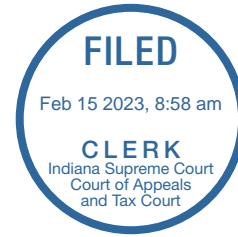


MEMORANDUM DECISION

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 Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Gary W. Miller, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 15, 2023

Court of Appeals Case No.
22A-CR-2440

Appeal from the
Ripley Superior Court

The Honorable
Jeffrey Sharp, Special Judge

Trial Court Cause No.
69C01-1205-FA-3

Memorandum Decision by Judge Foley
Judges Vaidik and Tavitas concur.

Foley, Judge.

- [1] Gary W. Miller, Jr. (“Miller”) appeals from the trial court’s order revoking his probation. He raises one issue for our review: whether the trial court abused its discretion when it ordered him to serve the majority of his previously suspended sentence. He argues that, because he self-reported his violation and then admitted to the violation at the revocation hearing, it was an abuse of discretion to revoke almost all of his suspended sentence. Because we find no abuse of discretion, we affirm.

Facts and Procedural History

- [2] On June 7, 2013, Miller pleaded guilty to Class A felony child molesting and was sentenced to twenty-five years with eighteen years executed and seven years suspended to probation. On October 8, 2020, he was released from the Department of Correction (“DOC”) and placed on probation. Miller’s probation required him to register as a sex offender and prohibited him from having any contact with a child under the age of sixteen. On May 11, 2021, the State filed a petition for probation revocation because Miller was alleged to have committed a new criminal offense, failure to register as a sex offender as a Level 6 felony. On August 18, 2021, Miller admitted the violation, and the trial court subsequently revoked his probation and ordered him back to the DOC for two years. On June 16, 2022, Miller was released from the DOC and again began serving his suspended sentence on probation.
- [3] On August 15, 2022, Miller self-reported to the probation department that, on several occasions, he had contact with a child who was approximately four months old. On August 16, 2022, the State filed a petition to revoke Miller’s

probation, alleging that he violated the terms of his probation by having contact with a child under the age of sixteen. Miller subsequently admitted to this violation at the hearing on his probation violation on September 14, 2022. Miller testified at the hearing that, about a month after his release from the DOC, he was assaulted, which caused some severe injuries. Because he did not feel safe alone, Miller began staying with his friend Lilly, who had a four-month-old daughter. Miller spent the night at Lilly's house with her child present approximately twelve times during July and August of 2022. Miller slept on the floor next to the couch where Lilly and her child slept every time that he stayed there. Miller also rode in a vehicle with Lilly and her daughter on numerous occasions. During this time, Miller did not tell Lilly that he was a sex offender. He testified that he “had some [trepidation] [sic]” about reporting that he was a sex offender because of the 2022 assault. Tr. p. 15.

[4] At the conclusion of the hearing, the trial court considered that the present violation was Miller’s second failure to abide by the rules and regulations of probation and that Miller admitted the violation. The trial court also considered the circumstances that Miller had been recently attacked and threatened and his reasoning for going to Lilly’s home was his fear. However, the trial court found that Miller’s fear could not be resolved by being in a place that had a minor present. The trial court then found that Miller violated the “most significant term and condition of a sex offender’s probation” by having contact with a child. Tr. p. 31. The trial court further found Miller’s violation to be “extremely egregious” due to the fact that his contact with the child was

repeated and occurred in the very “intimate” setting of sleeping near the child. Tr. pp. 32–33. The trial court revoked Miller’s probation for the second time and ordered him to serve four and a half years of his previously suspended sentence in the DOC. Miller now appeals.

Discussion and Decision

[5] Miller argues on appeal that the trial court abused its discretion when it revoked almost his entire previously suspended sentence. “Probation is a matter of grace left to the trial court’s discretion, not a right to which a criminal defendant is entitled.” *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). It is within the discretion of the trial court to determine probation conditions and to revoke probation if these conditions are violated. *Id.* If a trial court determines that a person has violated a term or condition of probation within the probationary period, the court may impose one or more of the following sanctions:

- (1) Continue the person on probation, with or without modifying or enlarging the conditions.
- (2) Extend the person's probationary period for not more than one (1) year beyond the original probationary period.
- (3) Order execution of all or part of the sentence that was suspended at the time of initial sentencing.

Ind. Code § 35-38-2-3(h).

- [6] We review a trial court's selection of a sanction for an abuse of discretion. *Overstreet v. State*, 136 N.E.3d 260, 263 (Ind. Ct. App. 2019), *trans. denied*. An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances. *Id.*
- [7] Miller argues that the trial court abused its discretion in the sanction it gave him because he self-reported his violation, admitted it at the hearing, and only committed the violation due to his fear and not because he intended any harm. However, the trial court took these things into account when issuing its sanction to Miller. Although the trial court considered these things, it also noted that this was Miller's second violation for the failure to abide by the rules and regulations of his probation and that, even if Miller was fearful, that fear could not be resolved by being in a place that has a minor child. Further, the trial court found that Miller violated "probably the most significant term and condition of a sex offender's probation[,] " which was in place to protect society from individuals who have committed sex offenses. Tr. p. 31. The trial court further noted that Miller's contact with Lilly's child occurred multiple times and in the intimate setting of sleeping near each other. The trial court also stated it was giving Miller a bit of mitigation in the sanction given based on his admission and the surrounding circumstances and did not revoke the entire suspended sentence.
- [8] Further, Miller's violation was not a mere technical violation. In contrast to missing probation appointments or other technical violations, Miller's violation endangered a vulnerable member of society and placed his rehabilitation at risk.

See Jackson v. State, 816 N.E.2d 868, 871 (Ind. Ct. App. 2004) (probation condition prohibiting defendant from contact with minors was proper protective measure and would assist in defendant's rehabilitation); *cf. Brown v. State*, 162 N.E.3d 1179, 1181 (Ind. Ct. App. 2021) (concluding that the trial court abused its discretion when it ordered defendant to serve the entirety of his remaining sentence as a result of the technical violations of missing an undetermined amount of appointments with his probation officer). Because of Miller's prior probation violation and his repeated contact with a minor child, we cannot say that the trial court abused its discretion when it revoked four and half years of his previously-suspended sentence.

[9] Affirmed.

Vaidik, J., and Tavitas, J., concur.