

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

Jason M. Gerstorff,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 15, 2024

Court of Appeals Case No.
23A-CR-2525

Appeal from the Howard Superior Court

The Honorable Brant J. Parry, Judge

Trial Court Cause No.
34D02-2002-F5-512

Memorandum Decision by Judge Foley
Judges Riley and Brown concur.

Foley, Judge.

- [1] Jason M. Gerstorff (“Gerstorff”) admitted to violating the conditions of his probation on more than one occasion. As a sanction, the trial court revoked the balance of Gerstorff’s previously suspended sentence. Gerstorff now appeals, alleging that revoking the balance of the suspended sentence amounted to “an unduly harsh sanction for [the] probation violation” and, therefore, the trial court abused its discretion. Appellant’s Br. p. 7. We affirm the trial court.

Facts and Procedural History

- [2] In November 2020, Gerstorff pleaded guilty to Level 5 felony child solicitation¹ pursuant to a plea agreement calling for a fixed sentence. In March 2021, the trial court sentenced Gerstorff in accordance with the plea agreement. That is, the trial court imposed 1,093 days in the Indiana Department of Correction with the sentence fully suspended to “supervised probation . . . subject to the special rules of probation for sex offenders.” Appellant’s App. Vol. 2 p. 48.
- [3] In April 2022, Gerstorff and the Howard County Adult Probation Department (“the Probation Department”) executed a document titled Motion to Enter Admission to Probation Violation and Waiver of Rights. Therein, Gerstorff admitted to violating a condition of his probation, specifically admitting that he failed three polygraph tests “resulting in ‘Significant Reactions Indicated’

¹ Ind. Code § 35-42-4-6(b).

indicative of deceptive answers . . . without any valid explanations.” *Id.* at 85. Gerstorff further admitted that “[i]t has been determined that [he] is not making forward progress in his sex offender treatment.” *Id.* The document set forth a “Requested Action,” which was for Gerstorff to “serve 30 actual . . . days executed in the Howard County Jail” as a “specific condition of probation[.]” *Id.* at 86. The trial court accepted Gerstorff’s admission to violating a condition of his probation and, as requested, ordered Gerstorff to serve “30 actual . . . days executed in the Howard County Jail.” *Id.* at 90. Gerstorff then filed an emergency motion asking that he instead be transferred to work release so that he could maintain his employment. The court allowed transfer to work release.

[4] In March 2023, the Probation Department filed a petition to revoke Gerstorff’s probation. In June 2023—during the pendency of that petition to revoke—the Probation Department filed another petition to revoke. In September 2023, the trial court held a hearing at which Gerstorff admitted to violating the conditions of his probation by continuing to fail polygraph tests, being dishonest about his sexual relationships, failing to show up for a drug screen, using oxycodone without a prescription, and diluting his drug screens to cover up his use of oxycodone. Gerstorff further admitted that, when confronted with the results of the polygraph testing, he disclosed having unapproved sexual relationships with three individuals, stating that he met each of the individuals “while trying to sell them items.” *Id.* at 106. When Gerstorff was asked “how he was selling items if he [was] not approved to be on social media,” Gerstorff “reverted to now saying [that] his [m]other facilitated the meetings.” *Id.* The trial court

accepted Gerstorff's admissions to the allegations. The trial court also gave Gerstorff an opportunity to testify. Gerstorff asked that, instead of prison or jail time, the trial court place him on in-home detention or work release.

- [5] After Gerstorff testified, the trial court reflected on whether to revoke the previously suspended sentence. In doing so, the court remarked: "There are rules, you violated those rules." Tr. Vol. 2 p. 12. The court also noted that it had given Gerstorff "another chance" when it "put him [on] Work Release," but Gerstorff "still ha[d not] followed the rules[.]" *Id.* The trial court added: "So, in my opinion, it's just not that difficult to do what you are told and you . . . couldn't get it done. So, I don't know that . . . you deserve another chance to keep trying to do it when you have shown that you can't." *Id.* The trial court ultimately decided to revoke the balance of Gerstorff's previously suspended sentence. The trial court recommended that Gerstorff be allowed to enter the Recovery While Incarcerated Program "to help with any substance abuse issues he may have." *Id.* at 13. The trial court also noted that, "if [Gerstorff] finishes that program, he can ask for a modification." *Id.* Gerstorff now appeals.

Discussion and Decision

- [6] Gerstorff challenges the revocation of the balance of his previously suspended sentence. According to Gerstorff, the trial court imposed "an unduly harsh sanction for [the] probation violation that [was] clearly against the logic and effect of the facts and circumstances before the court." Appellant's Br. p. 7. He claims that, due to the alleged error, we "should revise his sentence." *Id.* at 10.

[7] “Probation revocation is a two-step process.” *Woods v. State*, 892 N.E.2d 637, 640 (Ind. 2008). First, the trial court must make a factual determination as to whether the probationer violated a condition of probation. *Id.* If the trial court identifies a violation, then the court must “determine if the violation warrants revocation of the probation.” *Id.* The trial court has several options. That is:

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.*

Ind. Code § 35-38-2-3(h) (emphasis added).

[8] Here, Gerstorff acknowledges that “[t]he options before the trial court were many[.]” Appellant’s Br. p. 9. Gerstorff contends that, rather than revoke the balance of his previously suspended sentence, the trial court should have given him “a chance to complete probation under a less severe sanction[.]” *Id.* In so arguing, Gerstorff points out that he admitted to the allegations against him.

[9] “We recognize that ‘a probationer who admits the allegations against him must . . . be given an opportunity to offer mitigating evidence suggesting that the violation does not warrant revocation.’” *Killebrew v. State*, 165 N.E.3d 578, 582 (Ind. Ct. App. 2021) (quoting *Ripps v. State*, 968 N.E.2d 323, 326 (Ind. Ct. App. 2012)), *trans. denied*. Nevertheless, when selecting a sanction for a probation violation, “trial courts are not required to balance aggravating and mitigating circumstances.” *Id.* Moreover, “[p]roof of a single violation is sufficient to permit a trial court to revoke probation.” *Id.* In short, “[s]o long as the proper procedures have been followed in conducting a probation revocation hearing pursuant to Indiana Code Section 35-38-2-3, the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence.” *Id.* (quoting *Crump v. State*, 740 N.E.2d 564, 573 (Ind. Ct. App. 2000)). Put differently, when there is no alleged procedural error, nor any dispute a probation violation occurred, we will affirm a sanction authorized by statute. *See id.* That is because “[p]robation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled.” *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). Thus, if a trial court “exercised its grace by ordering probation rather than incarceration, the [court] should have considerable leeway in deciding how to proceed.” *Id.* (adding that, “[i]f this discretion were not afforded” and we “scrutinized [a sanction] too severely on appeal,” trial courts “might be less inclined to order probation” in the future).

[10] In this case, Gerstorff admitted to violating the conditions of his probation. At times, Gerstorff characterizes his admissions as “his first plea under a Petition

to Revoke Suspended Sentence.” Appellant’s Br. p. 9. Yet, Gerstorff does not dispute that he previously admitted to violating a condition of his probation and the trial court afforded Gerstorff the opportunity to remain on probation and in community placement. Gerstorff did not take advantage of that opportunity, but instead continued to violate the terms of his probation order by failing polygraph tests, being dishonest about his sexual activity, and using controlled substances. Absent any challenge to the procedures involved, Gerstorff has not shown that the trial court abused its discretion when the court decided to revoke the balance of the previously suspended sentence, which is a sanction our legislature specifically authorized in Indiana Code section 35-38-2-3(h).

[11] Affirmed.

Riley, J., and Brown, J., concur.

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