

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

JaRiquez Darquan Brown,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 14, 2023

Court of Appeals Case No.
23A-CR-1562

Appeal from the Hamilton
Superior Court

The Honorable Michael A. Casati,
Judge

Trial Court Cause Nos.
29D01-1408-F3-6293
29D01-1810-F6-6885

Memorandum Decision by Judge Brown
Judges Vaidik and Bradford concur.

Brown, Judge.

[1] JaRiquez Darquan Brown appeals the revocation of his probation. We affirm in part and remand.

Facts and Procedural History

[2] On August 1, 2014, the State charged Brown under cause number 29D01-1408-F3-6293 (“Cause No. 93”) with: Count I, robbery resulting in bodily injury as a level 3 felony; Count II, robbery resulting in bodily injury as a level 3 felony; and Count III, theft as a class A misdemeanor. On November 5, 2014, the State filed an amended information adding Count IV, conspiracy to commit robbery resulting in bodily injury as a level 3 felony, and Count V, conspiracy to commit robbery while armed with a deadly weapon as a level 3 felony.

[3] Brown pled guilty to Count IV, and the State moved to dismiss the remaining counts pursuant to a plea agreement. On February 19, 2015, the court sentenced Brown to nine years, noted “Jail Executed: N/A,” with six years in community corrections and three years suspended to probation. Appellant’s Appendix Volume II at 63. The abstract of judgment listed 203 days of confinement prior to sentencing and 203 earned credit days. On November 10, 2016, the court entered an Order Modifying Sentencing which indicated Brown had successfully completed his electronic home monitoring sentence and had petitioned to modify his work release sentence. The court ordered a total sentence of “[n]ine (9) years” in the Department of Correction (“DOC”), an executed portion of “1091 days executed as Electronic Home Monitoring for a period of 1091 days as a direct commitment to Hamilton County Community Corrections,” and a suspended portion of 2,194 days, and it stated Brown “shall

be granted actual-time and good-time credits for a total of 1,091 days” *Id.* at 87. It also stated: “[Brown] shall be granted further actual-time and good-time credits for 624 actual days served (2/19/15-11/4/16), plus 283 days for good time credit earned. With good time credit or earned credit days applied, [Brown’s] executed portion of his sentence is hereby completed, as time served.” *Id.* at 88.

[4] On November 17, 2016, the court entered an Order of Probation under Cause No. 93 indicating that the probation dates were from November 10, 2016, to November 9, 2019. It also listed a number of conditions including:

2. Comply with all Local, State and Federal laws, and within 48 hours of being arrested or charged for a new criminal offense, you shall contact your Probation Officer with that information.

3. Cooperate with and truthfully answer all reasonable inquiries of your Probation Officer.

* * * * *

16. Submit to a CARE assessment (substance abuse assessment) or its equivalent and follow all recommendations set forth in the assessment. . . .

Id. at 89-90.

[5] On January 17, 2018, the State filed a notice of probation violation alleging that Brown committed two counts of leaving the scene of an accident as class B misdemeanors which were pending under cause number 29D01-1801-CM-231 (“Cause No. 231”), had not provided the probation department with written

verification of completion of any community service hours, and had not enrolled in a community college program. On April 11, 2018, the State filed a second notice alleging Brown tested positive for amphetamine on March 27, 2018, and was dishonest regarding his use of illegal drugs.

- [6] On September 10, 2018, the State charged Brown under cause number 29D01-1810-F6-6885 (“Cause No. 85”) with: Count I, residential entry as a level 6 felony; Count II, criminal trespass as a class A misdemeanor; Count III, criminal mischief as a class B misdemeanor; and Count IV, disorderly conduct as a class B misdemeanor.
- [7] On October 1, 2018, the State filed a third notice of probation violation under Cause No. 93 alleging that Brown had pending charges under Cause No. 85, was dishonest with his probation officer on July 17, 2018, regarding his alcohol use, and submitted a urine screen that day which indicated the use of alcohol.
- [8] On December 13, 2018, the court held a hearing under Cause No. 93.¹ On December 18, 2018, the court entered an order finding that Brown violated the conditions of his probation. That same day, the court entered an order under Cause No. 85 stating that Brown had pled guilty to Count I, residential entry as a level 6 felony.

¹ The record does not contain a copy of the transcript of this hearing.

[9] On January 11, 2019, the court entered an order under Cause No. 93 modifying Brown's probation such that "[t]wo (2) years of the previously suspended six (6) year sentence are ordered executed in the [DOC] as a direct commitment to HCCC in work release" and "[t]wo (2) years shall be served on probation." *Id.* at 136. The court ordered that "[t]his cause is consecutive to [Cause No. 85], including probation." *Id.*

[10] That same day, the court sentenced Brown under Cause No. 85 to 910 days with 545 days executed in the DOC, 365 days suspended, and two years of probation. The court found that Brown had served 102 actual days and granted him accrued time credit for those days as well as "earned good-time credit in the amount of 102 days" for "credit totals" of "204 days toward the executed sentence." Appellant's Appendix Volume III at 85. The court ordered the sentence to be served consecutive to the sentences imposed under Cause Nos. 93 and 231. Specifically, it ordered: "Sentence shall be served *consecutively* including probation to that imposed under [Cause Nos. 231 and 93]." *Id.* at 86. The court imposed court costs of \$185.

[11] On December 31, 2020, the court entered an Order of Probation in Cause No. 85 which stated that "[p]robation will be tolled during the service of the executed term" and "[s]entence shall be served consecutively, including probation, to that imposed under [Cause Nos. 231 and 93]." *Id.* at 108. The probation dates were left blank. The order provided a number of probation conditions including:

2. Comply with all Local, State and Federal laws, and within 48 hours of being arrested or charged for a new criminal offense, you shall contact your Probation Officer with that information.

* * * * *

12. Pay the following fees and costs in payments as outlined below. Completion of payments should be made 30 days before you are released from probation unless otherwise ordered. If these ordered financial obligations are not discharged by the completion of the probation term, then they will be considered a judgment lien against you.

Probation User Fees: \$100.00 administrative fee to be paid within 30 days

\$100.00 initial fee to be paid within 60 days

\$20.00 per month starting the second month of probation

Total Probation User Fees to be paid: \$660.00

Court Costs of \$185.00 to be paid within _____ days

Id. at 108-109 (emphasis omitted).

[12] On October 18, 2022, the State filed a fourth notice of probation violation under Cause No. 93 alleging that Brown committed two counts of operating a vehicle while intoxicated as class A misdemeanors, which were pending under cause number 49D33-2210-CM-27655 (“Cause No. 55”), he was dishonest with his probation officer on October 14, 2022, regarding his use of alcohol, he was not to possess or consume alcohol during his probation term, and an officer smelled the odor of alcohol emitting from Brown’s person and observed an open “Jose Cuervo bottle” in his vehicle. Appellant’s Appendix Volume II at 168. Also, on October 18, 2022, the State filed a notice of probation violation

under Cause No. 85 alleging that Brown had committed two counts of operating a vehicle while intoxicated as class A misdemeanors under Cause No. 55.

[13] On April 27, 2023, the court held a consolidated hearing under Cause Nos. 93 and 85. Indiana State Police Trooper Aaron Smith testified that he was called to the scene of a vehicle crash on September 29, 2022, and found an elderly woman with three people and Brown. According to Trooper Smith's testimony, he observed a red sport utility vehicle and an overturned white vehicle. Trooper Smith determined that Brown was the driver of the white vehicle. Brown was on the right shoulder and "bleeding pretty bad." Transcript Volume II at 7. Trooper Smith smelled the odor of alcohol. The State introduced a photograph of the interior of the white vehicle. Trooper Smith testified that the photograph showed "a bottle of Jose Cuervo" on the passenger seat. *Id.* at 12. He testified that his sergeant said that Brown began to fight with him, medics, and firefighters, and he was placed in handcuffs. He concluded that the white vehicle struck the red vehicle and the "impact was so hard that it actually broke the axle and pushed it forward" *Id.* at 16. He testified that Brown refused to do a walk and turn test, the one-leg stand test, and the portable breath test, but he conducted a horizontal gaze nystagmus test on Brown and "observed six of six clues" of impairment. *Id.* at 17. He stated that Brown had red and glassy eyes and there was an "open alcohol container that was also in the vehicle." *Id.* at 18. He also testified: "With him saying he did not know what happened, that was also another clue." *Id.* at 19.

[14] On cross-examination, when asked if the horizontal gaze nystagmus test “may not be the most accurate way of telling if somebody was intoxicated in a crash where he has hit his head,” Trooper Smith answered: “I guess it may not be, yes. Because if he hit his head it could alter it some, yes.” *Id.* at 23. He also testified that he submitted Brown’s blood, which he obtained pursuant to a search warrant, and the blood alcohol level “was a .04.” *Id.* The State introduced and the court admitted a toxicology report indicating that Brown’s blood tested positive for ethanol in the amount of “0.046 ± 0.004 g/100 mL.” Exhibits Volume III at 28.

[15] Probation Officer Heather Bozell testified that Brown was required under Cause Nos. 93 and 85 to notify the probation department if he had been arrested within forty-eight hours and Brown did not notify the probation department after he was arrested under Cause No. 55 until October 13, 2022. She stated that Brown was ordered to submit to a CARE assessment as a condition of probation and as a term of the CARE evaluation he was ordered not to consume any alcohol. On cross-examination, she indicated that she did not allege in Cause No. 85 that Brown was not to drink alcohol or that he failed to advise within forty-eight hours “because that case was consecutive,” “we only file violations on new criminal offenses,” and “[f]or consecutive cases we don’t include technical violations.” Transcript Volume II at 26. Brown’s counsel asked: “So that wasn’t alleged in that one?” *Id.* She answered: “Correct, only under the case he was on active supervision, not the probationary period like he was in the consecutive case.” *Id.*

[16] The court stated that it found that Brown had “violated Condition No. 2 of [his] probation in both cases by committing the offense of Operating a Vehicle While Intoxicated.” *Id.* at 28. It stated “[a]dditionally, with respect to [Cause No. 93], the Court does find that you violated Condition 2 with respect to failing to notify the probation department within 48 hours of your arrest,” he violated “Condition 3 by being dishonest with the probation officer regarding the use of alcohol in violation of [his] conditions of probation,” and he violated “Condition No. 16 by failing to comply with the recommendations resulting from your CARE assessment.” *Id.*

[17] On April 27, 2023, the court entered an order under Cause No. 93 finding that Brown violated Conditions 2, 3, and 16 of his probation and an order under Cause No. 85 finding that Brown violated Condition 2 of his probation.

[18] On June 15, 2023, the court held a consolidated dispositional hearing. The court stated:

[T]here are various types of violations of probation. The most serious kind is committing a new criminal offense. It’s very problematic for the Court, for me. And you’ve been arrested three times while on probation for new criminal offenses. So it’s clear that probation isn’t appropriate at this point in time given the number and nature of violations that have occurred. I guess I do find it interesting that you completed work release without violation. Here’s what I’m going to do. As to [Cause No. 85], I’m going to revoke your probation and order you to serve 365 days in the Hamilton County Jail. . . . You will serve that sentence first. As to [Cause No. 93], the Court is going to revoke your probation and order you to serve two years in the Indiana [DOC], to be served as a direct commitment to Hamilton County

Community Corrections work release. I'll order that your [Cause No. 85] jail time in the Hamilton County Jail be served first. After completion of that sentence you'll be transferred to work release to complete your sentence under [Cause No. 93].

Id. at 37-38. The prosecutor stated that Brown had outstanding fees of \$1,487 under Cause No. 93 and an outstanding balance of \$895 under Cause No. 85. The court stated: "Okay, those will be entered as a judgment against him." *Id.* at 39.

[19] Also on June 15, 2023, the court issued a written order under Cause No. 93 revoking Brown's probation and ordering that two years of the previously suspended sentence be executed as a direct commitment to Hamilton County Community Corrections. The court also ordered: "Civil Judgment is entered against [Brown] in the amount of \$1,487.00 for outstanding court costs and fees." Appellant's Appendix Volume II at 191. The court also issued a written order under Cause No. 85 revoking Brown's probation and ordering that 365 days of the previously suspended sentence be executed in the DOC. The court ordered: "Civil judgment is entered against [Brown] in the amount of \$895.00 for outstanding court costs and fees." Appellant's Appendix Volume III at 128.

Discussion

[20] Brown argues the finding that he violated Condition 2 by committing the offense of operating while intoxicated was in error because the trial court relied on hearsay evidence that had not been established as reliable, and irrelevant evidence of his blood alcohol level. He contends that "[b]ecause violation of

Condition 2 was the only violation alleged in the Residential Entry probation case” in Cause No. 85 “the revocation should be reversed in that cause” and, “[w]ith regard to the Conspiracy to Commit Robbery probation” under Cause No. 93 “due to the fact that other violations were proven, the matter should be remanded to the trial court for new disposition in light of the State’s failure to prove Condition 2.” Appellant’s Brief at 10.

[21] Brown also argues that the trial court abused its discretion by assessing “probation fees for the Residential Entry probation” in Cause No. 85 “when [he] was not actively serving probation yet on that conviction.” *Id.* at 7 (emphasis omitted). He contends that the sentencing order under Cause No. 85 set forth that he owed \$185 for court costs, “[n]o other assessment appears in the record that would justify an assessment of \$895,” “[t]he clerk’s record indicates that \$845 is the balance due,” and “[s]imple math reveals this would be comprised of \$185 Court cost[s], \$200 of initial and administrative probation fees, and 23 months of \$20 monthly users fees.” Appellant’s Brief at 8, 8 n.4. He cites *Fleming v. State*, 143 N.E.3d 987 (Ind. Ct. App. 2020), and argues the court abused its discretion by ordering him to pay fees for probation that had been revoked prior to the start of his probation. He contends that “the matter should be remanded to the trial court with instructions to reduce the assessed amount by \$660.” *Id.* at 8.

[22] The State contends the trial court correctly found Brown violated his probation. It asserts the court did not err in imposing fees in Cause No. 85 because Brown was serving probation in that cause. It argues that the first notice of probation

violation in Cause No. 85 indicated that his probation began on January 10, 2019. It contends that, “even if the probation department was incorrect to assign that date to the beginning of his probationary period, it was still true that [Brown] had to serve 545 days executed and had 204 days counted towards that sentence.” Appellee’s Brief at 13. It argues that “[t]his means that beginning on January 11, 2019, he had to serve 341 days before his probationary period would begin.” *Id.* It further argues that “January 11, 2019, plus 341 days, is December 18, 2019,” and “[t]his means that the probationary period began on December 18, 2019,” which “pre-dates September 29, 2022, and by almost three years.” *Id.* at 13-14. It contends that the record supports the conclusion that Brown was serving his probation in Cause No. 85 and that, “[i]f he was, then the trial court did not abuse its discretion in imposing fees for the cost of probation.” *Id.* at 14. It states “[i]f the amount was wrong, then remand is necessary” and, “[l]ikewise, if [Brown] was in fact not yet serving his probation in [Cause No. 85], then the proper remedy is also to remand this case back to the trial court so that it can mathematically adjust the fees imposed to reflect the actual time served, if any on probation in [Cause No. 85].” *Id.* The State also cites *Fleming* and contends that “if the fees imposed are not proportional to the time actually served on probation, then remand, to allow for recalculation, is the necessary solution.” *Id.* In his reply brief, Brown contends the State’s argument that he was serving his probation under Cause No. 85 at the same time as the probation under Cause No. 93 ignores the evidence at the violation hearing and the sentencing order in Cause No. 85 that the sentences including probation were to run consecutively.

[23] To the extent Brown asserts that the evidence was insufficient to support the revocation of his probation, we review trial court probation violation determinations 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)). Probation revocation is governed by Ind. Code § 35-38-2-3, and a revocation hearing is civil in nature, the State needing only to prove the alleged violations by a preponderance of the evidence. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999), *reh'g denied*. We consider all the evidence most favorable to supporting the judgment of the trial court without reweighing that evidence or judging the credibility of witnesses. *Id.*

[24] The record reveals that Trooper Smith testified that he smelled the odor of alcohol. The court admitted a photograph of the interior of the white vehicle, and Trooper Smith testified that the photograph showed “a bottle of Jose Cuervo” on the passenger seat. Transcript Volume II at 12. According to Trooper Smith’s testimony, he “observed six of six clues” during the horizontal gaze nystagmus test of Brown, he had red and glassy eyes, Brown fought with his sergeant, medics, and firefighters, and there was an “open alcohol container that was also in the vehicle.” *Id.* at 17-18. He also testified that “[w]ith him saying he did not know what happened, that was also another clue.” *Id.* at 19. In light of the record, we cannot say the trial court abused its discretion in revoking Brown’s probation.

[25] With respect to Brown’s argument regarding the probation fees, in *Fleming*, Kentrell Fleming pled guilty to battery resulting in serious bodily injury as a

level 5 felony on September 26, 2018. 143 N.E.3d at 989. On October 10, 2018, the trial court sentenced Fleming per the terms of the plea agreement, imposing a five-year sentence, with three years executed and two years suspended. *Id.* The executed portion of the sentence was to be served as one year in the DOC and two years in community corrections. *Id.* Of the two years suspended, one year was to be served on probation. *Id.* As part of the original sentencing order, the court ordered Fleming to pay court costs and fees totaling \$845, including \$560 in probation-related fees. *Id.*

[26] On February 1, 2019, community corrections filed a notice of violation alleging that Fleming violated a no contact order. *Id.* The probation department also filed a notice of probation violation on February 4, 2019, alleging that he had not paid any portion of his \$845 monetary obligation. *Id.* at 989, 989 n.1. On May 17, 2019, the court found that Fleming violated the rules of both community corrections and probation by violating the no contact order. *Id.* at 989. The court revoked both placements and ordered Fleming to serve four years in the DOC. *Id.* Because Fleming was still serving his community corrections sentence when the violations were filed, he had not yet begun serving his time on probation. *Id.* The trial court issued an updated sentencing order reflecting the sanction and reassessed \$845 in court costs and fees, including the \$560 in probation fees. *Id.*

[27] On appeal, Fleming argued that the trial court abused its discretion by imposing probation fees for a term of probation that was revoked before it ever began. *Id.* at 989. The Court held:

Relying on *Johnson v. State*, 27 N.E.3d 793 (Ind. Ct. App. 2015), Fleming contends that the trial court abused its discretion by requiring him to pay probation user fees despite his probation being revoked before it ever began. In *Johnson*, the trial court ordered the defendant to pay twelve months of probation fees but after the defendant served just five months of probation, the trial court revoked his probation due to a violation. The defendant appealed the trial court’s order that he pay the entire twelve months of probation fees. This court held that “probation fees should reflect the time a defendant actually served on probation” and because “the \$340 in probation fees reflected a twelve-month probation and [defendant] served only five of those months, the trial court should recalculate [defendant’s] probation fees, if appropriate, to correspond with the probation time [defendant] actually served.” *Id.* at 794-95 (citing I.C. § 35-38-2-1(e)).

Id. at 990-991.² The Court observed “Fleming never served probation, and the trial court revoked his previously ordered probation before his probation even

² Ind. Code § 35-38-2-1 provides:

(d) In addition to any other conditions of probation, the court shall order each person convicted of a felony to pay:

- (1) not less than twenty-five dollars (\$25) nor more than one hundred dollars (\$100) as an initial probation user’s fee;
- (2) a monthly probation user’s fee of not less than fifteen dollars (\$15) nor more than thirty dollars (\$30) for each month that the person remains on probation;
- (3) the costs of the laboratory test or series of tests to detect and confirm the presence of the human immunodeficiency virus (HIV) antigen or antibodies to the human immunodeficiency virus (HIV) if such tests are required by the court under section 2.3 of this chapter;
- (4) an alcohol abuse deterrent fee and a medical fee set by the court under IC 9-30-9-8, if the court has referred the defendant to an alcohol abuse deterrent program; and
- (5) an administrative fee of one hundred dollars (\$100);

to either the probation department or the clerk.

began.” *Id.* at 991. The Court stated that, “[a]lthough the trial court revoked Fleming’s probation, the trial court nevertheless ordered him to pay \$560 in probation-related fees.” *Id.* It concluded that the trial court abused its discretion in ordering Fleming to pay probation fees as part of a sanction that did not include probation and remanded the case to the trial court with instructions to reduce the amount of fees by \$560. *Id.*

[28] The December 31, 2020 Order of Probation in Cause No. 85 stated that “[p]robation will be tolled during the service of the executed term” and the “[s]entence shall be served consecutively, including probation, to that imposed under [Cause Nos. 231 and 93].” Appellant’s Appendix Volume III at 108. The probation dates were left blank. The State acknowledges that “[i]f the amount was wrong, then remand is necessary,” “[l]ikewise, if [Brown] was in fact not yet serving his probation in [Cause No. 85], then the proper remedy is also to remand this case back to the trial court so that it can mathematically adjust the fees imposed to reflect the actual time served, if any on probation in [Cause No. 85],” and that, “if the fees imposed are not proportional to the time

(e) In addition to any other conditions of probation, the court may order each person convicted of a misdemeanor to pay:

- (1) not more than a fifty dollar (\$50) initial probation user’s fee;
- (2) a monthly probation user’s fee of not less than ten dollars (\$10) nor more than twenty dollars (\$20) for each month that the person remains on probation;
- (3) the costs of the laboratory test or series of tests to detect and confirm the presence of the human immunodeficiency virus (HIV) antigen or antibodies to the human immunodeficiency virus (HIV) if such tests are required by the court under section 2.3 of this chapter; and
- (4) an administrative fee of fifty dollars (\$50);

to either the probation department or the clerk.

actually served on probation, then remand, to allow for recalculation, is the necessary solution.” Appellee’s Brief at 14. In light of the record and the State’s acknowledgement, we remand for clarification of whether Brown’s term of probation began under Cause No. 85 and consideration of the probation fees imposed.

[29] For the foregoing reasons, we affirm the trial court’s revocation of probation and remand with respect to whether Brown’s term of probation began and the probation fees under Cause No. 85.

[30] Affirmed in part and remanded.

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