MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Malik Gross,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 27, 2023

Court of Appeals Case No. 23A-CR-734

Appeal from the Lake Superior Court

The Honorable Kathleen Sullivan, Magistrate

Trial Court Cause Nos. 45G04-1805-F5-45 45G04-2205-F6-997

Memorandum Decision by Judge Kenworthy
Chief Judge Altice and Judge Weissmann concur.

Kenworthy, Judge.

Case Summary

[1] Malik Gross pleaded guilty in two cases and was sentenced according to the terms of the plea agreements. While Gross was serving thirty months in community corrections, he violated several rules. The trial court expelled Gross from community corrections and ordered him to serve the full thirty months in the Indiana Department of Correction ("DOC"). Gross appeals this sanction, raising a single issue: did the trial court abuse its discretion by deferring to the terms of the plea agreements in imposing a sanction? We reverse and remand, concluding the trial court was not obligated to follow the terms of Gross' plea agreements in imposing sanctions for his community corrections violations.[1]

Facts and Procedural History

[2] In 2020, Gross pleaded guilty in Cause Number 45G04-1805-F5-45 ("Cause 45") to Level 5 battery resulting in serious bodily injury. The plea agreement called for Gross to be sentenced to eighteen months in the DOC, suspended to probation. The trial court entered judgment of conviction and sentenced Gross accordingly.

[3] In May 2022, Gross was charged with Level 6 felony residential entry in Cause Number 45G04-2205-F6-997 ("Cause 997"). In part because of this new

[1] Gross does not appeal the trial court's determination that he violated the terms of his community corrections placement, and we affirm that part of the trial court's order.

charge, the probation department sought to revoke Gross' probation in Cause 45.

[4] In September 2022, Gross pleaded guilty in Cause 997. The plea agreement called for Gross to be sentenced to twelve months in the Lake County Jail. The trial court entered judgment of conviction and sentenced Gross to twelve months in the Lake County Jail, to be served in Lake County Community Corrections ("LCCC"). At the same time, Gross admitted to violating his probation in Cause 45. The trial court revoked Gross' probation and imposed his previously suspended eighteen-month sentence in the DOC, also to be served in LCCC. The sentences in Cause 45 and Cause 997 were ordered to be served consecutively. Gross entered a work release program through LCCC.

[5] In November 2022, an LCCC case manager filed petitions in both cases to expel Gross from community corrections. The case manager alleged Gross had committed four or more unrelated violations in a thirty-day period, including arguing with staff, threatening to injure another person, and being absent without authorization ("AWOL") for thirty-eight hours. The case manager alleged Gross had "demonstrated a total disregard for the rules and regulations" of LCCC and was "beyond the effective control of this form of supervision." *Appellant's App. Vol. 2* at 33; *Vol. 3* at 152.

[6] The trial court heard evidence on the petition to expel and, based primarily on proof Gross was AWOL, granted the petition. After Gross made a statement

asking not to be sent to DOC and the parties argued their positions regarding a sanction, the trial court stated:

> [T]his was an agreed sentence, I'm not going to modify the terms and they aren't willing. I can't modify the terms with[out] the State's agreement, and community corrections isn't willing to take you back because of your behavior . . . .
>
> Based on the agreement of the parties and the evidence that I've heard here today, in [Cause 45], the defendant is sentenced to 18 months in the Department of Corrections. In [Cause 997], that's 12 months in the Lake County Jail. . . . Those sentences are to be served consecutively, which was what was agreed to in the plea agreement.

Tr. Vol. 2 at 30–31. Gross appeals the sanction only.

Standard for Reviewing a Community Corrections Revocation Decision

[7] Probation revocation is a two-step process. First, the trial court must make a factual determination that a violation occurred. *Heaton v. State,* 984 N.E.2d 614, 616 (Ind. 2013). Second, if a violation is found, then the trial court must determine the appropriate sanction. *Id.* The array of available sanctions is described by statute, including:

> (1) Continue the person on probation, with or without modifying or enlarging the conditions.
>
> (2) Extend the person's probationary period for not more than one (1) year beyond the original probationary period.

(3) Order execution of all or part of the sentence that was suspended at the time of initial sentencing.

Ind. Code § 35-38-2-3(h) (2015).

[8] Probation and community corrections are both alternatives to commitment to the DOC, and both placements are made at the sole discretion of the trial court. Due to these similarities, our standard for reviewing revocation of a community corrections placement is the same as for a probation revocation. *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999). Placement in either program is not a right to which the defendant is entitled but a "matter of grace" and a "conditional liberty." *Id*. (quoting *Million v. State*, 646 N.E.2d 998, 1002 (Ind. Ct. App. 1995)). As such, decisions about probation are "within the sole discretion of the trial court," *Woods v. State*, 892 N.E.2d 637, 639 (Ind. 2008), and we review revocation decisions under the abuse of discretion standard, *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

The Trial Court Has Discretion to Determine the Sanction

[9] Because plea agreements "are in the nature of contracts entered into between the defendant and the State[,]" *Berry v. State*, 10 N.E.3d 1243, 1246 (Ind. 2014) (citation omitted), a plea agreement is binding on a trial court when initially sentencing a defendant, *Abernathy v. State*, 852 N.E.2d 1016, 1021 (Ind. Ct. App. 2006); *see* I.C. § 35-35-3-3(e) ("If the court accepts a plea agreement, it

shall be bound by its terms."). But "an agreement cannot override the trial court's discretion . . . in a probation revocation or similar proceeding." *Holsapple v. State*, 148 N.E.3d 1035, 1041 (Ind. Ct. App. 2020).

[10] In *Holsapple*, the defendant pleaded guilty pursuant to a plea agreement and the State recommended a sentence of sixteen years executed in the DOC. 148 N.E.3d at 1037. But the plea agreement also provided the sentence would be stayed pending the defendant's participation in a problem-solving-court program. If the defendant completed the program, her sentence would be stayed permanently; if she did not, "then the stay on her sentence shall be lifted, and her sentence, sixteen (16) years to be executed at [the DOC], shall be imposed." *Id.* The trial court accepted the plea, entered judgment of conviction, and sentenced the defendant to sixteen years in the DOC, staying the sentence while the defendant was in the program. When the defendant violated the program's rules, she was referred back to the trial court. The trial court terminated her from the program and, concluding it had "no discretion whatsoever[,]" lifted the stay and ordered the defendant to serve the entire sixteen-year sentence in the DOC. *Id*. at 1038. A panel of this Court reversed the sanction because "it is based on the predetermined sanction," concluding:

> [C]ontrary to the trial court's belief that it was required to impose the agreed-upon sanction of full execution of the stayed sentence, a plea agreement cannot bind the trial court's hands as to an appropriate sanction. Rather, as in any probation revocation proceeding, the trial court may impose one or more sanctions [authorized by statute].

Id. at 1042.[2] The case was remanded for the trial court "to determine *in its discretion* the appropriate sanction[.]" *Id.* (emphasis added).

[11] Citing *Holsapple* and the trial court's statements when imposing the sanction, Gross argues the trial court abused its discretion because it believed it was required by the terms of his original plea agreements to order him to serve the entirety of his suspended sentences in the DOC. *See Appellant's Br.* at 8–9. The State focuses on the evidence supporting revocation and dismisses the trial court's statements related to the sanction as "isolated phrasing," contending the trial court recognized it had discretion to impose any sanction but simply chose not to do so. *Appellee's Br.* at 6.

[12] Although some of the specifics of this case differ from *Holsapple*—Gross' sentence was not stayed, he was not participating in a problem-solving-court program, and there was no agreement for a predetermined sanction—the principle discussed in *Holsapple* still applies. The trial court is bound by the terms of a plea agreement when initially sentencing a defendant but when a defendant subsequently violates the terms of that sentence, the trial court has

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[2] In *Mefford v. State*, another panel of this Court declined to reverse when the trial court stated it was "bound" to sentence the defendant in accordance with a plea agreement when terminating him from a problem-solving-court program. 165 N.E.3d 571, 575 (Ind. Ct. App. 2021), *trans. denied*. The *Mefford* court acknowledged the *Holsapple* decision but distinguished it because Mefford's conviction and sentence were deferred while he participated in the program whereas the defendant in *Holsapple*—with a judgment of conviction and sentence entered but stayed—was effectively on probation. The trial court in *Mefford* retained discretion only to continue, modify, or terminate Mefford's participation in the program; upon his termination from the program, the trial court had no discretion to do anything but enter judgment of conviction and sentence Mefford pursuant to the plea agreement. *Id.* at 576–77. Here, as in *Holsapple*, Gross' sentence was not deferred—he was already serving his sentence when he was terminated from community corrections.

discretion to determine what sanction to impose under the probation revocation statute. *See Abernathy*, 852 N.E.2d at 1022 (stating "ultimately it is the trial court's discretion as to what sanction to impose under the statute"). When the trial court indicates it has not exercised that discretion, reversal and remand is warranted. *See Holsapple*, 148 N.E.3d at 1042.

[13] Here, the State's position that the trial court *did* exercise its discretion in determining a sanction is unconvincing given the trial court stated it "*can't* modify the terms" of the "agreed sentence"—which can only refer to Gross' plea agreements. *Tr. Vol. 2* at 30 (emphasis added). We agree with Gross that the trial court's statements leave no doubt the court felt bound by the terms of the plea agreements when imposing a sanction and believed it had no discretion in the matter. It is entirely possible the trial court may ultimately make the same determination, but we remand for the trial court to reconsider the sanction in the exercise of its own discretion to impose any sanction it determines is warranted on the record.

Conclusion

[14] The trial court was not obligated to sanction Gross in accordance with the sentences provided in his plea agreements when expelling him from his community corrections placement. Accordingly, we reverse the trial court's sanction order and remand for the trial court to exercise its discretion and impose any sanction it determines is appropriate.

[15] Reversed and remanded.

Altice, C.J., and Weissmann, J., concur.