

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Douglas Wayne Crum,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 25, 2023

Court of Appeals Case No.
22A-CR-1587

Appeal from the Orange Circuit
Court

The Honorable Steven L. Owen,
Judge

Trial Court Cause No.
59C01-1107-FA-49

Weissmann, Judge.

[1] With forty-seven days left of what was originally a four-year probationary term, Douglas Crum tested positive for methamphetamine. After finding Crum violated the terms and conditions of his probation by using illegal drugs, the trial court revoked Crum's probation and ordered him to serve roughly 3½ years of his previously suspended sentence in the Indiana Department of Correction (DOC). Crum appeals, arguing that the State presented insufficient evidence that he used methamphetamine during his probationary term. We disagree and affirm.

Facts

[2] Crum was convicted of five drug-related offenses in December 2016: (1) dealing in a schedule II controlled substance, a Class B felony; (2) dealing in a schedule III controlled substance, a Class B felony; (3) unlawful use or possession of a legend drug, a Class D felony; (4) maintaining a common nuisance, a Class D felony; and (5) dealing in marijuana, a Class A misdemeanor. The trial court sentenced Crum to an aggregate term of ten years in the DOC, with 1,464 days credit and four years suspended to probation. The court imposed standard terms and conditions on Crum's probation, including that he refrain from using illegal drugs.

[3] Crum began his probationary term sometime in 2017. He purportedly was scheduled for release from probation on December 17, 2021.¹ But on November 1, 2021, Crum failed a random hair follicle drug screen by testing positive for methamphetamine. Based on this failed drug screen, the State filed a petition to revoke Crum's probation, alleging he violated its terms and conditions by using illegal drugs.

[4] At his probation revocation hearing, Crum denied ever using methamphetamine and was stumped as to how it ended up in his system on November 1, 2021. Testifying in his defense, Crum stated:

The only thing that I could think of (sic) on Halloween I dyed my hair. But I dyed my hair all of the time Judge and um, that's the only thing I could say unless it's in the dye, where I'm dyeing my hair. The chemicals inside where you gotta leave it on your head for like thirty-five to forty-five minutes. That's the only thing that I can figure that it would come back as, it would have to be that. Because I have never ever did meth where something has showed up in my system like that.

Tr. Vol. II, p. 38.

[5] The trial court found that Crum violated the terms and conditions of his probation by using illegal drugs. The court therefore revoked Crum's probation and ordered him to serve roughly 3½ years of his previously suspended

¹ As a result of a 2018 probation violation, the trial court extended Crum's probationary term by one year. It is not clear from the record whether the purported December 17, 2021, end date accounts for this extension.

sentence in the DOC. Crum belatedly appeals, arguing that the State presented insufficient evidence of a probation violation.

Discussion and Decision

I. Right to Appeal

[6] On cross-appeal, the State argues that Crum forfeited his right to appeal his probation revocation by failing to timely file a notice of appeal. Indiana Appellate Rule 9(a)(5) provides: “Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2.” Crum did not timely file his notice of appeal, and Post-Conviction Rule 2 is not available for belated appeals of probation revocations. *Dawson v. State*, 943 N.E.2d 1281, 1281 (Ind. 2011). Thus, Crum indeed forfeited his right to appeal his probation revocation. But as Crum observes, we may restore a forfeited right to appeal if there are “extraordinarily compelling reasons” to do so. *In re Adoption of O.R.*, 16 N.E.3d 965, 971 (Ind. 2014). We find such reasons here.

[7] After sentencing, Crum promptly filed a request for appointment of pauper appellate counsel. The trial court appointed attorney Matthew McGovern to represent Crum five days before Crum’s notice of appeal was due. However, attorney McGovern mistakenly calendared the due date for the notice of appeal for 30 days from the date of his appointment rather than the date of the trial court’s probation revocation order. As a result, Crum missed the notice of appeal deadline through no fault of his own. Within three weeks of the

deadline, however, attorney McGovern realized his mistake and filed a belated notice of appeal.

- [8] Given the foregoing circumstances, we believe Crum’s right to appeal his probation revocation should be restored. We therefore address the merits of Crum’s sufficiency challenge.

II. Sufficiency of the Evidence

- [9] Crum acknowledges that he tested positive for methamphetamine while on probation. But he claims the State presented no evidence of the time period covered by his failed hair follicle drug screen. Therefore, according to Crum, the trial court could only speculate that Crum ingested methamphetamine while on probation rather than before his probationary term began nearly four years earlier.

- [10] “It is axiomatic that, to violate one’s probation, one must perform some prohibited act, or fail to perform some required action, *during* the period of probation.” *Carpenter v. State*, 999 N.E.2d 104, 106 (Ind. Ct. App. 2013) (emphasis added). But “[a] probation hearing is civil in nature and the State need only prove the alleged violations by a preponderance of the evidence.” *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999). In determining whether there is sufficient evidence to support a probation revocation, we consider the evidence most favorable to the judgment without reweighing that evidence or judging witness credibility. *Id.* “If there is substantial evidence of probative value to

support the trial court's conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation." *Id.*

[11] At Crum's probation revocation hearing, the State presented the results of Crum's hair follicle drug screen, which showed that Crum tested positive for methamphetamine on November 1, 2021. Crum's probation officer, Jeff Holland, also testified that Crum had previously tested negative for illegal drugs approximately one year earlier. However, this prior drug test was a urine screen, not a hair follicle screen.

[12] When Officer Holland was asked why he ordered a hair follicle drug screen versus another drug screening method in November 2021, Officer Holland explained:

It's a timing (sic). *If you suspect or if you haven't drug screened someone in three months and you hear or get some kind of impression that they may have been using within that three months* um, the oral will not catch any drug use past two weeks and then urine, any kind of drug use past thirty days isn't picked up so it's usually a, a hair test is done for a larger period of time.

Tr. Vol. II, p. 21 (emphasis added). Officer Holland further testified that he ordered Crum's hair follicle drug screen after he was informed by "law enforcement and a civilian" that Crum was using illegal drugs. *Id.* at 22

[13] From this testimony, the trial court could reasonably infer that Crum's positive hair follicle drug screen established that he ingested methamphetamine during the preceding three months—August, September, and October 2021—and not

some time before his probationary term began in 2017, nearly four years prior. We therefore find sufficient evidence to support the trial court's finding that Crum violated the terms and condition of his probation.

[14] The trial court's judgment is affirmed.

May, J., and Crone, J., concur.