

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Cameron J. Davenport,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 18, 2022

Court of Appeals Case No.
21A-CR-2017

Appeal from the Allen Superior
Court

The Honorable Samuel R. Keirns,
Magistrate

Trial Court Cause No.
02D06-1908-F5-270

Darden, Senior Judge.

Statement of the Case

[1] Cameron J. Davenport appeals the sanction the trial court imposed after determining that Davenport had violated the terms and conditions of his work release program and his probation. We affirm.

Issues

- [2] Davenport raises one issue, which we restate as: whether the trial court abused its discretion by ordering him to serve one year of his previously suspended sentence, plus three years of probation.
- [3] In addition, the State raises one issue on cross-appeal: whether this appeal should be dismissed because Davenport belatedly sought appellate relief through the process set forth in Indiana Post-Conviction Rule 2.

Facts and Procedural History

- [4] On August 26, 2019, the State charged twenty-six-year-old Davenport with battery resulting in serious bodily injury, a Level 5 felony. The State alleged that after Davenport's basketball team lost a game, he struck an opponent in the face, breaking his jaw.
- [5] On March 13, 2020, the trial court presided over a guilty plea hearing, during which the parties filed their proposed plea agreement. Under the terms of the plea agreement, Davenport agreed to plead guilty as charged, and the State agreed that any executed portion of his sentence, if ordered by the trial court, would not exceed two years. The trial court accepted the parties' plea agreement. On May 22, 2020, the trial court imposed a sentence of five years, with one year executed and four years suspended to probation.
- [6] Davenport did not appeal his sentence. Instead, on May 28, 2020, he filed a request for alternative sentencing screening, in which he asked the trial court to

order the Allen County Community Corrections Program (“ACCC”) to screen him for placement in a work release or home detention program. The trial court granted Davenport’s request, and the ACCC subsequently reported that Davenport was eligible for placement.

[7] On August 19, 2020, the trial court modified the executed portion of Davenport’s sentence, directing that he would be placed in the ACCC’s Residential Services Facility (“RSF”). The trial court further ordered Davenport to comply with all rehabilitative services while under the ACCC’s supervision.

[8] On October 6, 2020, Davenport reviewed and signed a document captioned “General Rules and Special Conditions” (“General Rules”). Tr. Ex. Vol. p. 6. This document described the terms under which Davenport would serve his sentence at the RSF. The General Rules provided, “I understand and agree that if I violate any of the General Rules and Special Conditions of supervision I may be sanctioned, violated, terminated, and/or arrested.” *Id.* at 10. Among other conditions, the General Rules stated, “I understand that I will not . . . [t]hreaten or intimidate anyone while under supervision.” *Id.* at 15. Immediately above his signature, a paragraph provided: “I have received, read, and understand the [General Rules] and I agree to comply with all rules, regulations and requirements set forth in the [General Rules].” *Id.* at 14.

[9] On November 20, 2020, ACCC employee Joseph Runyon was working at the RSF. At 1 p.m., he performed a security check and observed Davenport in the computer room. Runyon knew that residents were required to reserve a period of

time to use the computers, and Davenport's name was not on the signup sheet. Runyon approached Davenport and asked him to leave the room because his name was not on the signup sheet. Rather than leave, Davenport commenced arguing with Runyon, stating that he should be the one to leave. Davenport then told Runyon that if he did not leave, that he would "whoop [Runyon's] ass." Tr. p. 11. Davenport finally left after repeated requests for him to leave, but he remained belligerent. Later that day, Davenport refused to comply with Runyon's instruction to leave a dayroom, and return to his cell for a routine inmate head count pursuant to RSF policy. As a result, Davenport was removed from the RSF and transferred to the county jail.

[10] On November 23, 2020, the ACCC filed a verified petition to revoke Davenport's placement. The ACCC alleged Davenport had violated the terms and conditions of his placement by: (1) threatening an ACCC employee; (2) failing to obtain employment; and (3) failing to pay required fees. The next day, the Allen County Probation Department filed a petition to revoke Davenport's probation, alleging the same violations.

[11] The trial court presided over an evidentiary hearing on February 18, 2021. During the hearing, Davenport was represented by counsel, and the court received testimony from Runyon. Runyon testified about his encounter with Davenport, including Davenport's threat of bodily harm to him.

[12] After the parties rested their cases, the trial court found that the State had met its burden of proving that Davenport had threatened an ACCC employee, in violation

of the terms and conditions of his RSF placement and his probation, but the State had not met its burden on the other two alleged violations. The trial court revoked Davenport's placement with the ACCC, as well as his probation. As a sanction, the trial court ordered him to serve one year of his previously suspended sentence, with credit for time served, and directed that the remainder of the sentence would be suspended to probation.

[13] At the end of the hearing, the following discussion and advisement occurred:

THE COURT: Do you understand that you can appeal both my finding that you violated and my disposition of revoking and executing some of that term? Do you understand you have the right to appeal both of those issues?

THE DEFENDANT: I don't know what appeal means.

THE COURT: Do you understand you have that right?

([Davenport's attorney] explains to defendant.)

[DAVENPORT'S ATTORNEY]: He understands, Your Honor.

THE COURT: Alright, do you wish to appeal my decisions here today?

[DAVENPORT'S ATTORNEY]: He does wish to appeal, Your Honor, and we would also ask that the public defender be appointed given the sentence that was just imposed.

THE COURT: Alright, you would not be able to hire private counsel to perfect that appeal, is that correct?

THE DEFENDANT: Correct.

THE COURT: Alright, then I will show the public defender is appointed to perfect the appeal on your behalf and they will have to file the Notice of Appeal within thirty days of what they intend to appeal.

Tr. p. 56.

[14] Next, the trial court issued an order of judgment further setting forth the sanction. The judgment stated as follows, in relevant part: “The defendant is advised of his appellate rights and requests to appeal. The defendant states that he is indigent. The public defender is appointed to perfect an appeal on behalf of the defendant.” Appellant’s App. Vol. II, p. 95. It is undisputed that the trial court’s staff failed to notify the public defender’s office, pursuant to the trial court’s order, of Davenport’s desire to appeal. As a result, counsel for Davenport did not file a Notice of Appeal within thirty days of the issuance of the trial court’s order of judgment.

[15] After being incarcerated and not hearing anything concerning his case, in late August 2021 Davenport called the public defender’s office, requesting information about his case. An employee explained that they did not know anything about an appeal in his case and directed him to contact the trial court’s chambers. The trial court’s staff determined that a public defender had not appeared in Davenport’s case to perfect an appeal, and they emailed the public defender’s office to determine if that agency had received the trial court’s judgment. An employee of the public defender’s office responded that they had never received the trial court’s order of judgment.

[16] Finally, on August 30, 2021, Davenport, by counsel, filed a Motion for Leave of Court to File Notice of Appeal Belatedly. Davenport requested relief under Indiana Post-Conviction Rule 2, claiming that, due to no fault of his own, a Notice of Appeal was not timely filed, but he had been diligent in pursuing an appeal. On

September 9, 2021, the trial court granted Davenport’s motion without holding a hearing. This appeal followed.

Discussion and Decision

I. Cross-Appeal

- [17] The State argues that the Court should dismiss this appeal because he was not permitted to seek relief under Post-Conviction Rule 2 for a probation violation. Under the specific facts and circumstances of this case, and following the Indiana Supreme Court’s precedent, we choose to exercise our jurisdiction under Appellate Rule 1 and address the merits of Davenport’s appeal.
- [18] Indiana Appellate Rule 9(A) provides that a Notice of Appeal must be filed within thirty days after the entry of a final judgment in the Chronological Case Summary. In certain criminal cases, a defendant who misses the appellate filing deadline may belatedly seek relief. Indiana Post-Conviction Rule 2 provides, in relevant part:

Eligible Defendant Defined. An ‘eligible defendant’ for purposes of this Rule is a defendant who, but for the defendant’s failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal.

* * *

Section 1. Belated Notice of Appeal

(a) *Required Showings.* An eligible defendant convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence if;

(1) the defendant failed to file a timely notice of appeal;

(2) the failure to file a timely notice of appeal was not due to the fault of the defendant; and

(3) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

[19] In *Dawson v. State*, 943 N.E.2d 1281, 1281 (Ind. 2011), the Indiana Supreme Court stated, “belated appeals from orders revoking probation are not presently available pursuant to Post-Conviction Rule 2.” In the past, this Court has applied the holding in *Dawson* to dismiss belated appeals by probationers. See, e.g., *Cummings v. State*, 137 N.E.3d 255, 258 (Ind. Ct. App. 2019); *Core v. State*, 122 N.E.3d 974, 978 (Ind. Ct. App. 2019).

[20] The facts and circumstances of Davenport’s case differ from those of *Dawson*, *Cummings*, and *Core*. Specifically, the record indicates that Davenport was not at fault for the failure to perfect an appeal.¹ As previously noted, the record is clear that on February 18, 2021, the trial court advised Davenport of his right to appeal and ordered the public defender’s office to represent him in this appeal. A failure of communication between the trial court’s office and the public defender’s office resulted in the lack of a timely appeal for Davenport.

[21] Regardless of the applicability of Post-Conviction Rule 2, we find guidance in the Indiana Supreme Court’s decision in *In re Adoption of O.R.*, 16 N.E.3d 965 (Ind. 2014). In that case, a biological father, N.R., unsuccessfully contested a petition to

¹ In the proceedings before the trial court, the State neither filed a response to Davenport’s Motion for Leave of Court to File Notice of Appeal Belatedly nor requested an evidentiary hearing to contest whether Davenport had acted diligently and without fault for purposes of Post-Conviction Rule 2.

adopt his child. Before the deadline to appeal expired, N.R. wrote a letter to the trial court requesting appellate counsel. The trial court did not appoint counsel until twenty-three days after the deadline had expired, and counsel filed a notice of appeal fifteen days later.

[22] A panel of this Court dismissed the appeal for failure to timely file a Notice of Appeal, but the Indiana Supreme Court disagreed. The Supreme Court noted that failing to timely file a Notice of Appeal is not a jurisdictional defect, merely a forfeiture of the right to appeal. And in limited cases, there may be “extraordinarily compelling reasons why this forfeited right should be restored.” *Id.* at 971. The Supreme Court cited Indiana Appellate Rule 1, under which Indiana’s appellate courts “may, upon the motion of a party or the Court’s own motion, permit deviation from these Rules.” Regarding the facts and circumstances of N.R.’s case, the Supreme Court noted: (1) he had asked for the appointment of counsel before the deadline to appeal had expired; and (2) a fundamental liberty interest – the right to parent a child – was at stake. As a result, the Supreme Court considered the merits of N.R.’s appeal and ultimately affirmed the trial court’s decision.

[23] A probation revocation case, like an adoption proceeding, is civil in nature. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999). It is well established that a defendant is not entitled to serve a sentence on probation. *Lightcap v. State*, 863 N.E.2d 907, 911 (Ind. Ct. App. 2007). But an order revoking probation “is a final appealable order.” Ind. Code § 35-38-2-3 (2015). And Davenport experienced a loss of a liberty interest in his case when the trial court determined that he should be placed

in jail as opposed to a work release facility. Finally, Davenport, like N.R., requested that the trial court appoint counsel for his appeal prior to the expiration of the appellate deadline, and the failure to timely appeal was no fault of Davenport. Under these circumstances, we find these events are “extraordinarily compelling reasons,” as discussed in *In re Adoption of O.R.*, which allow this appeal to proceed on the merits.

[24] Of course, instead of requesting a belated appeal under Post-Conviction Rule 2, Davenport could have filed a petition for post-conviction relief under Post-Conviction Rule 1. *See* Ind. Post-Conviction Rule 1(a)(5) (permitting claims that a person’s “probation . . . [was] unlawfully revoked . . .”). But dismissing this appeal without prejudice to Davenport’s right to file a petition for post-conviction relief would exalt form over substance, because: (1) the record already establishes that Davenport was deprived of his right to timely appeal the probation revocation judgment through no fault of his own; and (2) he has presumably already served the executed portion of his sentence. Furthermore, we find that under the specific facts and circumstances of this case, that justice delayed would amount to justice denied (Davenport’s right to appeal) with respect to appellate review of the merits of Davenport’s claim. Finally, filing a petition for post-conviction relief would merely reiterate the same evidence and facts presented at his probation revocation hearing, which would amount to a waste of judicial resources and time.

II. Review of the Trial Court’s Sanction

[25] Now, to the merits of Davenport’s argument that the trial court erred by imposing sanctions on him for violations of probation. Davenport claims the one-year

executed term the trial court imposed is too severe and suggests that a shorter term of incarceration is more appropriate for his behavior. If a trial court determines that a person has violated a term or condition of probation within the probationary period, the court may impose one 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).

[26] We review a trial court's selection of a sanction for an abuse of discretion.² *Overstreet v. State*, 136 N.E.3d 260, 263 (Ind. Ct. App. 2019), *trans. denied*. An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

[27] Davenport was convicted of a violent crime, but the trial court granted his request to serve the executed portion of his sentence on work release. The terms and conditions of Davenport's placement explicitly barred him from threatening anyone. Despite being given the opportunity to serve his sentence on work release,

² Davenport argues that the sanction for his violation of the terms and conditions of his placement is inappropriate in light of the nature of his offense and the character of the offender, per Indiana Appellate Rule 7(B). This Court's authority to review and revise sentences under that appellate rule does not extend to probation violation cases. *Jones v. State*, 885 N.E.2d 1286, 1290 (Ind. 2008).

and despite the clear language of the terms and conditions that Davenport read and signed, he chose to disobey the rules and policies and his placement, including threatening an ACCC employee with violence upon being asked to leave a computer room. In fact, the trial court noted that Davenport's conduct was "very close" to the crime of intimidation. Tr. p. 54. Under these circumstances, the trial court acted well within its discretion to impose a sanction of one year of executed time, which was equal to the executed portion of Davenport's original sentence, plus three years of probation.

Conclusion

[28] For the reasons stated above, we affirm the judgment of the trial court.

[29] Affirmed.

Bradford, C.J., and Riley, J., concur.