MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Tracy Caliboso,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 27, 2021

Court of Appeals Case No. 21A-CR-564

Appeal from the Cass Superior Court

The Honorable James K. Muehlhausen, Judge

Trial Court Cause Nos. 09D01-2001-F5-5 09D01-2005-F6-149

Weissmann, Judge.

[1] Two months after her conviction for Level 5 felony domestic battery, Tracy Caliboso violated the terms of her probation by committing Level 6 felony domestic battery and Class B misdemeanor disorderly conduct. The trial court sanctioned Caliboso for the probation violation by reinstating her suspended sentence of 4 years executed. For the new offenses, the court imposed a combined sentence of 2½ years, with 1½ years suspended to probation, to be served consecutively to the probation sanction.

[2] Caliboso belatedly appeals her probation revocation sanction and her sentence for the new offenses, arguing that the trial court failed to consider her ADHD and bipolar disorder as mitigating circumstances. Finding no error, we affirm.

Facts

[3] In January 2020, Caliboso struck her 12-year-old son during an unspecified incident at her home. The State charged Caliboso with Level 5 felony domestic battery under Cause No. 09D01-2001-F5-005 (hereinafter "Case 5"). Caliboso pleaded guilty and was sentenced to 4 years imprisonment, all suspended to probation.

[4] Two months into her probationary period, during another unspecified incident at her home, Caliboso struck her mother and was unruly when police responded to the scene. The State charged Caliboso with Level 6 felony domestic battery and Class B misdemeanor disorderly conduct under Cause No. 09D01-2005-F6-149 (hereinafter "Case 149"). The State also filed a notice

of probation violation in Case 5, alleging Caliboso violated the terms of her probation by committing the new offenses.

[5] Caliboso pleaded guilty to the charges in Case 149 and admitted to the probation violation in Case 5. While Caliboso was awaiting a consolidated disposition and sentencing hearing on those matters, the State filed another notice of probation violation in Case 5, alleging Caliboso tested positive for methamphetamine, amphetamine, and hydrocodone during a random drug screen. The trial court set this matter for a factfinding hearing to coincide with Caliboso's disposition in Case 5 and her sentencing in Case 149.

[6] In the end, the trial court revoked Caliboso's probation in Case 5 and ordered her to serve in prison her originally suspended 4-year sentence. In Case 149, the court sentenced Caliboso to 2½ years for domestic battery, with 1 year executed and 1½ years suspended to probation, and to 180 days executed for disorderly conduct. Caliboso's sentences were ordered to be served concurrently to each other but consecutively to her probation revocation sanction, for a combined executed term of 5 years. No findings were issued on the newly filed notice of probation violation in Case 5; however, Caliboso admitted to testing positive for methamphetamine during a random drug screen. Tr. Vol. II, p. 64.

[7] Caliboso requested and was appointed appellate counsel, but due to no fault of her own, she failed to file a timely notice of appeal in either Case 5 or Case 149. Eventually, however, Caliboso petitioned to file a belated appeal in both cases

pursuant to Indiana Post-Conviction Rule 2(a)(1). The trial court granted Caliboso's petition, and this appeal followed.

Discussion and Decision

[8] Caliboso challenges her probation revocation sanction in Case 5 and her sentences for the offenses in Case 149. As to both, she argues that the trial court failed to consider her ADHD and bipolar disorder as mitigating circumstances. We review such issues for an abuse of discretion. *Heaton v. State*, 984 N.E.2d 614, 616 (Ind. 2013) (as to probation revocation sanctions); *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (as to sentencing), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances, or when the trial court misinterprets the law. *Heaton*, 984 N.E.2d at 616.

I. Case 149 Sentence

[9] Caliboso claims the trial court erred by failing to consider her ADHD and bipolar disorder as mitigating circumstances at sentencing. "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Anglemyer*, 868 N.E.2d at 493.

[10] Our review of the record finds evidence that Caliboso lives with ADHD and bipolar disorder. While these conditions generally make Caliboso "unstable," Tr. Vol. II, pp. 58, 60, she has medication that helps "a lot." *Id.* at 65, 68. At the time of her offenses, however, Caliboso was not taking her medication. *Id.* at

61, 68. She was using illicit drugs. *Id.* at 67. And Caliboso took responsibility for this decision at her sentencing, apologizing for her drug use and admitting—"My mental health should have been my only concern[.]" *Id.*

[11] We further find that, on the heels of Caliboso's apology, the following exchange occurred between her and the trial court:

> COURT: . . . Ms[.] Caliboso you can't say we haven't tried, in fact I think we've tried about everything for you and none of it worked. You know at some level I know you have a choice, I don't believe you're a victim of these drugs you take and they just take away your ability to choose. At bare minimum you have the right to choose whether you take the drug… (sic) medication or not and if you don't it's like you're asking for the consequences. Ms. Caliboso we just can't keep doing this.
>
> DEFENDANT: I understand sir, I'm sorry, I'm truly sorry. I am an adult and I will be an adult about all my choices.
>
> COURT: Okay, alright so at the DOC they do have mental health treatment and counseling and I am going to talk to the folks down there and make sure you get that.
>
> DEFENDANT: Okay.
>
> COURT: But there is a consequence Ms. Caliboso, I'm all for giving people chances but if they don't take advantage of them there's consequence.

Tr. Vol. II, pp. 70-71.

[12] Based on the evidence presented and the trial court's comments thereon, it appears to us that the court considered Caliboso's ADHD and bipolar disorder at sentencing but determined they were not significant mitigating

circumstances. *See Anglemyer*, 868 N.E.2d at 493 (presuming defendant's mental illness was deemed not significant where trial court emphasized defendant's choice not to participate in treatment).

[13] Caliboso next claims that the trial court erred by failing to carefully explain why it did not find her ADHD and bipolar disorder to be significant mitigating circumstances. The cases on which Caliboso relies, however, all involved defendants who were found guilty but mentally ill under Indiana Code § 35-36-2-3. *See, e.g.*, *Smith v. State*, 770 N.E.2d 818, 823 (Ind. 2002) (finding error in a trial court's failure to explain why it assigned no mitigating weight to mental illness of defendant found guilty but mentally ill). Because Caliboso pleaded guilty—not guilty but mentally ill—these cases are easily distinguishable. *See generally Weeks v. State*, 697 N.E.2d 28, 30 (Ind. 1998) (explaining a finding of guilty but mentally ill "may signal that significant evidence of mitigating value on the point has been presented.").

[14] In most cases, a trial court is "not obligated" to explain why it does not find the existence of a mitigating factor that has been argued by counsel. *Anglemyer*, 868 N.E.2d at 493. We therefore conclude that the trial court was not required to explain why it did not find Caliboso's ADHD and bipolar disorder to be significant mitigating circumstances. Finding no abuse of discretion in the trial court's sentencing decision, we affirm the court's judgment as to Case 149.

II. Case 5 Sanction

[15] The State argues that Caliboso forfeited her right to appeal her probation revocation sanction by failing to timely file a notice of appeal. We agree. 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." Caliboso did not file a timely notice of appeal in Case 5. Accordingly, she forfeited her right to appeal her probation revocation sanction except as provided by Post Conviction Rule 2. *See* Ind. Appellate Rule 9(a)(5).

[16] Caliboso brought her appeal pursuant to Post-Conviction Rule 2(a)(1), which provides: "An eligible defendant[1] 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" under certain circumstances. However, our Supreme Court has held that "the sanction imposed when probation is revoked does not qualify as a 'sentence' under the Rule." *Dawson v. State*, 943 N.E.2d 1281, 1281 (Ind. 2011). Thus, Post-Conviction Rule 2 is not available for belated appeals of probation revocation sanctions. *See id.*

[17] Caliboso attempts to distinguish *Dawson* by highlighting it involved a stand-alone probation revocation sanction, whereas her probationary matter (Case 5) was consolidated with a sentencing matter (Case 149). She relies on Appellate

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[1] The statute defines "eligible defendant" as "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." P-C.R.2.

Rule 38(A), which provides that actions consolidated for hearing in the trial court "shall remain consolidated on appeal." But this Rule presumes a party's right to appeal in both actions. Because Post-Conviction Rule 2 is not available for Caliboso's belated appeal of her probation revocation sanction, *see Dawson*, 943 N.E.2d at 1281, Caliboso forfeited her right to appeal in Case 5 by failing to file a timely notice of appeal. *See* App. R. 9(a)(5). Absent a right to appeal, Case 5 cannot "remain consolidated" with Case 149. *See* Ind. Appellate Rule 38(A).

[18] Caliboso alternatively claims that we should decide this case on its merits under *In re Adoption of O.R.*, 16 N.E.3d 965 (Ind. 2014). In *O.R.*, our Supreme Court declared that appellate courts may restore a forfeited right to appeal if there are "extraordinarily compelling reasons" to do so. *Id.* at 971. We find such reasons here.

[19] The record reveals that Caliboso requested and was appointed appellate counsel at her consolidated disposition and sentencing hearing. But for unknown reasons, appellate counsel was not notified of the appointment until six days after Caliboso's notice of appeal was due. Two days later, Caliboso petitioned the trial court for permission to file a belated notice of appeal in both Case 5 and Case 149, which the trial court granted. In doing so, the court expressly found that Caliboso had a been diligent in pursuing an appeal and that the failure to file a timely notice of appeal was not her fault. App. Vol. II, p. 175.

[20] Given the foregoing circumstances, we believe Caliboso's right to appeal her probation revocation sanction should be restored. However, for the reasons

articulated as to Case 149 above, her argument that the trial court failed to consider her ADHD and bipolar disorder as mitigating circumstances is without merit. We therefore affirm the court's judgment as to Case 5.

[21] Affirmed.

Mathias, J., and Tavitas, J., concur.