

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 Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.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

Zachary L. Scott,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff



April 10, 2024

Court of Appeals Case No.
23A-CR-2840

Appeal from the Howard Superior Court

The Honorable Hans S. Pate, Judge

Trial Court Cause No.
34D04-1312-FA-195

Memorandum Decision by Judge Tavitas
Judges Mathias and Weissmann concur.

Tavitas, Judge.

Case Summary

- [1] Zachary Smith appeals the trial court's order imposing his previously suspended sentence as a sanction for Scott's probation violations. Scott argues that, in reaching this sanction, the trial court abused its discretion by improperly considering: (1) hearsay contained in the probable cause affidavit for his underlying conviction; and (2) uncharged probation violation allegations contained in the State's sanctions memorandum. We are not persuaded by these arguments. Accordingly, we affirm.

Issue

- [2] Scott raises one issue on appeal, which we restate as whether the trial court abused its discretion in sanctioning Scott by improperly considering hearsay contained in the probable cause affidavit for Scott's underlying conviction and uncharged probation violation allegations.

Facts

- [3] This appeal stems from Scott's underlying conviction for aggravated battery, a Class B felony. Scott committed this offense in the early morning hours of August 24, 2013, when Scott and several other individuals followed a man named David Parr from a strip club to a neighborhood, and Scott brutally

attacked and stabbed Parr. The attack was in “retaliation” for a “negative situation” that occurred between Scott and Parr when they were previously incarcerated together. Appellant’s App. Vol. II p. 42. After the attack, Scott indicated that, “if he believed [Parr] was not dead, he would have returned to [Parr’s] location in order to cut his throat.” *Id.*

[4] The State charged Scott with attempted murder, a Class A felony, and aggravated battery, a Class B felony. Scott pleaded guilty to the aggravated battery charge and admitted to the “material facts” contained in the probable cause affidavit as they pertained to the aggravated battery charge. *Id.* at 143. In exchange, the State dismissed the remaining charge. In January 2015, the trial court accepted Scott’s guilty plea and sentenced him to fifteen years: six years executed in the Department of Correction (“DOC”), five years executed on home detention, and four years suspended to probation.

[5] After his release from prison, Scott committed several violations while on home detention, work release, and probation. In 2017, Scott violated the conditions of his home detention placement by visiting unapproved locations, failing to pay fees, failing to communicate with staff regarding his job status, failing to enroll with a drug screen provider, and failing to contact his case manager. Scott admitted to these violations in 2018 and was ordered to return to home detention.

[6] A second set of violations occurred in 2019, when Scott was on home detention and was found to be under the influence of a prohibited substance during a

routine home visit, was removed from his temporary housing due to drug use, and failed to pay fees. Scott admitted to these violations and was ordered to serve one year on work release.

[7] While Scott was on work release, he committed a third set of violations in 2020. Over the course of several days, Scott left the work release facility but failed to go to his place of employment. When work release staff informed Scott of his violations, Scott fled the facility. After he was apprehended, Scott admitted to violating the conditions of his work release placement, and the trial court ordered him to serve the remaining portion of his placement on home detention. Scott later pleaded guilty to escape, a Level 6 felony, in Cause No. 34C01-2003-F6-694, based on his conduct.

[8] A fourth set of violations occurred while Scott was on probation in 2023. On May 9, 2023, the State filed a petition to revoke Scott's probation, which alleged that: (1) on April 10, 2023, Scott disobeyed instructions by leaving the probation department facility after he was advised that a drug screen would be administered; (2) Scott diluted a drug screen on February 27, 2023, and failed to appear for drug screens on March 31, April 6, and April 10, 2023; and (3) Scott committed new criminal offenses.

[9] The trial court held a fact-finding hearing on October 12, 2023. Scott admitted to violating the conditions of his probation by leaving the probation department facility on April 10, 2023, and failing to appear for a drug screen that day. Scott denied the remaining allegations.

[10] Regarding the missed drug screens on March 31 and April 6, 2023, Scott's probation officer, Amanda Spicer, testified that Scott was not excused from missing those screens. Starting with the March 31 drug screen, Officer Spicer testified that, in early March, Scott asked to be excused from drug testing at the designated facility for a period of time so that he could work at an excavating job in Terre Haute and stated that he would return by March 30 or 31. Scott, however, did not appear for the March 31 drug screen. As for the April 6 drug screen, Spicer testified that Scott had until 7:00 p.m. to screen that day but that she received a message from Scott at 6:54 p.m. stating that he had a flat tire and would be unable to attend. Lastly, Officer Spicer testified that Scott had pending charges for committing additional criminal offenses. The trial court determined that the State proved Scott failed to attend the March 31 drug screen but that the State had not proved that Scott committed new criminal offenses.¹

[11] The trial court scheduled a sanctions hearing for November 2, 2023. Before the hearing, the State submitted a memorandum to the trial court, which included allegations regarding Scott's documented violations as well as failed drug screens in 2021 and 2022, for which it was unclear whether Scott had previously been sanctioned. These failed drug screens were neither alleged in the State's petition to revoke probation nor discussed at the fact-finding hearing.

¹ The record does not reveal the trial court's finding regarding the April 6 drug screen.

[12] At the sanctions hearing, the trial court referenced the probable cause affidavit for Scott's underlying aggravated battery conviction and asked whether Scott "chased [Parr] down" and stabbed him, which Scott admitted. Tr. Vol. II p. 27. In determining its sanction, the trial court further stated:

[A]nd the rest of the evidence was [Scott said] that if [he] believe[d] [Parr] was not dead [Scott] would have returned to [Parr's] location in order to cut his throat. . . . So they charge you with attempted murder Pled it down to aggravated battery B felony. And then you've got the substantial sentence that you did since then. Been violation after violation. **There have even been things that you did according to this latest memo on probation in or supervision in Tipton County that they gave you some kind of verbal warning or whatever about it and didn't document it at least well enough for Howard County to know what happened or what you did or [] how they sanctioned you or if they even sanctioned you at all. [S]o the aggravating factors are the multiple violations in the past, which have continued. [F]ailure to take advantage of the opportunities that probation provided for rehab and other programs and the only mitigating factor I see really is that you [are] pleading true to this and taking responsibility for it at this time. [S]o the aggravating outweigh the mitigating. [T]he original crime shows extremely poor character. I don't think there's anything to reflect here on what you've done since then that changes [the original sentencing judge's] view before or my view now that your character has [not] changed much. [Y]ou're still not able to do the things you're supposed to do when you're supposed to do them. And so I don't think that's gonna change [if] I were to put you back on probation or in-home detention or work release.**

Id. at 27-28 (emphasis added). The trial court revoked Scott’s probation and imposed his previously suspended sentence to be served in the DOC. Scott now appeals.

Discussion and Decision

[13] Scott argues that the trial court abused its discretion by imposing his previously suspended sentence. Scott has not carried his burden of persuasion.

“Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled.” *Killebrew v. State*, 165 N.E.3d 578, 581 (Ind. Ct. App. 2021) (quoting *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007)), *trans. denied*. 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.*

[14] When a probation violation is alleged, the trial court engages in 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.

[15] “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.

[16] Scott argues that, in reaching its sanction, the trial court impermissibly considered: (1) hearsay contained in the probable cause affidavit from the underlying case, in which Scott pleaded guilty to aggravated battery; and (2) the uncharged allegations regarding missed drug screens in 2021 and 2022 contained in the sanctions memorandum. Probation proceedings are “more flexible” than criminal trials, and trial courts “may admit evidence during probation revocation hearings that would not be permitted in a full-blown criminal trial.” *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007), *reh’g denied*; see also Evidence Rule 101(d)(2) (providing that the Rules of Evidence do not apply in probation proceedings). In *Reyes*, 868 N.E.2d at 442, however, our Supreme Court held that a trial court may only admit hearsay evidence in a probation revocation hearing when the hearsay evidence bears “substantial

trustworthiness.” The Court explained that “‘ideally [the trial court should explain] on the record why the hearsay [is] reliable and why that reliability [is] substantial enough to supply good cause for not producing . . . live witnesses.’” *Id.* (quoting *United States v. Kelley*, 446 F.3d 688, 693 (7th Cir. 2006)).

[17] We reject Scott’s challenge to the trial court’s sanction for several reasons. First, the argument is waived. Scott never objected to the trial court’s consideration of the probable cause affidavit or the sanctions memorandum at the hearing, and on appeal, he makes no effort to explain why either is untrustworthy. *See Wilkerson v. State*, 918 N.E.2d 458, 462 n.1 (Ind. Ct. App. 2009) (failure to object to the admission of hearsay evidence at probation revocation hearing “waive[s] the issue for appeal” (citing *Marsh v. State*, 818 N.E.2d 143, 145 (Ind. Ct. App. 2004))); *Comer v. State*, 936 N.E.2d 1266, 1268 (Ind. Ct. App. 2010) (holding probationer waived argument by failing to support it with “cogent argument” pursuant to Indiana Appellate Rule 46(A)(8)(a)), *trans. denied*.

[18] Waiver notwithstanding, even if the trial court erred by considering the challenged materials, any error would be harmless. The trial court found that Scott violated the conditions of his probation by failing to appear for drug screens on two days, and Scott does not challenge this finding. Additionally, Scott has an extensive criminal history and has repeatedly violated the conditions of his home detention and work release placements in this case. *See, e.g., Prewitt*, 878 N.E.2d at 188 (affirming probation revocation based on probationer’s repeated violations and failure to complete halfway house

program); *Utley v. State*, 167 N.E.3d 777, 784 (Ind. Ct. App. 2021) (affirming probation revocation based, in part, on probationer's positive alcohol test and criminal history). We are confident that the trial court would have imposed the same sanction here even if it had not considered the materials Scott now challenges. Accordingly, the trial court did not abuse its discretion by imposing Scott's previously suspended sentence.

Conclusion

[19] The trial court did not abuse its discretion by imposing Scott's previously suspended sentence as a result of his probation violations. Accordingly, we affirm.

[20] Affirmed.

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

ATTORNEYS FOR APPELLANT

Justin K. Clouser
Jeffrey W. Elftman
Bolinger Law Firm
Kokomo, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Robert M. Yoke
Deputy Attorney General
Indianapolis, Indiana