

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Daivon Jones,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 6, 2023

Court of Appeals Case No.
23A-CR-1216

Appeal from the Marion Superior
Court

The Honorable Matthew E.
Symons, Magistrate

Trial Court Cause No.
49D29-2002-F3-8148

Memorandum Decision by Judge Brown

Judges Vaidik and Bradford concur.

Brown, Judge.

[1] Daivon Jones appeals the sanction imposed by the trial court following the revocation of his probation. We affirm.

Facts and Procedural History

[2] On February 27, 2020, the State charged Jones with: Count I, attempted rape as a level 3 felony; Count II, criminal confinement as a level 6 felony; Count III, battery resulting in bodily injury as a class A misdemeanor; Count IV, criminal mischief as a class B misdemeanor; and Count V, attempted rape as a level 3 felony. On September 10, 2020, Jones and the State filed a plea agreement pursuant to which Jones agreed to plead guilty to Counts I and V and the State agreed to dismiss the remaining counts. The parties agreed to a cap of five years on Count I with any executed time to be served on Marion County Community Corrections Home Detention and a cap of five years for Count V, also with any executed time to be served on Marion County Community Corrections Home Detention. They agreed that the sentence for Count V would be served consecutive to Count I. They also agreed that Jones would register as a sex offender for a time period determined under Indiana law and he would be placed on “Sex Offender Probation for the duration of any imposed period of probation.” Appellant’s Appendix Volume II at 142.

[3] In September 2020, the court sentenced Jones to five years with 545 days in community corrections, 1,280 days suspended, and two years of probation, for Count I as well as Count V and ordered that the sentences be served consecutively. It ordered “executed time to be served on home detention with GPS.” *Id.* at 194. In an Order of Probation for Sex Offenders, which was dated

September 17, 2020, and signed by Jones, Condition 36 provided: “You shall participate in and complete periodic polygraph testing . . . at the direction of your probation officer or any other behavioral management professionals who are providing treatment or otherwise assisting your probation officer in monitoring your compliance with your probation conditions.” Exhibits Volume I at 5.

[4] On March 18, 2021, Marion County Community Corrections filed a notice of community corrections violation alleging that Jones traveled to several unauthorized locations during an approved pass on March 10, 11, 15, 16, and 17, 2021, left his residence without authorization on March 11, 2021, and failed to comply with the condition prohibiting him from contacting any person under the age of sixteen years old unless approved by the court and community corrections. That same day, the court entered an Order on Violation of Community Corrections Rules which issued a warrant for Jones’s arrest.

[5] On March 25, 2021, the State filed a Notice of Probation Violation alleging that Jones failed to comply with the community corrections placement. On April 20, 2021, the court held a hearing at which Jones admitted the allegations that he violated his community corrections placement and his probation.¹ That same day, the court entered a sentencing order which stated: “Executed

¹ The record does not contain a transcript of this hearing. An April 20, 2021 chronological case summary entry states: “defendant admits allegations 1-7 (mccc) and 1 (vop).” Appellant’s Appendix Volume II at 12 (italics omitted).

sentence served on count 1. Community Corrections placement revoked and defendant to complete executed sentence at DOC as to count 5.” Appellant’s Appendix Volume II at 205.

[6] On February 16, 2023, the State filed a Notice of Probation Violation alleging that Jones failed to participate in and complete periodic polygraph testing. The State alleged that Jones completed a polygraph test on January 7, 2023, and the polygrapher indicated Jones had significant reactions indicative of deception. It further alleged Jones completed a re-test polygraph on January 21, 2023, and the polygraph examiner advised that Jones’s attempts at “countermeasures or purposeful non-cooperation did nothing to affect the outcome of the test” and found that Jones “still had significant reactions to the questions indicative of deception.” *Id.* at 230. The notice also stated “[t]his is the second Notice of Probation Violation filed under this case number” and, on April 20, 2021, he was revoked from community corrections home detention and sentenced to the Department of Correction (“DOC”) with probation to follow his executed sentence. *Id.*

[7] On May 5, 2023, the court held a hearing. Marion County Probation Officer Courtney Mueller testified that Condition 36 of sex offender probation required Jones to complete and participate in polygraph testing, his responsibilities were explained to him, and Jones indicated he understood them. On cross-examination, when asked if it “was Probation’s belief that he did not satisfactorily participate in the polygraph exams,” she answered affirmatively. Transcript Volume II at 17.

[8] Terry Hudson, the senior credibility assessment officer for Nosduh Forensic Bureau and a certified polygraph examiner, testified that someone from his agency conducted a polygraph exam on Jones on January 7, 2023, and a report was completed indicating there were significant reactions indicative of deception. According to his testimony, the treatment provider and the probation department received the report and referred him for a re-test. On January 21, 2023, Hudson administered a clinical polygraph exam to Jones, and Jones failed that exam. Hudson testified that Jones had “a grand total of negative 17” and “[a]ll he needed was a negative 3 to fail the test.” *Id.* at 25. He stated that Jones’s scores indicated deception. He testified that the test was sent for blind scoring using a quality control analyst who “scored him a -22 versus my -17.” *Id.* at 28. When asked if that reaffirmed his results, he answered: “That is correct. I mean, generally, you know, that type of response, someone’s hiding something, you know.” *Id.*

[9] Hudson testified that he had explained three rules to Jones including to be truthful regarding his compliance issues, to follow his instructions, and to pay attention, and Jones “repeatedly did not follow” his instructions throughout the “in-test.” *Id.* at 29. He also testified that Jones told him during the “post-test” stage that he was trying to manipulate his test results which was “more proof that he was not following the instructions.” *Id.* He testified that Jones “purposely manipulated his test results, by his own admission” *Id.*

[10] Hudson testified that, during the post-test stage when he questioned Jones about his reactions, Jones stated that he was scared, that people in prison told

him that he could go back to jail “for this,” and that he “purposely manipulated [his] behavior because of that.” *Id.* at 29-30. He testified:

And I asked him three or four different times to make sure we were on the same page as to what was happening. I also asked him, I said, Well, what were you doing? And at one point I think we both giggled because I said – I said, Hey, I could tell something was going on. I asked you to look straight ahead, and he decided to focus on – I think’s [sic] something on the wall. I don’t remember exactly what it was on the wall. He decided to focus on that item on the wall instead of look straight ahead and answer the questions, as previously reviewed.

Id. at 30. He testified that Jones said he was participating “in some mental inner conversations with himself, hoping that it would keep him calm and, you know, get him through the test.” *Id.*

[11] Upon questioning by the court, Hudson testified that he told Jones to focus on his three instructions to “successfully get through [his] test.” *Id.* at 33. He also testified: “And in this case, we had conversation regarding that hey, I – I’ve done everything that I can do to help you get through the test, but you now are implementing things that are screwing yourself up here.” *Id.* When asked if there were any warnings that “by doing this, you could be being considered not complying with the test,” he testified that “they’re told if you don’t follow my instructions, which are look straight ahead, do not move, focus on the questions as we reviewed them, be truthful regarding the questions that Probation wants to know about, you’re not going to do well today,” and “that’s explained to them earlier on, during the pre-test interview.” *Id.* at 35-36. The court admitted

a Psychophysiological Detection of Deception Examination Report regarding the January 21, 2023 examination.

[12] After the State rested, Jones’s counsel asked Jones what he was thinking and feeling during the polygraph exam, and he answered:

Well, I’ve been to prison. It was like this last – since I’ve been convicted and all these things, I’ve been all through a lot of – a lot. And I was just – I just remember going there, and my heart was already – I just feel like when somebody – when I feel like somebody got power to send me back to prison or almost like minute – like mess – like mess up my life or something like that, I get nervous; I get scared.

And I just remember feeling like my heart was just like going real fast. And I was just sweating. I was nervous. I was scared because I have a lot to lose.

And so I just remember just going in the room, and I just couldn’t sit still. My – like I am now, like my arm, my hands were just shaking because I was just scared. And all I was thinking is just relax.

Id. at 38-39. On rebuttal, Hudson testified that he conducted an exam to obtain a baseline of Jones’s general nervous tension. He also stated that, “[i]n [his] professional opinion, based on [Jones’s] own test – [Jones’s] own disclosures to [him], [Jones] was purposely manipulating or trying to manipulate the test results.” *Id.* at 42.

[13] The court stated: “There is case law that does allow for polygraphs – failing polygraphs to be used for . . . revoking probation.” *Id.* at 46. Jones’s counsel answered affirmatively and stated: “I think that the case law – yes, I understand

that, and . . . it is my opinion that that's bad case law." *Id.* She also stated she hoped the court would find that Jones had not violated his probation.

[14] The court stated:

[T]he conditions of sex offender probation were entered into on the same day the defendant took his plea agreement. . . . They were signed by the defendant that day. So he understood from the time he took the plea agreement that polygraph is going to be part of the . . . sentence on sex offender probation. And so that – that's where we start with.

From there, the defendant admitted that he attempted to evade the polygraph. He was told – he was given instructions by the polygraph operator. He didn't follow those instructions.

The polygraph operator further inquired about those. He admitted he was using purposeful non-compliance and he was trying to evade. Whatever reasons he may have to do so, he didn't follow through with a condition of probation, which was to cooperate with the polygraph.

That is what I base my decision on, understanding the argument from counsel that polygraphs are unreliable. They are not admissible in criminal cases. We are not in a criminal case here.

While I respect the counsel's argument that this is a bad case law, I have to follow case law until it's deemed not appropriate by a court – by a higher authority. And the court authority as it is now is that the – is that in polygraph – in cases of probation revocation, polygraph examination and deception is allowed to be considered. So I do find that the defendant did violate the – his probation by failing to cooperate with the polygraph examination – to participate and to complete periodic polygraph examination.

Id. at 48-49.

[15] With respect to the sanction, Jones said that he had not had any positive drug screens and it “was hard to keep a stable job” because of his felony but he “made sure [he] was always working.” *Id.* at 50. He stated that he supported himself and his fiancée, he wanted to be able to support his son, and he “was just trying to just calm [himself] down.” *Id.* at 51. On May 5, 2023, the court ordered that Jones serve 2,560 days of his previously suspended sentence.

Discussion

[16] Jones argues that the trial court abused its discretion by ordering him to serve seven years in the DOC. He “does not challenge the trial court’s finding that he violated a condition of his probation” and “he only challenges the trial court’s order imposing his entire suspended sentence as a sanction for his probation violation.” Appellant’s Brief at 14. He contends that he “made a choice – probably not the wisest choice – to go beyond the polygraph examiners’ instructions and take what he thought were reasonable steps to maintain composure during the polygraph tests.” *Id.* He requests that he be released from the DOC and continued on probation or, in the alternative, that we modify his sanction to 365 days with no resumption of probation.

[17] Ind. Code § 35-38-2-3(h) provides:

If the 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 impose one (1) or more of the following sanctions:

- (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.

[18] We review trial court probation violation determinations and sanctions for an abuse of discretion. *Heaton v. State*, 984 N.E.2d 614, 616 (Ind. 2013) (citing *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007)). The Indiana Supreme Court has explained 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” and that, “[i]f 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 188. When reviewing an appeal from the revocation of probation, we consider only the evidence most favorable to the judgment, and we will not reweigh the evidence or judge the credibility of the witnesses. *Vernon v. State*, 903 N.E.2d 533, 536 (Ind. Ct. App. 2009), *trans. denied*. As long as the proper procedures have been followed in conducting a probation revocation hearing, the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence. *Goonen v. State*, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999).

[19] The record reveals that the Psychophysiological Detection of Deception Examination Report regarding the January 21, 2023 exam completed by Hudson stated:

Per his admission to this examiner, rather than listen to the questions and answer them as reviewed [Jones] chose to focus his attention on a picture hanger on the wall up to his left and have conversations with himself in his mind. Additionally, he reports that he was actively trying to control his breathing as well. Mr. Jones was asked if he purposely affected his previous exam also and he said “yes”. When asked how he affected his previous exam he said he used similar methods as to what he employed today.

Exhibits Volume I at 19. Hudson testified that he explained the instructions to Jones who “repeatedly did not follow” his instructions throughout the “in-test.” Transcript Volume II at 29. He testified that Jones “purposely manipulated his test results, by his own admission” *Id.* We also note that Jones acknowledges that he previously violated community corrections. In light of the record, we cannot say the trial court abused its discretion.

[20] For the foregoing reasons, we affirm the trial court’s order.

[21] Affirmed.

Vaidik, J., and Bradford, J., concur.