offenses, testing positive for drugs, failing to complete drug screens, failing to complete court-ordered counseling, and failing to pay required fees.

[7] On June 16, 2021, the State charged Makori with four counts: Count I, stalking, a Level 5 felony; Count II, invasion of privacy, a Class A misdemeanor; Count

III, theft, a Class A misdemeanor; and Count IV, criminal mischief, a Class B misdemeanor, in Cause No. 71-D01-2106-F5-138 ("Cause No. F5-138"). Two days later, the State filed a second petition to revoke probation, which alleged that Makori again violated his probation by committing these new offenses.

[8] On November 24, 2021, Makori and the State executed a plea agreement in Cause No. F5-138 wherein: (1) the State agreed to dismiss Counts II, III, and IV; (2) Makori agreed to plead guilty to stalking, a Level 6 felony, as a lesser-included offense of Count I; and (3) Makori agreed to admit to the allegations in the State's two petitions to revoke probation.

[9] The trial court held a hearing on February 9, 2022. The trial court accepted Makori's admissions to the probation violations and ordered Makori to serve the balance of his suspended thirty-month sentences in Cause Nos. F6-333 and F5-154 "as a direct commitment to the St. Joseph Community Corrections [("the DuComb Center")]." The trial court also entered a judgment of conviction in Cause No. F5-138 for stalking, a Level 6 felony, as a lesser-included offense of Count I, and sentenced Makori to thirty months in the DOC, all suspended, with twenty-four months suspended to probation.

[10] Makori began serving his executed sentence in the DuComb Center on February 14, 2022. On March 11, at around 12:00 p.m., the DuComb Center alerted the residents that staff were conducting a search and instructed the residents to place all contraband on the floor. Makori was in his dorm while his bunkmate was at work. Makori removed the items and bedding from his bed and obtained permission to do the same for his bunkmate's bed. A camera in

the dorm room captured Makori rummaging through his bunkmate's belongings and placing something in his left pocket while looking toward a staff member, whose back was turned. Ex. Vol. IV, State's Ex. 2 at 12:14:12-12:14:26.

[11] Later that day, Makori's bunkmate reported that he was missing four dollars in quarters, and a DuComb Center officer interviewed Makori. Makori denied taking any of his bunkmate's belongings but made a written statement after being prompted by the interviewing officer. The statement provides: "I got $4.00 off of the bed [a]s I was removing things and for something that was owed to me[.] I'm saying all this in hopes that it is took [sic] into consideration and I will pay the $4.00 back to him . . . ." Ex. Vol. III p. 3. On March 15, 2022, the DuComb Center filed a notice of community corrections violation with the trial court that alleged Makori violated the conditions of his community corrections placement by "taking another resident's property." Appellant's App. Vol. II p. 135.

[12] The trial court held a hearing on June 17, 2022. Makori testified that he found the quarters on his own bed and that he did not know that the quarters belonged to his bunkmate. Makori also testified that a DuComb official prompted him to make a written statement as follows:

> And she [the officer] said that I wouldn't be going to jail until I made that statement. And then I finally made the statement. . . . She said that I would not be violated in [] terms of the DuComb Center contract.

Tr. Vol. II pp. 11-12. The trial court found Makori violated the conditions of his community corrections placement by stealing from his bunkmate and imposed: (1) twenty-four months of Makori's previously suspended thirty-month sentence in Cause No. F6-333 and (2) all thirty months of Makori's previously suspended consecutive sentence in F5-154.[1] Makori now appeals.

Discussion and Decision

[13] Makori argues that the State presented insufficient evidence that Makori violated the conditions of his community corrections placement and that the trial court abused its discretion by imposing fifty-four months of Makori's previously suspended sentences. We disagree.

[14] "'For purposes of appellate review, we treat a hearing on a petition to revoke a placement in a community corrections program the same as we do a hearing on a petition to revoke probation.'" *Flowers v. State*, 101 N.E.3d 242, 247 (Ind. Ct. App. 2018) (quoting *Withers v. State*, 15 N.E.3d 660, 663-64 (Ind. Ct. App. 2014)). "'Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled.'" *Heaton v. State*, 984 N.E.2d 614, 616 (Ind. 2013) (quoting *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

[1] The trial court appears to have confused Makori's thirty-month sentence in Cause No. F6-333 with Makori's twenty-four-month suspended sentence in Cause No. F5-138, which was not at issue. The parties do not mention the issue, and we, thus, decline to address it further.

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." *Id.* (citing *State v. Cozart*, 897 N.E.2d 478, 483 (Ind. 2008)). "We will consider all the evidence most favorable to supporting the judgment of the trial court without reweighing that evidence or judging the credibility of the witnesses." *Holmes v. State*, 923 N.E.2d 479, 483 (Ind. Ct. App. 2010) (quoting *Monroe v. State*, 899 N.E.2d 688, 691 (Ind. Ct. App. 2009)).

"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." *Heaton*, 984 N.E.2d at 616 (citing *Woods v. State*, 892 N.E.2d 637, 640 (Ind. 2008)). It is well settled that a single violation of a condition of probation is sufficient to permit the trial court to revoke probation. *Pierce v. State*, 44 N.E.3d 752, 755 (Ind. Ct. App. 2015).

[15] "Second, if a violation is found, then the trial court must determine the appropriate sanctions for the violation." *Heaton,* 984 N.E.2d at 616.

> [If the trial court] finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may . . . [o]rder execution of all or part of the sentence that was suspended at the time of initial sentencing.

Ind. Code § 35-38-2-3(h)(3).

I. Sufficiency of the Evidence to Support Revocation

[16] The State must prove violations of a community corrections placement by a preponderance of the evidence. *Johnson v. State*, 62 N.E.3d 1224, 1229 (Ind. Ct. App. 2016) (citing *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999)). Makori argues that the State presented insufficient evidence that he violated the conditions of his community corrections placement because Makori testified that he found the quarters on his own bed and that he did not know that they belonged to his roommate.

[17] Makori argues that *Bailey v. State*, 52 Ind. 462 (1876), precludes a finding that he violated the terms of his probation for taking the quarters. In *Bailey*, the defendant was found guilty of stealing a pair of shoes. *Id*. The owner of the shoes, Moffett, testified that he had been intoxicated and could not recall where he "parted with the possession of the shoes." *Id*. at 463. The Indiana Supreme Court reversed, holding, "[i]f Moffett lost his shoes—a supposition not at all unlikely, considering his condition at the time—and the [defendant] merely found and took them, not knowing, and not having the means to find out, who owned the shoes, [the defendant] cannot be guilty of larceny. . . ." *Id*. at 468.

[18] Makori's case is distinguishable from *Bailey*. Here, the State presented video evidence that Makori rummaged through his bunkmate's belongings on his bunkmate's bunk and placed something in his left pocket while looking toward a staff member, whose back was turned. In his written statement, moreover, Makori wrote that he "got the $4.00 off the bed . . . **for something that was owed to [him]**." Ex. Vol. III p. 3 (emphasis added). In other words, Makori

knew the quarters did not belong to him. Makori's argument that he found the quarters on his own bed merely asks us to reweigh the evidence, which we will not do.

[19] Makori also argues that his written statement was unreliable because it was induced "by promises of lesser punishment." Appellant's Br. p. 11 (quoting *Massey v. State*, 473 N.E.2d 146, 147-48 (Ind. 1985)). Makori contends that he only made the statement because the DuComb Center officer promised him that he would not be found to have violated his community corrections placement.[2]

[20] During the hearing, however, Makori suggested the written statement was truthful. When asked if he admitted to taking the quarters from his bunkmate's bed in his written statement, Makori responded, "I was referring to my bed. That's why it says 'a bed' not . . . 'his bed.'" Tr. Vol. II p. 6. Makori also never denied that he took something that he believed was owed to him. The trial court was in the best position to assess Makori's credibility, and we will not revisit that assessment. We find, accordingly, that the State presented sufficient evidence for the trial court to find by a preponderance of the evidence that Makori violated the conditions of his community corrections placement.

[2] Makori does not argue that his written statement was inadmissible, and, moreover, he never objected to its admission during the hearing.

II. Abuse of Discretion

[21] Makori next argues that, even if the State presented sufficient evidence to support a finding that he violated the conditions of his community corrections placement, the trial court nonetheless abused its discretion by imposing fifty-four months of his previously suspended sentences. We disagree.

[22] Makori violated the conditions of his probation twice before the instant violation of his community corrections placement. *See Prewitt*, 878 N.E.2d at 188 (finding repeated probation violations supported sanction). These violations, moreover, involved the commission of new offenses, not mere technical violations. In addition, the instant violation occurred less than one month after Makori began his placement in the DuComb Center. *See Utley v. State*, 167 N.E.3d 777, 784 (Ind. Ct. App. 2021) (finding the fact that the violations occurred "within two months" of probationer's placement was significant), *trans. denied*. Finally, Makori has an extensive criminal history, which includes five felonies and five misdemeanors. *See id*. These circumstances support the trial court's sanction.

[23] Makori also argues that imposing fifty-four months of his previously suspended sentence was a disproportionate sanction for his violation, which, if charged as theft, would be a Class A misdemeanor "punishable by up to one year imprisonment." Appellant's Br. p. 13 (citing Ind. Code §§ 35-43-4-2 and 35-50-3-2). We disagree.

[24] Makori relies on *Brown v. State*, 162 N.E.3d 1179 (Ind. Ct. App. 2021), which we find distinguishable. In *Brown*, we held that reimposing sixteen years and 205 days of the probationer's previously suspended sentence was a disproportionate sanction when the only evidence of a violation was that the probationer "missed an undetermined number of appointments with his probation officer." *Id*. at 1183. Here, Makori's violation was not merely missing appointments but rather stealing from his bunkmate, which is punishable as a crime. Makori's argument that the sanction here is disproportionate because a hypothetical theft conviction would carry a maximum sentence of only one year is unavailing. As we have explained, Makori twice violated his probation before the instant violation, the violation occurred less than one month into Makori's community corrections placement, and Makori has an extensive criminal history. The trial court's sanction, thus, was not disproportionate.

Conclusion

[25] The State presented sufficient evidence to support a finding that Makori violated the conditions of his community corrections placement, and the trial court did not abuse its discretion by imposing fifty-four months of Makori's previously suspended sentences. Accordingly, we affirm.

[26] Affirmed.

Brown, J., and Altice, J., concur.