MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Derrick A. Kimbrell,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 9, 2023

Court of Appeals Case No. 23A-CR-169

Appeal from the Madison Circuit Court

The Honorable Angela Warner Sims, Judge

Trial Court Cause No. 48C01-1806-F6-1626

Memorandum Decision by Senior Judge Baker
Judges Vaidik and Brown concur.

Baker, Senior Judge.

[1] Derrick Kimbrell appeals the revocation of his work release placement, claiming that the evidence was insufficient to prove a violation and that the trial court erred in the sanction imposed. Finding the evidence sufficient and no error in the sanction imposed, we affirm the judgment of the trial court.

Facts and Procedural History

[2] In 2018, Kimbrell pleaded guilty, pursuant to a plea agreement, to Level 6 felony failure to return to lawful detention and admitted to being an habitual offender. In accordance with the agreement, the court sentenced Kimbrell to four years, with two and one-half years executed and the remaining one and one-half years suspended to probation.

[3] Kimbrell served his executed sentence and was placed on probation in February 2021. In June 2022, the State filed a notice of probation violation. After a hearing, the court determined Kimbrell had committed several violations. The court revoked his probation and imposed the entirety of his suspended sentence, which it ordered him to serve on work release in the Continuum of Sanctions Program.

[4] In October, the State filed its notice of work release/continuum of sanctions termination alleging that Kimbrell had violated the terms of the program in four distinct ways. Following a hearing, the court determined Kimbrell had violated the terms of work release in two respects: (1) he acted violently toward officers in the work release facility, and (2) he failed to pay work release fees. The court

revoked his placement in the program and sanctioned him to serve 365 days of his previously suspended sentence.

[5] The Court issued its sanctions order on November 21, 2022. On January 13, 2023, Kimbrell moved to file a belated notice of appeal, which the trial court granted, and this appeal ensued.

Discussion and Decision

[6] Prior to focusing on the merits of this appeal, we must first address Kimbrell's forfeiture of his right to appeal by failing to timely file his notice of appeal. The trial court terminated Kimbrell's work release placement on November 21, 2022, and that judgment was noted in the CCS on November 30. Kimbrell's counsel failed to file a notice of appeal within thirty days of that date. On January 13, 2023, Kimbrell's counsel moved for leave to file a belated notice of appeal under Post-Conviction Rule 2(1), which the trial court erroneously granted.

[7] To initiate an appeal, a party must file a notice of appeal within thirty days after entry of a final judgment is noted in the chronological case summary. Ind. Appellate Rule 9(A)(1). "Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2." App. R. 9(A)(5). Post-Conviction Rule 2(1) allows an eligible defendant to petition the trial court for permission to file a belated notice of appeal of "the conviction or sentence." Accordingly, Post-Conviction Rule 2(1) applies to direct appeals only and not post-conviction orders. *See Core v. State*, 122 N.E.3d 974, 978 (Ind. Ct. App.

2019) ("Our Indiana Supreme Court has held that Post-Conviction Rule 2(1) does not apply to post-conviction proceedings and that it is a 'vehicle for belated direct appeals alone.'" (quoting *Howard v. State*, 653 N.E.2d 1389, 1390 (Ind. 1995))).

[8] Because Kimbrell's appellate counsel did not file the notice of appeal within the required thirty days and Post-Conviction Rule 2 does not allow a belated appeal of post-conviction rulings, he forfeited his right to appeal. *See* Ind. Appellate Rule 9(A)(5). However, our Supreme Court has recognized a limited exception to the forfeiture of an untimely appeal when there are "extraordinarily compelling reasons" to restore the forfeited right. *In re Adoption of O.R.*, 16 N.E.3d 965, 971 (Ind. 2014). The Court also acknowledged that our rules of court provide a mechanism permitting the appellate courts to resurrect an otherwise forfeited appeal. *Id.* at 972 (citing Appellate Rule 1, which provides: "The Court may, upon the motion of a party or the Court's own motion, permit deviation from these Rules.").

[9] Here, the fault for the forfeiture lies solely with appellate counsel, not Kimbrell. Counsel failed to recognize his appointment and timely file a notice of appeal. On January 13, 2023, the trial court contacted counsel regarding the status of the appeal, and counsel moved for leave to file a belated notice of appeal the very same day, affirming in the motion that he failed to recognize his appointment as Kimbrell's appellate counsel. Thus, in light of Appellate Rule 1 and the fact that Kimbrell was not at fault for the untimeliness and delay, we

conclude that his forfeited appeal should be restored and proceed with a determination on the merits.

I. Violation

[10] Kimbrell first contends the State failed to present sufficient evidence to establish that he violated the terms of his work release placement. The court found two violations: (1) acting violently toward officers and (2) failing to pay work release fees. Here, Kimbrell argues only that he did not threaten the work release staff or direct any violence toward them because he asserts that, without this violation, the remaining violation of failing to pay fees would not warrant the sanction imposed.

[11] As this Court has aptly stated:

> Both probation and community corrections programs serve as alternatives to commitment to the DOC [or the county jail], and both are made at the sole discretion of the trial court. A defendant is not entitled to serve a sentence in either probation or a community corrections program. Rather, placement in either is a matter of grace and a conditional liberty that is a favor, not a right.
>
> The standard of review of an appeal from the revocation of a community corrections placement mirrors that for revocation of probation. That is, a revocation of community corrections placement hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. We will consider all the evidence most favorable to the judgment of the trial court without reweighing that evidence or judging the credibility of witnesses. If there is substantial evidence of probative value to support the trial court's conclusion that a

> defendant has violated any terms of community corrections, we will affirm its decision to revoke placement.

McQueen v. State, 862 N.E.2d 1237, 1242 (Ind. Ct. App. 2007) (citations and quotation marks omitted).

[12] At the evidentiary hearing, Taylor Flores, Kimbrell's case manager, testified she reviewed the work release rules with Kimbrell. Curt Jackson, an officer at the Madison County Correctional Complex, testified that he took Kimbrell into custody from the work release facility when Kimbrell refused to comply with the standard procedures of the facility. The officer testified that a few days later at the correctional complex Kimbrell began punching a metal bench and "making it known that he was going to hurt someone. He said that he wasn't suicidal, but homicidal . . . ." Tr. Vol. I, p. 100. Officer Jackson explained that the staff must protect all the offenders in their custody so they cannot house an offender that is aggressive and threatening. Kimbrell testified on his own behalf, alleging that the State's witnesses were lying and that video from the correctional complex would show that he was not violent. The video footage of Kimbrell at the correctional complex was introduced as State's Exhibit 1, but the recording is from a day several days after the day the incident testified to by Officer Jackson is alleged to have occurred.

[13] Kimbrell's argument is nothing more than an invitation for this Court to reweigh the evidence and the credibility of the witnesses. Mindful of our standard of review, we decline this invitation. The State presented evidence that Kimbrell exhibited violent behavior and made threatening statements,

thereby creating a dangerous situation for both the staff and other offenders. This evidence constitutes substantial evidence of probative value to support the trial court's conclusion that Kimbrell's conduct violated the terms of his program.

II. Sanction

[14] Kimbrell next asserts that the trial court erred when it committed him to the county jail for 365 days as a sanction for his violations. He challenges the sanction as excessive based on his minor violations, his mental health issues, his work history, and his prior military service. He bases these arguments on his assertion that his behavior did not rise to the level of a criminal offense, case manager Flores' testimony that he told her he had a brain injury and forgets things, and his own statements at his sanctions hearing.

[15] As we do with appeals of sentencing decisions for probation revocations, we review a trial court's decision of the sanction to impose following the revocation of work release placement for an abuse of discretion. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). An abuse of the trial court's discretion occurs when its decision is clearly against the logic and effect of the facts and circumstances before it. *Id.*

[16] We have little hesitation in concluding the trial court acted within its discretion in ordering Kimbrell to serve 365 days of his previously suspended sentence. Kimbrell's criminal history, consisting of ten misdemeanor convictions, eleven felony convictions, several probation violations, and at least two termination of

work release placements, is significant. Here, Kimbrell violated his probation in several respects, and when the trial court revoked his probation and ordered him to serve the entirety of his suspended sentence, it allowed him to do so on work release. The fact that he had already received leniency from the court and squandered that opportunity—and many before it—shows that he is not a good candidate for continuation in the work release or alternate placement program.

Conclusion

[17] We conclude that the evidence most favorable to the trial court's judgment proves that Kimbrell violated the terms of his work release placement and that the trial court did not abuse its discretion when it ordered him to serve 365 days as a sanction for his violations.

[18] Affirmed.

Vaidik, J., and Brown, J., concur.