MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

Chad A. Bowen,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 24, 2022

Court of Appeals Case No. 22A-CR-974

Appeal from the Decatur Superior Court

The Honorable Matthew D. Bailey, Judge

Trial Court Cause No. 16D01-2009-FD-1146

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Chad Bowen (Bowen), appeals following the trial court's revocation of his probation for non-support of a dependent child, a Class D felony, Ind. Code § 35-46-1-5(a) (2001).

[2] We affirm.

ISSUE

[3] Bowen presents this court with one issue which we restate as: Whether the trial court abused its discretion when it determined that he had violated a term of his probation and imposed part of his previously suspended sentence.

FACTS AND PROCEDURAL HISTORY

[4] On September 25, 2020, the State filed an Information, charging Bowen with non-support of his dependent child, H.R., from July 21, 2010, to September 11, 2020. On April 27, 2021, Bowen entered into a plea agreement with the State whereby he would plead guilty to the charge and he would be sentenced to 900 days, with four days executed and 896 days suspended to unsupervised probation. On May 6, 2021, the trial court accepted Bowen's guilty plea and sentenced him according to the terms of his plea agreement. As terms of his unsupervised probation, Bowen agreed not to commit any new criminal offenses and to pay his child support as ordered, namely $70 per week, with $10 of that amount going towards his arrearage.

[5] On November 18, 2021, the State filed a petition to revoke Bowen's probation, alleging that he had accrued a $12,456.87 child support arrearage as of November 12, 2021. On April 21, 2022, the trial court held a hearing on the State's petition. Shelly Warfield (Warfield), a child support division administrator, testified that in 2021, Bowen had paid approximately half of his $3,180 child support obligation and that, in 2022, he had made one payment of $100 on April 20, 2022, the day before the hearing. Bowen had not reported any employment to the child support division. Rebecca Six (Six), Bowen's probation officer, related that she had spoken with Bowen regarding his child support obligation at each of their meetings and that she had referred him to staffing agencies and factories for work. According to Six, Bowen had told her that the mother of his child did not really want his child support payments and that some jobs were "not worth walking to in the cold and in the rain." (Transcript p. 14). Six felt that Bowen preferred to work for employers who would pay him off the books in cash, that paying child support was not a priority for Bowen, and that Bowen "doesn't really want to work." (Tr. p. 14).

[6] After the State rested its case, Bowen did not present any evidence but moved the trial court for a separate hearing as to disposition. The trial court denied Bowen's motion for a separate dispositional hearing and ruled that Bowen had violated his probation. The trial court then proceeded to disposition. Bowen was sworn in and testified that he had not worked since September 2021 but had recently become employed and that, in addition to having made a child support payment the previous day, he intended to make one that day. Bowen

stated that he had provided clothes, shoes, school supplies, and "anything that's asked" for his child. (Tr. p. 19). Bowen requested that the trial court continue his probation.

[7] On April 22, 2022, the trial court entered an Order, revoking Bowen's probation. The trial court ordered Bowen to execute 540 days of his previously suspended sentence. The trial court also terminated Bowen's probation, ruling that Bowen had been unsuccessful.

[8] Bowen now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[9] Bowen challenges the evidence supporting the trial court's conclusions that he violated his probation for non-support of a dependent and that an executed sentence was merited. Probation is a matter of grace left to the trial court's discretion and is not a right to which a defendant is entitled. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). We review a trial court's probation decision for an abuse of discretion, which occurs only where the decision is against the logic and effect of the facts and circumstances before the court. *Id*. "A probation hearing is civil in nature, and the State must prove an alleged probation violation by a preponderance of the evidence." *Murdock v. State*, 10 N.E.3d 1265, 1267 (Ind. 2014). When a probationer challenges the sufficiency of the evidence supporting the revocation of his probation, we will consider only the evidence most favorable to the judgment, without regard to weight or

credibility. *Id*. We will affirm if there is substantial evidence of probative value to support the trial court's conclusion that the probationer violated any condition of his probation. *Id*.

II. *Inability to Pay Despite Bona Fide Efforts*

[10] A trial court may revoke probation if the probationer has violated a condition of his or her probation during the probation period. I.C. § 35-38-2-3(a)(1). However, "[p]robation may not be revoked for failure to comply with conditions of a sentence that imposes financial obligations on the person unless the person recklessly, knowingly, or intentionally fails to pay." *Id*. at (g). The State has the burden of proof to show both the fact of the violation and the requisite intent. *Runyon v. State*, 939 N.E.2d 613, 616 (Ind. 2010). When an alleged probation violation is based on a failure to pay child support, the trial court must also be satisfied that the probationer was unable to pay despite bona fide efforts to do so. *Id*. at 616-17. The probationer has the burden of proof to show both "an inability to pay and indicating sufficient bona fide efforts to pay so as to persuade the trial court that further imprisonment should not be ordered." *Id*. at 617.

[11] Here, Bowen does not argue that the State failed to prove the fact of his non-payment or his intent. Rather, Bowen contends that he proved that he was unable to pay his support as ordered and that he had made sufficient bona fide efforts to pay. In support of his argument, Bowen draws our attention to evidence that he had been unemployed since September 2021 but had obtained employment shortly prior to the April 21, 2022, hearing, he paid his support

when he was working, and that he had provided certain in-kind support to his child.

[12] However, this evidence was inadequate to meet Bowen's burden. Bowen's testimony indicated that he did not work from September 2021 to April 2022, but he did not testify regarding why he did not work during this period or regarding what other efforts he undertook to make the court-ordered child support payments that he missed. *See Smith v. State*, 963 N.E.2d 1110, 1114 (Ind. 2012) (finding insufficient evidence of inability to pay and bona fide efforts where Smith did not present evidence showing he was incapable of working, even where he implied he was unemployed due to health issues). On the other hand, Warfield's testimony established that Bowen did not make working to pay his child support payment a priority and that he chose not to work. The trial court could have reasonably concluded from this testimony that Bowen was able to work in order to pay his support but chose not to do so. While Bowen contends that it was "uncontroverted" that he paid his child support while he was employed, our review of the evidence indicates that he paid half of his child support obligation for 2021 while only claiming to be unemployed starting in September of that year. (Appellant's Br. p. 8). Bowen's arguments are essentially a request that we ignore this evidence that supports the trial court's determination and that we reweigh the evidence on appeal, which is contrary to our standard of review. *See Murdock*, 10 N.E.3d at 1267. In addition, the trial court was under no obligation to credit Bowen's unsubstantiated testimony that he had provided an unspecified amount of in-

kind support to his child. Even if the trial court had credited that testimony, Bowen has failed to provide us with any case law holding that evidence of in-kind payments is sufficient to prove bona fide efforts at child support payment for our present purposes, and our research uncovered none. Accordingly, we find no abuse of the trial court's discretion in revoking Bowen's probation and imposing an executed term.

CONCLUSION

[13] Based on the foregoing, we conclude that, because Bowen failed to prove that he was unable to pay his child support and that he had made bona fide efforts to do so, the trial court did not abuse its discretion in revoking Bowen's probation and imposing part of his previously suspended sentence.

[14] Affirmed.

[15] Bailey, J. and Vaidik, J. concur