

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.



ATTORNEY FOR APPELLANT

Anne Medlin Lowe
Fugate Gangstad LLC
Carmel, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Samuel J. Dayton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Jimmy Joe Tomlin,
Appellant / Respondent,

v.

State of Indiana,
Appellee / Petitioner.

November 16, 2022

Court of Appeals Case No.
22A-CR-1586

Appeal from the Fayette Circuit
Court

The Hon. Hubert Branstetter,
Judge

Trial Court Cause No.
21C01-1811-F5-856

Bradford, Chief Judge.

Case Summary

- [1] Following Jimmy Tomlin’s guilty plea to Level 5 felony dealing in methamphetamine and admission to being a habitual offender, the trial court sentenced him to five years of incarceration for the dealing conviction, all suspended to probation, and a term on work release for being a habitual offender. In August of 2021, police searched Tomlin’s residence and found, *inter alia*, almost forty grams of methamphetamine and various items typically used by drug dealers. The State petitioned for the revocation of Tomlin’s probation on the basis that he had committed new crimes. The trial court found that Tomlin had violated the terms of his probation by committing new crimes and ordered that he serve four years of his previously-suspended sentence for dealing in methamphetamine. Tomlin contends that the trial court abused its discretion in revoking his probation and in ordering that he serve four years of his previously-suspended sentence. Because we disagree, we affirm.

Facts and Procedural History

- [2] On November 7, 2018, the State charged Tomlin with Level 5 felony dealing in methamphetamine and Level 6 felony maintaining a common nuisance and alleged that he was a habitual offender. Tomlin ultimately pled guilty to Level 5 felony dealing in methamphetamine, admitted to being a habitual offender, and agreed to be sentenced to five years of incarceration suspended to probation for dealing in methamphetamine and two-and-a-half years on work release for

being a habitual offender. The trial court accepted the plea agreement and sentenced Tomlin according to its provisions.

[3] In August of 2021, the Connersville Police Department obtained and executed a search warrant for a property at which a controlled buy had been conducted. Tomlin was living at that address, and officers searched his bedroom, finding 38.98 grams of methamphetamine, one pipe used to smoke methamphetamine, water pipes, three sets of digital scales, approximately 3.89 grams of marijuana, and unused plastic baggies. The State charged Tomlin with Level 2 felony dealing in methamphetamine, Level 6 felony maintaining a common nuisance, Class B misdemeanor possession of marijuana, and Class C misdemeanor possession of paraphernalia in cause number 21C01-2108-F2-611. On September 2, 2021, the State filed a petition in this case alleging that Tomlin had violated the terms of his probation by committing a new criminal offense. After a hearing, the trial court found that Tomlin had violated the terms of his probation and ordered that he serve four years of his previously-suspended five-year sentence.

Discussion and Decision

[4] Tomlin argues that the trial court abused its discretion in revoking his probation and ordering him to serve four years of his previously-suspended sentence. “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) (citing *Sanders v. State*, 825 N.E.2d 952, 955 (Ind. Ct. App. 2005), *trans. denied*). The Indiana Supreme Court has held that “a trial court’s sentencing

decisions for probation violations are reviewable using the abuse of discretion standard[,]” explaining that

[o]nce a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed. If this discretion were not afforded to trial courts and sentences were scrutinized too severely on appeal, trial judges might be less inclined to order probation to future defendants.

Prewitt, 878 N.E.2d at 187. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances. *Id.*

[5] Probation revocation is a two-step process. *Cox v. State*, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006). First, there must be a factual determination that a violation of a probation condition occurred, *id.*, by a preponderance of the evidence. *Heaton v. State*, 984 N.E.2d 614, 616–17 (Ind. 2013). This Court will only consider “the evidence most favorable to the judgment without reweighing that evidence or judging the credibility of the witnesses.” *Woods v. State*, 892 N.E.2d 637, 639–40 (Ind. 2008) (citing *Braxton v. State*, 651 N.E.2d 268, 270 (Ind. 1995)). If the trial court’s determination that a defendant violated his probation is supported by substantial evidence of probative value, the reviewing court will affirm the trial court’s decision to revoke probation. *Id.*

[6] Second, the trial court must determine whether the violation warrants revocation. *Id.* A trial court may revoke the defendant’s probation upon proof of a single violation. *See e.g., Killebrew v State*, 165 N.E.3d 578, 582 (Ind. Ct. App. 2021) (citations omitted), *trans. denied*. Where a violation of the terms of probation has been established, Indiana Code subsection 35-38-2-3(h)(3) allows

the trial court to “[o]rder execution of all or part of the sentence that was suspended at the time of initial sentencing” and the “[c]onsideration and imposition of any alternatives to incarceration is a ‘matter of grace’ left to the discretion of the trial court.” *Monday v. State*, 671 N.E.2d 467, 469 (Ind. Ct. App. 1996).

A. The Violation

[7] Tomlin contends that the State failed to establish that he possessed the contraband found in his room. A person can have actual or constructive possession of contraband. *Smith v. State*, 113 N.E.3d 1266, 1269–70 (Ind. Ct. App. 2018), *trans. denied*. To show that Tomlin had constructive possession over the contraband in question, the State was required to show that he had the intent and capability to maintain dominion and control over it. *Id.* at 1270 (citing *Henderson v. State*, 715 N.E.2d 833, 835 (Ind. 1999)). The State may prove capability by showing that the defendant could reduce the contraband to his personal possession. *Id.* (citing *K.F. v. State*, 961 N.E.2d 501, 510 (Ind. Ct. App. 2012), *trans. denied*). To prove intent, the State is required to show that the defendant had knowledge of the presence of the contraband. *Id.* The intent element is shown when the State demonstrates that the defendant knew of the presence of the contraband; this knowledge may be inferred from various facts, including exclusive dominion and control over the premises where the contraband was found. *Canfield v. State*, 128 N.E.3d 563, 572 (Ind. Ct. App. 2019), *trans. denied*. The State is not required to have caught the defendant red-handed in the commission of a possessory offense. *Smith*, 113 N.E.3d at 1270.

[8] The State showed that Tomlin had exclusive control over the area where the methamphetamine and marijuana was found and had the capability to reduce the drugs to his personal possession. When officers arrived to execute their search warrant, Tomlin was the only person in the house, and he told the officers that the bedroom was his. Tomlin also told the officers that, although his daughter lived in the house, she lived downstairs in the basement. Officers did not find any women's clothing in Tomlin's bedroom. This was probative evidence from which the trial court could determine, by a preponderance of the evidence, that the bedroom was an area over which Tomlin had exclusive dominion and control. Consequently, the trial court could infer from this evidence that Tomlin intended to possess the methamphetamine, marijuana, and paraphernalia found inside his bedroom. The fact that the contraband was found inside Tomlin's bedroom showed that he had the capability to reduce it to his personal possession as well.

[9] Tomlin points to his own self-serving claim that he never identified the bedroom as his and a statement, made by Tomlin's daughter in a separate court proceeding, that the drugs and paraphernalia had belonged to her. The trial court was under no obligation to credit this testimony, and apparently did not. This argument amounts to nothing more than an invitation to reweigh the evidence, which we will not do. *See Woods*, 892 N.E.2d at 639–40.

[10] Tomlin's reliance on *Cain v. State*, 451 N.E.2d 672 (Ind. Ct. App. 1983), and *Robinson v. State*, 454 N.E.2d 873 (Ind. Ct. App. 1983), is misplaced because both cases are readily distinguished. In *Cain*, the defendant was charged with

deception after law enforcement discovered an illegal connection to cable television connected to the exterior of his home. 451 N.E.2d at 673. The difference between *Cain* and this case was that Tomlin possessed contraband within his own bedroom, while Cain was alleged to have connected a cable to the outside of his house, an area over which he had not been shown to have exclusive control. *Id.* In *Robinson*, law enforcement found heroin and cocaine in a bedroom, but this Court concluded that the State had not shown that the apartment or the bedroom belonged to the defendant. 454 N.E.2d at 874–75. In contrast, Tomlin himself identified the bedroom in which the contraband was found as his. We conclude that the State proved that Tomlin had violated the terms of his probation by committing new criminal offenses by a preponderance of the evidence.

B. The Revocation

[11] As discussed above, a trial court may revoke the defendant’s probation upon proof of a single violation, *Killebrew*, 165 N.E.3d at 582 (citations omitted), and Indiana Code subsection 35-38-2-3(h)(3) allows the trial court to “[o]rder execution of all or part of the sentence that was suspended at the time of initial sentencing” and the “[c]onsideration and imposition of any alternatives to incarceration is a ‘matter of grace’ left to the discretion of the trial court.” *Monday*, 671 N.E.2d at 469.

[12] We have little hesitation in concluding that the trial court acted within its discretion in ordering Tomlin to execute four years of his previously-suspended five-year sentence. The fact that Tomlin would commit conduct that could be

charged as a Level 2 felony¹ while serving probation for a Level 5 felony shows that he is not a good candidate for continued probation because to this point it has not led him to reform himself. Tomlin's commission of several new criminal offenses more than justifies the trial court's decision to order him to serve four years of his previously-suspended five-year sentence. We affirm the judgment of the trial court.

Vaidik, J., and Pyle, J., concur.

¹ As mentioned, nearly forty grams of methamphetamine and items consistent with dealing, including three digital scales and unused plastic baggies, were found in Tomlin's bedroom. A person who possesses more than ten grams of methamphetamine with the intent to deliver it commits a Level 2 felony. Ind. Code § 35-48-4-1.1(e).