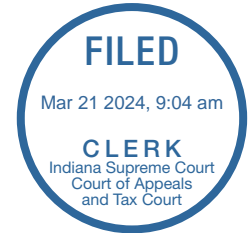


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE
Court of Appeals of Indiana

Marvin L. Kelly,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

March 21, 2024

Court of Appeals Case No.
23A-CR-2424

Appeal from the Vigo Superior Court
The Honorable Charles D. Johnson, Judge

Trial Court Cause No.
84D01-1804-F4-1135

Memorandum Decision by Judge Crone
Judges Bailey and Pyle concur.

Crone, Judge.

Case Summary

- [1] Marvin L. Kelly appeals the trial court's revocation of his placement in community corrections. We affirm.

Facts and Procedural History

- [2] On November 13, 2017, Kelly was on probation when he sold methamphetamine to a confidential informant. In April 2018, the State charged Kelly with level 4 felony dealing in methamphetamine, level 5 felony dealing in methamphetamine, level 5 felony possession of methamphetamine, level 6 felony possession of methamphetamine, and being a habitual offender. Kelly pled guilty to the level 4 felony in exchange for dismissal of the remaining charges. The plea agreement provided for an eleven-year suspended sentence with four years of probation. The trial court sentenced him in accordance with the plea agreement on May 23, 2019.
- [3] In June 2021, the State filed a notice of probation violation alleging that Kelly had committed a new crime and failed to report to his probation officer. The State subsequently charged Kelly with two counts of level 5 felony domestic battery, class A misdemeanor interference with the reporting of a crime, and class A misdemeanor cruelty to an animal. Three weeks later, the State filed a second notice of probation violation alleging that Kelly violated his probation by testing positive for methamphetamine and committing a new crime. The State subsequently charged Kelly with class A misdemeanor intimidation, class

A misdemeanor invasion of privacy, and class B misdemeanor disorderly conduct. Shortly thereafter, on July 19, 2021, the State filed an amended notice of probation violation alleging that Kelly again tested positive for methamphetamine.

[4] The trial court held an evidentiary hearing in July 2021. The court found that Kelly had violated the terms and conditions of his probation and took the matter under advisement. On August 13, 2021, the trial court revoked Kelly's probation and suspended sentence. The trial court ordered that Kelly execute his previously suspended eleven-year sentence with placement in community corrections (four years to be served on work release followed by seven years on home detention).

[5] On September 15, 2021, the State filed a petition to revoke Kelly's placement in community corrections alleging that he committed a new crime. The State subsequently charged Kelly with class A misdemeanor invasion of privacy and class A misdemeanor conversion. Kelly reached an agreement with the State wherein he admitted to violating the terms of his placement and was returned to community corrections. In October 2022, Kelly reached a plea agreement with the State to resolve his pending criminal charges. He agreed to plead guilty to class A misdemeanor cruelty to an animal and class A misdemeanor invasion of privacy in exchange for dismissal of the remaining charges in all causes.

[6] On May 1, 2023, the State filed a second petition to revoke Kelly's placement in community corrections alleging that Kelly committed ten rule violations

between December 3, 2022, and April 28, 2023. The trial court held an evidentiary hearing on August 18, 2023. Kelly and his community corrections case manager, Haley Lindley, each testified during the hearing. Following the presentation of evidence, the trial court determined that the State had carried its burden of proof as to “all allegations” in the petition to revoke Kelly’s placement. Tr. Vol. 2 at 56. Accordingly, the trial court revoked Kelly’s placement and ordered him to serve eight years in the Department of Correction (DOC) followed by three years in community corrections with credit for time already served. This appeal ensued.¹

Discussion and Decision

Section 1 – The trial court did not violate Kelly’s due process rights.

- [7] Kelly first asserts that the trial court violated his due process rights in failing to issue an adequate written statement regarding the reasons for revoking his placement in community corrections. We disagree.
- [8] We have observed that both probation and community corrections programs serve as alternatives to commitment to the DOC, and both are made at the sole discretion of the trial court. *Treece v. State*, 10 N.E.3d 52, 56 (Ind. Ct. App. 2014), *trans. denied*. Indeed, a defendant is not entitled to serve his sentence in

¹ Pursuant to Indiana Evidence Rule 201(a)(2)(C), this Court may take judicial notice of the “records of a court of this state.” Accordingly, our statement of facts and procedural history references the disposition of various other criminal causes involving Kelly.

either probation or a community corrections program; rather, such placement is a matter of grace and a conditional liberty that is a favor, not a right. *Id.*

“However, once the State grants that favor, it cannot simply revoke the privilege at its discretion.” *Terrell v. State*, 886 N.E.2d 98, 100 (Ind. Ct. App. 2008) (citation omitted), *trans. denied*. “Probation revocation implicates a defendant’s liberty interest, which entitles him to some procedural due process.” *Cox v. State*, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006). “Because probation revocation does not deprive a defendant of his absolute liberty, but only his conditional liberty, he is not entitled to the full due process rights afforded a defendant in a criminal proceeding.” *Id.* Among the due process protections afforded a probationer upon revocation is “a written statement by the factfinder as to the evidence relied on and reasons for revoking probation.” *Terrell*, 886 N.E.2d at 100.

[9] It is well established that the written statement requirement is simply “a procedural device aimed at promoting accurate fact finding and ensuring the accurate review of revocation decisions.” *Crump v. State*, 740 N.E.2d 564, 568-69 (Ind. Ct. App. 2000) (quoting *Hubbard v. State*, 683 N.E.2d 618, 620-21 (Ind. Ct. App. 1997)), *trans. denied*. Accordingly, the writing requirement may be satisfied by placement of the transcript of the evidentiary hearing in the record if the transcript contains a clear statement of the trial court’s reasons for revoking probation. *Id.*

[10] Here, the trial court’s written revocation order states that the trial court “finds that defendant has violated the terms and conditions of his direct placement.”

Appellant’s App. Vol. 2 at 159. The transcript of the revocation hearing has been placed in the record and clearly discloses that the trial court revoked Kelly’s probation on the basis that the State proved “all of the allegations” of the community corrections rule violations contained in the petition to revoke. Tr. Vol. 2 at 56. Moreover, the petition to revoke was quite specific in its allegations, and Lindley’s testimony regarding Kelly’s rule violations, as well as supporting documentary evidence, was detailed and extensive. Thus, looking at the petition to revoke, the transcript of the factfinding hearing, and the trial court’s written revocation order, we are satisfied that the trial court produced a sufficient written record for us to meaningfully review the reasons and evidence underlying the revocation order. We therefore conclude that Kelly’s due process rights were not violated.

Section 2 – The trial court did not abuse its discretion in imposing the sanction for Kelly’s violation of his placement rules.

[11] Kelly next challenges the trial court’s sanction following the revocation of his placement in community corrections. We review a trial court’s sanction for the violation of a community corrections placement under the abuse of discretion standard. *Puckett v. State*, 183 N.E.3d 335, 339 (Ind. Ct. App. 2022), *trans. denied*. An abuse of discretion occurs when the trial court’s decision is against the logic and effect of the facts and circumstances before the court. *Id.* We neither reweigh the evidence nor judge the credibility of witnesses. *Id.*

[12] Kelly argues on appeal that the trial court's sanction that he serve the entirety of his previously suspended sentence in the DOC was too harsh in light of the State's recommendation that he serve only eight of those years. Appellant's Br. at 9. However, it is well established that so long as the trial court follows the procedures outlined in Indiana Code Section 35-38-2-3, the court may properly order execution of all or any part of a suspended sentence upon a finding of a single violation by a preponderance of the evidence. *Killebrew v. State*, 165 N.E.3d 578, 582 (Ind. Ct. App. 2021), *trans. denied*.

[13] Here, based upon Kelly's lengthy history of probation violations and the proof of multiple recent community corrections rule violations at the evidentiary hearing, we cannot say that the trial court abused its discretion in ordering him to execute the entirety of his previously suspended sentence in the DOC. The judgment of the trial court is affirmed.

[14] Affirmed.

Bailey, J., and Pyle, J., concur.

ATTORNEY FOR APPELLANT

Cara Schaefer Wieneke
Wieneke Law Office, LLC
Brooklyn, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Indiana Attorney General

Robert M. Yoke
Deputy Attorney General
Indianapolis, Indiana