MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Donald R. Barnes,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

November 16, 2021

Court of Appeals Case No. 20A-CR-2145

Appeal from the Elkhart Circuit Court

The Honorable Teresa L. Cataldo, Judge

Trial Court Cause No. 20D03-0212-FA-213

Robb, Judge.

Case Summary and Issue

[1] Donald Barnes was convicted in 2003 of child molesting, a Class A felony, and sentenced to fifty years in the Indiana Department of Correction ("DOC") with twenty years suspended, ten years of which were to be served on intensive reporting probation. In September 2016, Barnes' sentence was modified, and he was immediately released to probation on electronic monitoring. In May 2020, the Elkhart County Probation Department filed a petition to revoke Barnes' probation. Barnes admitted violating his probation and the trial court revoked his probation and ordered him to serve the twenty previously suspended years of his sentence. Barnes appeals the sanction, raising one issue for our review: whether the trial court abused its discretion in ordering him to serve his entire previously suspended sentence.[1] Concluding the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

[2] In 2003, Barnes pleaded guilty to one count of Class A felony child molesting and the State dismissed two other counts of Class A felony child molesting.

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[1] The State cross-appeals, arguing Barnes' appeal should be dismissed because the trial court erroneously allowed his appeal to be filed belatedly. The State previously filed a motion to dismiss which was denied by the motions panel of this court on March 29, 2021. We acknowledge the case law cited by the State that holds belated appeals are not available from orders revoking probation, *see* Brief of Appellee at 9-10, but the record shows that although Barnes timely requested appointment of an attorney to pursue an appeal of the trial court's decision, the trial court did not appoint him an attorney until *after* a notice of appeal could have been timely filed. Under these circumstances, where Barnes was not at fault for the belated appointment of counsel and corresponding belated filing of the appeal, we decline to reconsider the decision of the motions panel denying the motion to dismiss and will address this case on the merits.

The plea agreement called for a maximum sentence of fifty years, with not more than thirty years executed. The trial court accepted Barnes' plea and consistent with the terms of the agreement, sentenced him to fifty years in the DOC, with twenty years suspended, including ten years of reporting probation.

[3] In 2016, Barnes filed a motion seeking modification of his sentence. The trial court granted his motion and authorized Barnes' "immediate release to probation with the component of electronic monitoring added as a condition thereof." Appellant's Amended Appendix ("App."), Volume II at 91.[2] Upon his release, Barnes acknowledged and signed Terms of Probation, including Special Probation Conditions for Adult Sex Offenders and Special Probation Conditions for GPS Monitoring.

[4] In May 2020, the Elkhart County Probation Department filed a petition alleging Barnes had violated the terms of his probation. The specific terms of the Special Probation Conditions for Adult Sex Offenders that Barnes was alleged to have violated were as follows:

> 11. You shall attend, actively participate in and successfully complete a court-approved sex offender treatment program as directed by the court. [Y]ou must maintain steady progress towards all treatment goals as determined by your treatment

[2] Barnes was released on September 16, 2016. His earliest possible release date prior to the modification was January 11, 2017. *See* Transcript, Volume II at 14.

provider. Unsuccessful termination from treatment . . . will be considered a violation of your probation. . . .

On 5/29/2020, this [probation] Officer received an email from . . . [Barnes'] therapist, that she was unsuccessfully terminating the defendant from treatment [because] he had accessed, downloaded, and purchased varying apps on his phone that involved social media, chatrooms, pornography sites, and dating websites, many of which included images and possible contacts with minors.

* * *

13. You shall not possess obscene matter as defined by IC 35-49-2-1 or child pornography as defined in 18 U.S.C. § 2256(8), including but not limited to: videos, magazines, books, DVDs, and material downloaded from the Internet.

30. You are prohibited from accessing, viewing, or using internet websites and computer applications that depict obscene matter as defined by IC 35-49-2-1 or child pornography as defined in 18 U.S.C. § 2256(8). You shall not possess or use any data encryption technique or program to conceal your internet activity.

On 05/26/2020, . . . [t]his Officer investigated the defendant's RemoteCom page, which produced 1,075 screenshots taken directly from the defendant's cellular phone, as well as a report of

> all sites opened.[3] Hundreds of the screenshots contained pictures and videos depicting obscene matter. . . .
>
> On 5/28/2020, this Officer attended the defendant's group . . . administered by [his] therapist[.] This Officer and [the therapist] confronted the defendant about this Officer's findings. The defendant admitted to purposefully viewing obscene matter . . ., as well as making purchases on these websites for memberships and credits to be used to view videos. In the professional opinions of [the therapist] and this Officer, several females depicted on the websites that the defendant admitted to viewing looked extremely young, and possibly under the age of 16 based on their appearance. [The therapist] asked the defendant if he was aware that the females could potentially be minors under the age of 16 and the defendant said yes[.]

App., Vol. II at 49-50. The probation officer noted that he "was able to clearly see that the defendant was purposefully scrolling through these sights [sic] to view the obscene matter" and noted that he and Barnes' therapist "are very concerned for the safety of the community given the defendant's original conviction, and his acknowledgement of the possibility that some of the females he viewed could have potentially been under 16 years old. The defendant has had adequate sex offense specific treatment to have the support and tools to avoid this behavior and he simply chose not to." *Id.* at 50-51. A warrant without bond was issued and Barnes was arrested on May 29, 2020.

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[3] Barnes' attorney explained at the dispositional hearing that "[w]hen the Court gives a sex offender the ability to be on the internet, there is a program attached that takes screen shots essentially every second." Tr., Vol. II at 7.

[5] Barnes admitted to his violation and at the dispositional hearing, he gave a statement to "highlight some of the many positive aspects since [the trial court] granted me an early release from incarceration in 2016." Transcript, Volume II at 3. He mentioned his "faithful attendance" at church, his participation in NA and AA, his work schedule averaging more than fifty hours per week, his regular donation of platelets as "part of my amends and restitution for my crime," and his support of charity organizations. *Id.* at 3-5. His counsel asked that the trial court give Barnes a time-served sanction (seventy-seven days) and remove Barnes' authorization for internet usage, arguing that "it wasn't that [Barnes] sought [pornography] out. It was that he had a pop up on his phone and then followed down the rabbit hole[.]" *Id.* at 6. Counsel also noted that Barnes' violations "essentially stem from a less than 24 hour period." *Id.* at 8. The probation department recommended, and the State argued, that Barnes' suspended sentence should be revoked, and he should be ordered to serve the balance of his sentence at the DOC.

[6] In announcing its decision, the trial court noted that Barnes had admitted that several females depicted on the websites looked extremely young and were possibly under the age of sixteen, and that he "tend[s] to minimize, deflect and blame others." *Id*. at 12. In that regard, the trial court dismissed the explanation that the websites popped up on his phone without him seeking them out:

> I don't care what pops up on your phone, the fact that you clicked on it and you – if it takes an image every second and you

> viewed over 1,000 images on there – let's see, does it have the exact number[?] Let's just say 1,500 for argument purposes. That is 25 minutes. So 25 minutes to a half hour of viewing sites every second you knew that you shouldn't be looking at.

Id. at 12-13. The trial court told Barnes the recommendation from the probation department was "justified due to your actions and intentionally violating the terms of probation by viewing numerous pornographic sites. . . . So the fact . . . that you even went and clicked on pornographic sites is what the Court is basing the violation on, in addition to you viewing that for over 25 minutes." *Id.* at 13. The trial court revoked Barnes' probation and ordered him returned to the DOC to serve his previously suspended sentence. Barnes now appeals.

Discussion and Decision

I. Standard of Review

[7] Probation is not a right; rather, it is a matter of grace left to the trial court's discretion. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). Once a trial court orders probation, it is given considerable leeway in deciding how to proceed. *Id*. If the court finds that a person has violated a condition of probation at any time before termination of the probationary period, and the petition to revoke is filed within the probationary period, the court may impose one or more sanctions, including ordering execution of all or part of the sentence that was suspended at the time of initial sentencing. Ind. Code § 35-38-2-3(h). A trial court's decision imposing sanctions for probation violations is reviewed for an

abuse of discretion. *Holsapple v. State*, 148 N.E.3d 1035, 1039 (Ind. Ct. App. 2020). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id*.

II. Sanction for Probation Violation

[8] Barnes does not dispute that he violated the terms of his probation; he admitted as much to the trial court. His sole argument is that the trial court abused its discretion in revoking all twenty years of his suspended sentence as a sanction for the violation because of the "imprecise count of websites visited . . ., only totaling 25 minutes, coupled with the fact there were no new charges filed[.]" Appellant's Brief at 6.

[9] Barnes argues that the State's evidence regarding his violation was "imprecise," relying on *Brown v. State*, 162 N.E.3d 1179 (Ind. Ct. App. 2021). In *Brown*, the defendant's probation was revoked, and he was ordered to serve approximately sixteen years of his previously suspended sentence. In pertinent part, the State alleged that the defendant had violated his probation by missing appointments with his probation officer. The State's evidence of the defendant's violation consisted of testimony that he missed some appointments with his probation officer but made up some of them (the officer did not keep records that showed when a later appointment replaced an earlier, missed appointment) and made up others with another probation officer. We characterized this evidence as "imprecise" and determined that although the trial court did not abuse its discretion in revoking the defendant's probation, it did abuse its discretion by

the sanction imposed for missing an undetermined number of appointments with his probation officer. *Id.* at 1182-84. We remanded for the trial court to sanction the defendant "in a manner commensurate with the severity of the missed appointments with his probation officer[.]" *Id.* at 1184.

[10] In this case, the petition to revoke Barnes' probation alleged that on the day in question, RemoteCom captured 1,075 screenshots from his phone at the rate of one per second, of which "[h]undreds" contained pictures and videos depicting obscene matter. App., Vol. II at 50.[4] In addition, Barnes accessed at least ten websites that caused concern because they were "essentially hookup sites" and made purchases from some of those websites. Tr., Vol. II at 7. The State's evidence here was not "imprecise" in the same way as the evidence in *Brown*. The State's evidence identified the inappropriate websites Barnes visited, showed the exact number of screenshots captured from Barnes' phone, and demonstrated that he looked at obscene material he knew he was not supposed to access or view. Perhaps the trial court was imprecise in, "for argument purposes[,]" *id.* at 12-13, rounding up the number of screenshots captured in order to estimate how long Barnes viewed obscene material that allegedly popped up unwanted on his phone, but the evidence itself was not imprecise.

[4] The petition also alleged that Barnes violated a condition of his probation when he was unsuccessfully terminated from his treatment program because of accessing and viewing obscene material. The trial court identified only Barnes' viewing of pornographic websites as a violation, *see* Appealed Order at 2, and therefore we do not consider that allegation.

[11] Barnes also notes that the State's evidence alleged only that *some* of the captured images "*possibly* contained under age girls[.]" Br. of Appellant at 8 (emphasis added). Indeed, the probation officer believed, and Barnes conceded, that some of the images Barnes viewed depicted "extremely young looking females" who could be underage. App., Vol. II at 50. But the allegation that Barnes had violated his probation was not based on him viewing *child* pornography, it was based on the fact he accessed and viewed *any* obscene material, which was prohibited by his special probation conditions. *See id.* at 49-50. The facts that some of those materials may have contained child pornography and that Barnes admitted he knew he might be viewing obscene matter depicting minors were facts for the trial court to consider in fashioning an appropriate sanction.

[12] Finally, Barnes seems to equate his violation with a "technical violation," noting that the State did not allege that he committed a new offense as a result of his violation. Essentially, Barnes argues that his violation was not egregious enough to warrant revocation of his entire suspended sentence. To the extent Barnes argues that anything *but* commission of a new offense is a technical violation of probation, we disagree. Our appellate courts have expressed distaste for imposing a significant amount of previously suspended time for minor, technical violations of the conditions of probation. *See Johnson v. State*, 62 N.E.3d 1224, 1230 (Ind. Ct. App. 2016) (full revocation of previously suspended sentence not warranted when defendant committed only minor, technical violations of probation by leaving confines of apartment but not leaving apartment building and leaving early for authorized errand). But we

have never said that only the commission of a new offense would warrant full or nearly full revocation of a suspended sentence. *See Overstreet v. State*, 136 N.E.3d 260, 264 (Ind. Ct. App. 2019) (holding three positive drug screens "are hardly mere 'technical' violations of probation" and affirming revocation of a suspended sentence even without a finding that the defendant had committed a new offense), *trans. denied*. Therefore, the fact that Barnes was not alleged to have committed a new offense as a result of his violation is not determinative.

[13] Further, Barnes' violation is not, in our view, insignificant or "technical." Probation is a criminal sanction whereby a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment. *Bratcher v. State*, 999 N.E.2d 864, 873 (Ind. Ct. App. 2013), *trans. denied*. The conditions are designed to ensure that probation serves as a period of genuine rehabilitation and that the public is not harmed by a probationer living within the community. *Jones v. State*, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005). The conditions Barnes violated restricted his ability to access or view obscene material or child pornography, and his violation of those conditions is especially significant for a defendant on probation for a sex offense against a minor.

[14] Barnes admitted that he accessed and viewed obscene material in violation of the conditions of his probation and that he knew some of the material might depict minors. The trial court had previously extended leniency to him by modifying his sentence and releasing him to probation early. The trial court noted at the dispositional hearing that it had informed Barnes when it modified

his sentence that it would be paying particular attention to him and "that any mess ups whatsoever will probably return you back to the [DOC]." Tr., Vol. II at 11-12. Despite knowing the possible consequences, not only did Barnes "mess up" but he did so by acting in a way that casts doubt on the efficacy of probation as a means of rehabilitation despite his other successes while out on probation. The trial court seemed to give Barnes the benefit of the doubt that he did not initially access the material on his own but noted that he continued to view the material past the point of making a brief, innocent mistake. And we also note that he purchased material from the restricted sites, which is a far cry from having unwanted material forced upon him through a pop-up message. Although Barnes was on restricted websites for less than twenty-five minutes, as the State pointed out at the revocation hearing, "it doesn't take long to find a victim[.]" Tr., Vol. II at 10.

[15] Indiana Code section 35-38-2-3(h) gave the trial court authority to order execution of all or part of Barnes' suspended sentence upon finding that he had violated a condition of his probation warranting revocation, and Barnes had been specifically warned that return to the DOC was a likely consequence of a violation. The trial court did not abuse its discretion by ordering Barnes to serve the balance of his previously suspended sentence.

Conclusion

[16] We conclude the trial court did not abuse its discretion by revoking Barnes' probation and therefore affirm the trial court's order that Barnes serve the balance of his previously suspended sentence.

[17] Affirmed.

Bradford, C.J., and Altice, J., concur.