

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

Breon Davenport,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff



April 16, 2024

Court of Appeals Case No.
23A-CR-2230

Appeal from the Madison Circuit Court

The Honorable Mark K. Dudley, Judge

Trial Court Cause No.
48C06-1505-F2-791
48C06-1611-2341
48C06-1612-F6-2578

Memorandum Decision by Judge Tavitias
Judges Mathias and Weissmann concur.

Tavitas, Judge.

Case Summary

- [1] Breon Davenport appeals the trial court’s revocation of his probation in three separate causes and the sanctions imposed for the revocations. Davenport argues that the State failed to prove he violated his probation and that the sanctions imposed were an abuse of discretion. We disagree and, accordingly, affirm.

Issues

- [2] Davenport raises two issues, which we restate as:
- I. Whether the State proved Davenport violated his probation.
 - II. Whether the trial court abused its discretion when it imposed sanctions for the probation violation.

Facts

- [3] In May 2015, the State charged seventeen-year-old Davenport with two counts of robbery, Level 3 felonies, and one count of aggravated battery, a Level 3 felony, in Cause No. 48C06-1505-F2-791 (“Cause No. 791”). Davenport later pleaded guilty to aiding, inducing, or causing robbery, a Level 5 felony, and the trial court sentenced him to five years with two years executed on home detention and three years suspended to probation.

- [4] In November 2016, the State charged Davenport with attempted escape, a Level 5 felony, and criminal mischief, a Class A misdemeanor, in Cause No. 48C06-1611-F5-2341 (“Cause No. 2341”). Davenport pleaded guilty as charged, and the trial court sentenced him to five years with two years executed in the Continuum of Sanctions program (“COS”) with three years suspended to probation, consecutive to his sentence in Cause No. 791.
- [5] In December 2016, the State charged Davenport with pointing a firearm, a Level 6 felony, and carrying a handgun without a license, a Class A misdemeanor, in Cause No. 48C06-1612-F6-2578 (“Cause No. 2578”). Davenport pleaded guilty to carrying a handgun without a license, a Class A misdemeanor, and the trial court sentenced him to one year, suspended to probation.
- [6] Davenport repeatedly violated his probation in these causes. *See, e.g., Davenport v. State*, No. 48A02-1604-CR-954 (Ind. Ct. App. Feb. 28, 2017) (mem.); Appellant’s App. Vol. II pp. 41-42; Appellant’s App. Vol. III p. 118; Appellant’s App. Vol. IV p. 13, 160.
- [7] In April 2023, law enforcement was dispatched to 2012 George Street in Anderson for an alleged domestic violence incident. When police arrived, Sierra Thompson was found in the restroom trying to flush what appeared to be marijuana. K.M. told a detective that Davenport lived at the residence, and a search warrant was later obtained. Officers discovered a pill press used by narcotics dealers hidden in the bathroom in a basket under towels. In the

master bedroom, officers found mail addressed to Davenport; Davenport's prescription medications; a birth certificate of Davenport's child; a title for Davenport's vehicle; and a wallet with debit cards and other cards belonging to Davenport. In the master bedroom closet, officers discovered a bag of microcrystalline cellulose, which is a cutting agent used in narcotics dealing. In a pile of clothing in the bedroom, officers discovered a pair of pants. Inside a pocket of the pants, officers discovered a metal tin filled with blue pills, Davenport's identification card, and a small bag of a green leafy substance. In field testing, the pills tested positive for fentanyl. The quantity of pills found indicated dealing rather than merely using the drugs.

[8] The State charged Davenport with: Count I, dealing in a narcotic drug, a Level 2 felony; Count II, domestic battery resulting in bodily injury to a pregnant woman, a Level 5 felony; Count III, criminal recklessness, a Level 6 felony; and Count IV, unlawful possession of a firearm by a serious violent felon, a Level 4 felony, in Cause No. 48C06-2305-F2-1420 ("Cause No. 1420").

[9] As a result of the new charges in Cause No. 1420, the State alleged that Davenport violated his probation in the three earlier cases. In Cause No. 791, the State alleged that Davenport violated his probation by: (1) committing new criminal offenses in Cause No. 1420; (2) testing positive for THC¹ on March 15, 2023; and (3) admitting to the use of marijuana on January 28, 2023. In both

¹ THC is "the main active chemical in marijuana." *Medina v. State*, 188 N.E.3d 897, 900 (Ind. Ct. App. 2022).

Cause No. 2341 and Cause No. 2578, the State alleged only that Davenport violated his probation by committing new criminal offenses in Cause No. 1420. In all three cases, the State also later alleged that Davenport violated his probation by committing the new criminal offense of leaving the scene of an accident, a Class B misdemeanor.

- [10] Davenport admitted to violating his probation in Cause No. 791 by using marijuana. The trial court then held an evidentiary hearing in August 2023 regarding the remaining allegations. The State, however, presented evidence concerning only the charge of dealing in a narcotic drug, a Level 2 felony, as charged in Count I of Cause No. 1420.
- [11] In Cause No. 791, the trial court found that Davenport admitted to using marijuana and that the State met its burden of proving Davenport committed the lesser included offense of Count I of Cause No. 1420. The trial court found a violation based on the lesser included offense because the State did not prove the weight of the drugs found. The trial court ordered that Davenport serve two years of his previously suspended sentence in the DOC.
- [12] In Cause No. 2578, the trial court found that Davenport committed the lesser included offense of Count I of Cause No. 1420. The trial court, however, imposed no sanction as a result of the violation and returned Davenport to probation with all of the original terms in effect.
- [13] In Cause No. 2341, the trial court found that Davenport committed the lesser included offense of Count I of Cause No. 1420. The trial court then ordered

that Davenport serve three years of his previously suspended sentence consecutively to his sentence in Cause No. 791. Davenport now appeals these revocations and sanctions.

Discussion and Decision

I. Violation of Probation

[14] Davenport first challenges the trial court’s determination that he violated his probation. We review a trial court’s determination regarding probation violations for an abuse of discretion. *Heaton v. State*, 984 N.E.2d 614, 616 (Ind. 2013). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances or when the trial court misinterprets the law. *Id.*

[15] “Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled.” *Murdock v. State*, 10 N.E.3d 1265, 1267 (Ind. 2014) (quoting *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007)). A probation hearing is civil in nature, and the State must prove an alleged probation violation by a preponderance of the evidence. *Id.*; Ind. Code § 35-38-2-3(f). When the sufficiency of evidence is at issue, we consider only the evidence most favorable to the judgment, and we do not reweigh the evidence or credibility. *Murdock*, 10 N.E.3d at 1267. We will affirm if “there is substantial evidence of probative value to support the trial court’s conclusion that a probationer has violated any condition of probation.” *Id.*

[16] “Proof of a single violation is sufficient to permit a trial court to revoke probation.” *Killebrew v. State*, 165 N.E.3d 578, 582 (Ind. Ct. App. 2021), *trans. denied*. “The requirement that a probationer obey federal, state, and local laws is automatically a condition of probation by operation of law.” *Luke v. State*, 51 N.E.3d 401, 421 (Ind. Ct. App. 2016), *trans. denied*; Ind. Code § 35-38-2-1(b).

[17] We first note that Davenport admitted to violating his probation in Cause No. 791 by using marijuana. Although a single violation is sufficient to revoke his probation, we will address his argument regarding the other violation found by the trial court because that was the sole violation found in the other two causes. Davenport argues that the State failed to prove he committed the lesser included offense of Count I, dealing in a narcotic drug, a Level 2 felony. The base offense for dealing in a narcotic drug is a Level 5 felony.² At the time of

² At the time of the offense, Indiana Code Section 35-48-4-1(a) provided:

A person who:

(1) knowingly or intentionally:

- (A) manufactures;
- (B) finances the manufacture of;
- (C) delivers; or
- (D) finances the delivery of;

cocaine or a narcotic drug, pure or adulterated, classified in schedule I or II; or

(2) possesses, with intent to:

- (A) manufacture;
- (B) finance the manufacture of;
- (C) deliver; or
- (D) finance the delivery of;

cocaine or a narcotic drug, pure or adulterated, classified in schedule I or II;

commits dealing in cocaine or a narcotic drug, a Level 5 felony[.]

the offense, elevation to a Level 2 felony required that: “(1) the amount of the drug involved is at least ten (10) grams; [or] (2) the amount of the drug involved is at least five (5) grams but less than ten (10) grams and an enhancing circumstance applies[.]” Ind. Code § 35-48-4-1(e) (in relevant part). Because the State did not present evidence of the weight of the fentanyl pills found, the trial court found that the State proved the lesser included offense of the Level 2 felony charge.

[18] Davenport argues that the State failed to prove that he possessed the fentanyl pills.³ Possession of contraband may be either actual or constructive. *Cruz v. State*, 218 N.E.3d 632, 639 (Ind. Ct. App. 2023), *trans. denied*. Actual possession occurs when a person has direct physical control over the item. *Id.* “When the State cannot show actual possession, a conviction for possessing contraband may rest instead on proof of constructive possession.” *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011). “A person constructively possesses contraband when the person has (1) the capability to maintain dominion and control over the item; and (2) the intent to maintain dominion and control over it.” *Id.*

[19] “The capability requirement is met when the [S]tate shows that the defendant is able to reduce the controlled substance to the defendant’s personal possession.”

³ Davenport also implies that Sierra possessed the pill press because only Sierra was found in the bathroom with the pill press. We need not address this argument because we conclude that Davenport constructively possessed the fentanyl pills.

Goliday v. State, 708 N.E.2d 4, 6 (Ind. 1999). Here, the State presented evidence that K.M. told a detective that Davenport lived at the residence; multiple items linked to Davenport were present in the home; and the pills were found in a pocket that also contained Davenport’s identification card. The State, thus, presented evidence that Davenport was capable of maintaining dominion and control over the fentanyl pills.

[20] To prove intent to maintain dominion and control, the State must “demonstrate the defendant’s knowledge of the presence of the contraband.” *Id.* “This knowledge may be inferred from either the exclusive dominion and control over the premise containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant’s knowledge of the presence of the contraband.” *Id.* Our Supreme Court has identified non-exhaustive examples of additional circumstances, including: “(1) a defendant’s incriminating statements; (2) a defendant’s attempting to leave or making furtive gestures; (3) the location of contraband [such as] drugs in settings suggesting manufacturing; (4) the item’s proximity to the defendant; (5) the location of contraband within the defendant’s plain view; and (6) the mingling of contraband with other items the defendant owns.” *Gray*, 957 N.E.2d at 175.

[21] Here, the pills were mingled with other items belonging to Davenport. In the master bedroom, officers found mail addressed to Davenport; Davenport’s prescription medications; a birth certificate of Davenport’s child; a title for Davenport’s vehicle; and a wallet with debit cards and other cards belonging to Davenport. Inside a pocket of pants found in the bedroom, officers discovered

Davenport's identification card and a metal tin filled with the pills. The State, thus, presented evidence that Davenport had the intent to maintain dominion and control over the fentanyl pills.

[22] The State presented sufficient evidence to prove by a preponderance of the evidence that Davenport constructively possessed the fentanyl pills. The State also presented evidence that the number of pills and evidence of a cutting agent indicated that Davenport was dealing in narcotics rather than simply using the drugs. Accordingly, the trial court did not abuse its discretion when it found that Davenport violated his probation by committing dealing in narcotics.

II. Sanction for Probation Violation

[23] Next, Davenport challenges the sanction imposed by the trial court as a result of his probation violations. We review a trial court's determination regarding sanctions for probation violations for an abuse of discretion. *Heaton v. State*, 984 N.E.2d 614, 616 (Ind. 2013). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances or when the trial court misinterprets the law. *Id.*

[24] Probation revocation is a two-step process. *Id.* "First, the trial court must make a factual determination that a violation of a condition of probation actually occurred." *Id.* "Second, if a violation is found, then the trial court must determine the appropriate sanctions for the violation." *Id.* Indiana Code Section 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.

“While it is correct that probation may be revoked on evidence of violation of a single condition, the selection of an appropriate sanction will depend upon the severity of the defendant's probation violation, which will require a determination of whether the defendant committed a new criminal offense.”

Heaton, 984 N.E.2d at 618.

[25] Davenport argues that the sanction imposed by the trial court was an abuse of discretion because the probation department was recommending a lesser sanction and Davenport was working full-time, supporting his children, current on his fees, and willing to serve the sanction in community corrections. Davenport, however, had many opportunities to correct his behavior and has been shown leniency despite his multiple probation violations and new offenses over the years. In fact, the trial court here imposed a lenient sanction despite Davenport's new violations. Given Davenport's repeated probation violations

and failure to take advantage of leniency granted him over the years, we cannot say that the sanction imposed by the trial court was an abuse of discretion.

Conclusion

[26] The trial court did not abuse its discretion by finding that Davenport violated his probation, and the trial court's sanctions imposed for the violations was not an abuse of discretion. Accordingly, we affirm.

[27] Affirmed.

Mathias, J., and Weissmann, J., concur.

ATTORNEY FOR APPELLANT

Brandon Townsend
Law Office of Brandon Townsend
Anderson, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Jennifer Anwarzai
Deputy Attorney General
Indianapolis, Indiana