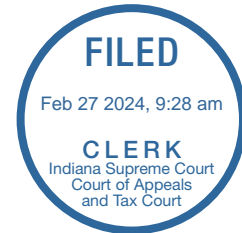


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE
Court of Appeals of Indiana

Joshua Stewart Simons,
Appellant-Respondent

v.

State of Indiana,
Appellee-Petitioner

February 27, 2024

Court of Appeals Case No.
23A-CR-2379

Appeal from the Ohio Circuit Court

The Honorable Kimberly A. Schmaltz, Magistrate

Trial Court Cause No.
58C01-2301-F6-1

Memorandum Decision by Judge Bradford
Chief Judge Altice and Judge Felix, concur.

Bradford, Judge.

Case Summary

- [1] After pleading guilty to Level 6 felony theft, Joshua Simons was sentenced to time served and placed on probation. Simons soon left the State and failed to report to probation as required. Following Simons's admission that he had violated the terms of his probation, the trial court ordered him to serve 365 days of his previously-suspended sentence, which order Simons claims was an abuse of discretion. Because we disagree, we affirm.

Facts and Procedural History

- [2] On January 5, 2023, Simons took two packages from the porch of a home in Rising Sun. Eight days later, the State charged Simons with Level 6 felony theft, and, after Simons pled guilty, the trial court sentenced him to 910 days of incarceration with 730 days suspended to probation. Simons received credit for time served, and he was released on April 15, 2023. As a condition of probation, Simons was required to report to the probation department within five days of his release. On May 5, 2023, the probation department filed a notice of probation violation, alleging that Simons had failed to report to probation within five days of his release and stating that Simons had had no contact with the probation department.
- [3] Simons was arrested in Kentucky on August 30, 2023. The trial court held a fact-finding hearing on September 8, 2023. During Simons's testimony, he claimed that he was a resident of Alabama and that his son had recently passed

away. Simons also admitted, “I did leave. I did go to Alabama and that broke a condition of probation. I admit that.” Tr. Vol. II p. 14. The trial court found that Simons had violated the terms of his probation and heard testimony that, in Alabama and Georgia, Simons has had over ten criminal convictions. Simons had also been charged with burglary and rape, but the dispositions of those cases were unknown. The trial court determined that Simons had a “significant criminal history” and ordered that he serve 365 days of his 730 remaining days of probation and that his probation would terminate upon serving that time. Tr. Vol. II p. 19.

Discussion and Decision

[4] Simons argues that the trial court abused its discretion in ordering him to execute 365 days of his previously-suspended sentence. The Indiana Supreme Court has held that “a trial court’s sentencing decisions for probation violations are reviewable using the abuse of discretion standard[,]” explaining that

[o]nce a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed. If this discretion were not afforded to trial courts and sentences were scrutinized too severely on appeal, trial judges might be less inclined to order probation to future defendants.

Prewitt v. State, 878 N.E.2d 184, 187 (Ind. 2007). An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances. *Id.*

[5] Probation revocation is a two-step process. *Cox v. State*, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006). First, there must be a factual determination that a violation of a probation condition occurred by a preponderance of the evidence. *See id.* Here, Simons admitted that he had violated the terms of his probation by failing to report to probation as ordered. Second, the trial court must determine whether the violation warrants revocation. *See id.* A trial court may revoke the defendant’s probation upon proof of a single violation. *See, e.g., Killebrew v. State*, 165 N.E.3d 578, 582 (Ind. Ct. App. 2021) (citations omitted), *trans. denied*. Where a violation of the terms of probation has been established, Indiana Code section 35-38-2-3(h)(3) allows the trial court to “[o]rder execution of all or part of the sentence that was suspended at the time of initial sentencing.”

[6] We conclude that the trial court did not abuse its discretion in ordering Simons to serve half of his remaining term of probation, or 365 days. Simons’s extensive criminal history indicates that his numerous contacts with the criminal justice system have not caused him to reform himself, with a criminal record dating back to 2000, which includes convictions in Alabama and Georgia for “Assault, Theft of Property, Marijuana, Receiving Stolen Property, Harassment, Invasion of Privacy, another Receiving Stolen Property, Failures to Appear, Shoplifting, Theft, [and] another Failure to Appear.” Tr. Vol. II p. 15. Simons has also been charged with rape and burglary, although the dispositions of those cases are unknown. Moreover, there is reason to believe that continuing Simons on probation would only result in more violations of its

terms, with him residing out-of-state and having already established that he is a flight risk by having left Indiana very soon after his original sentencing.

[7] Simons contends only that the trial court abused its discretion in ordering him to serve 365 days of his previously-suspended sentence for what he contends is a technical violation of the terms of his probation. We cannot agree that leaving the State almost immediately upon release and failing to report is a merely technical violation of the terms of probation. The Indiana Supreme Court has characterized “(1) failure to keep the probation department informed of [] current address; (2) failure to obtain a substance abuse evaluation; and (3) failure to verify employment with the probation department” as “technical” violations of the terms of probation. *Heaton v. State*, 984 N.E.2d 614, 615 (Ind. 2013). In this case, however, we cannot say that Simons’s failure to report was merely technical, because, at the very least, his leaving Indiana prevented authorities from easily ensuring that any of the other terms of probation were being satisfied. Simons has failed to establish that the trial court abused its discretion in ordering him to serve 365 days of his previously-suspended sentence.

[8] The judgment of the trial court is affirmed.

Altice, C.J., and Felix, J., concur.

ATTORNEY FOR APPELLANT

R. Patrick Magrath
Alcorn Sage Schwartz & Magrath, LLP
Madison, Indiana

ATTORNEYS FOR APPELLEES

Theodore E. Rokita
Indiana Attorney General

Alexandria Sons
Deputy Attorney General
Indianapolis, Indiana