

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Harley Michael Perkins,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

May 8, 2023

Court of Appeals Case No.
22A-CR-2047

Appeal from the Madison Circuit
Court

The Honorable Mark K. Dudley,
Judge

Trial Court Cause No.
48C06-1706-F5-1430

Memorandum Decision by Judge Weissmann
Judges Bailey and Brown concur.

Weissmann, Judge.

- [1] Over a four-week period while he was on probation, Harley Perkins at various times tested positive for both methamphetamine and THC, smoked marijuana, engaged in disorderly conduct, exposed his genitals to police, and possessed both marijuana and an uncapped syringe. When Perkins's probation officer sought to revoke Perkins's probation, Perkins admitted to the positive drug tests but denied the other allegations. The trial court found multiple probation violations and revoked Perkins's probation. Perkins appeals, claiming he endured illegal searches and that the State did not prove most of the alleged violations. As the record supports the trial court's judgment, we affirm.

Facts

- [2] Perkins pleaded guilty to Trafficking with an Inmate, a Level 5 felony, and Theft, a Level 6 felony, and was sentenced to six years imprisonment, with four years ordered executed in work release and two years suspended to probation. After violating the terms of his work release, Perkins was ordered to serve home detention, during which he tested positive for methamphetamine and THC in late May 2022. The terms of Perkins's probation, which he had violated at least twice before, prohibited his use of "illicit drugs." App. Vol. II, pp. 77, 111.
- [3] A week later, police received a report that Perkins had left his home without authorization. An officer discovered Perkins in a car that smelled of marijuana. Perkins admitted he had just smoked marijuana and all that was left of the marijuana was a "roach" that he had thrown out the window of the car. Tr.

Vol. II, p. 28. A search of the car, however, revealed two more “roaches.” *Id.* Because Perkins stated his intent to seek treatment at a drug rehabilitation facility, the officer, rather than arresting Perkins, issued him a summons for Perkins to appear in the Elwood City Court.

[4] Four days later, when Perkins still had not entered treatment, his probation officer petitioned to revoke Perkins’s probation. The petition alleged that Perkins violated the terms of his probation by: 1) testing positive for methamphetamine and marijuana; 2) committing the new offense of possession of marijuana a week later through his possession of the marijuana cigarette; and 3) failing to pay \$310 in home detention fees and \$30 in urine drug screen fees as required by the terms of his probation.

[5] Three weeks later, Elwood Police Department Officer Noah Shahnnavaz saw a man on a bicycle disregard a stop sign. After initiating a stop, Officer Shahnnavaz recognized Perkins as the bicyclist. Perkins appeared aggravated and became confrontational when the officer asked for his identification card. Officer Shahnnavaz, who was aware of Perkins’s lengthy history of drug use and possession, asked Perkins for consent to search him. Perkins consented, but when the officer attempted to search his pockets, Perkins insisted on removing the items from his pockets himself. Perkins withdrew an unsmoked marijuana cigarette and a smoking device containing burnt marijuana residue. The terms of Perkins’s probation required him to comply with all municipal, state, and federal laws including those prohibiting the possession of marijuana. App. Vol. II, pp. 80, 111.

- [6] Another officer—Nick Naselroad—arrived and began searching Perkins. But Perkins removed his pants and then his underclothing, leaving his genitals exposed. Officer Naselroad found an uncapped syringe in Perkins’s pants. When Officer Naselroad attempted to arrest him, Perkins fled. Officer Naselroad tasered Perkins, causing him to fall. Perkins’s face was bleeding, so the officers took him to a hospital, where Perkins yelled and acted unruly.
- [7] The State charged Perkins with five new crimes: Level 6 felony possession of a syringe, Class A misdemeanor possession of marijuana, Class A misdemeanor possession of paraphernalia, Class B misdemeanor public nudity, and Class B misdemeanor disorderly conduct. The probation department amended its probation revocation petition to allege two more probation violations: 1) that Perkins committed the five new offenses arising from the bicycle stop; and 2) that he failed to report to Recovery Works Residential Treatment on the day he was stopped on his bicycle and arrested.
- [8] Perkins admitted to testing positive for methamphetamine and marijuana but denied the other alleged probation violations. After an evidentiary hearing on his probation revocation, the trial court found Perkins had committed each alleged violation, except for failing to report to the Recovery Works Residential Treatment. The trial court revoked Perkins’s probation and ordered him to serve the remaining year of his sentence in the Indiana Department of Correction. Perkins appeals that judgment.

Discussion and Decision

[9] Perkins challenges his probation revocation on several grounds. He claims:

- the trial court should have suppressed all evidence of the probation violations arising from the bicycle stop, which he claims was illegal.
- the State did not prove his illegal possession of the syringe.
- the trial court erroneously found Perkins violated the terms of his probation through nonpayment of probation and screening fees because he lacked the financial ability to pay.
- the trial court abused its discretion in revoking his probation when, according to Perkins, the only proven violation was his positive drug test.

[10] As a probation revocation proceeding is civil in nature, the State need only prove a violation by a preponderance of the evidence. *Id.* We conclude that the trial court did not err in denying Perkins's motion to suppress and that the evidence supports the trial court's revocation of Perkins's probation.

I. Suppression

[11] Perkins contends the trial court erroneously denied his motion to suppress all evidence arising from the bicycle stop. That evidence was used to prove that Perkins violated his probation terms by committing the new offenses of Level 6 felony possession of a syringe, Class A misdemeanor possession of marijuana, Class A misdemeanor possession of paraphernalia, Class B misdemeanor public nudity, and Class B misdemeanor disorderly conduct. Perkins argues that the

police illegally stopped and searched him, so the evidence seized during that search was inadmissible.

[12] The exclusionary rule applicable to illegal searches in criminal proceedings does not apply in probation revocation hearings. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 359, 362-69 (1998); *Dulin v. State*, 169 Ind. App. 211, 219, 346 N.E.2d 746, 751 (1976). Instead, “[e]vidence seized illegally will be excluded from a revocation hearing only if it was seized as part of a continuing plan of police harassment or in a particularly offensive manner.” *Henderson v. State*, 544 N.E.2d 507, 513 (Ind. 1989).

[13] Perkins claims the bicycle stop and related search were conducted in a particularly offensive manner for two reasons. First, he asserts the stop was pretextual and was not authorized by the terms of his probation. Perkins agreed in the terms of probation to submit to searches by probation officers and “any law enforcement officer acting on behalf of the probation department.” App. Vol. II, pp. 80, 111. The officer who searched Perkins was not acting on behalf of the probation department, according to Perkins. Second, Perkins claims he was not advised of his right to counsel before he consented to the search. Perkins does not bolster either of these claims.

[14] Perkins contends the stop was pretextual because Officer Shahnavaz recognized him *before* the stop. But the officer testified that he did not recognize Perkins as the bicyclist until *after* initiating the stop. Tr. Vol. II, p. 33. Perkins is asking us to reweigh this evidence and judge witness credibility, both of which are

prohibited when appellate courts review a probation revocation decision. *See Murdock v. State*, 10 N.E.3d 1265, 1267 (Ind. 2014).

[15] As to his claim that he was not properly advised, Perkins cites no authority for the proposition that a probationer must be advised of his right to counsel before consenting to a search or that the absence of such an advisement requires suppression of the seized evidence. He also did not offer the trial court any citations to authority or substantive argument on this issue. On appeal, Perkins merely states, without accompanying support or argument, that our Supreme Court's decision in *Pirtle v. State*, 263 Ind. 16, 323 N.E.2d 634, 640 (1975), "should be extended to probation revocation proceedings to deter police from taking advantage of persons who are on probation." Appellant's Br., p. 14. *Pirtle* ruled that before a valid consent may be given, a person in police custody must be informed of the right to consult with counsel about whether to consent to the search. *Id.* at 640.

[16] "We will not become a party's advocate, nor will we address arguments that are inappropriate, improperly expressed, or too poorly developed to be understood." *Barrett v. State*, 837 N.E.2d 1022, 1030 (Ind. Ct. App. 2005). Perkins has waived this argument by failing to support it with authority and argument both in the trial court and on appeal.

[17] Waiver notwithstanding, *Pirtle* would not apply here even if it were relevant in probationer searches. The record shows that Perkins was not in custody at the time that Officer Shahnavaaz requested permission to search him. *See Meredith v.*

State, 906 N.E.2d 867, 873 (Ind. 2009) (holding that persons stopped by police in a traffic or investigatory stop ordinarily are not considered in custody). We thus find no error in the trial court’s denial of his motion to suppress.

II. Payment of Fees

[18] Perkins next argues that the trial court erroneously found he violated the terms of his probation by failing to pay \$310 in probation fees and \$30 in screening fees. Perkins does not contest that the fees were unpaid. Instead, he contends the State failed to prove his failure to pay was reckless, knowing, or intentional. *See* Ind. Code § 35-38-2-3(g) (specifying that probation may be revoked when the probationer recklessly, knowingly, or intentionally fails to pay fees).

[19] When the State seeks probation revocation based on the nonpayment of financial obligations, it carries the burden of proving that the probationer’s failure to pay was reckless, knowing, or intentional. *Runyon v. State*, 939 N.E.2d 613, 617 (Ind. 2010). The probationer’s burden is “to show facts related to an inability to pay and indicating sufficient bona fide efforts to pay so as to persuade the trial court that further imprisonment should not be ordered.” *Id.*

[20] And when reviewing a claim of insufficient evidence in a probation revocation appeal, we consider only the evidence most favorable to the trial court’s judgment. *Murdock*, 10 N.E.3d at 1267. We will affirm if substantial evidence of probative value supports the trial court’s findings that the appellant has violated the probation terms. *Id.*

- [21] The record reveals that Perkins had the ability to pay the fees but failed to do so. Perkins testified that he earned \$150 to \$200 weekly. Although Perkins testified that he had two jobs, he acknowledged he did not work full time and that nothing had prevented him from doing so. Tr. Vol. II, pp. 71-72. The terms of his probation even required that he work 35 hours weekly. App. Vol. II, p. 79.
- [22] Perkins's earnings, along with paying for housing, was used to pay "for . . . the dogs, or something like that." Tr. Vol. II, p. 56. Given this evidence that Perkins was working only part-time and had full-time employment available to him that would have bolstered his income available to pay the court-ordered fees, the trial court justifiably found that Perkins recklessly, knowingly, or intentionally did not pay those fees. *See, e.g., Jenkins v. State*, 956 N.E.2d 146, 149 (Ind. Ct. App. 2011) (affirming revocation of probation for failure to pay fees when the evidence showed that the defendant was working but had better employment available).

III. Sufficiency of Syringe Evidence

- [23] Perkins next claims that the State did not prove that his possession of the syringe was unlawful. Level 6 felony unlawful possession of a syringe requires proof that the accused possessed a hypodermic syringe for the use of a controlled substance or legend drug by injection in a human with intent to violate the Indiana Legend Drug Act or to commit a controlled substance offense. Ind. Code § 16-42-19-18(a). But we need not address whether the State

proved Perkins's commission of that offense, given the number of other violations that the State proved.

[24] Even if the syringe offense is disregarded, the State still proved by a preponderance of the evidence that Perkins violated his probation terms by testing positive for methamphetamine and THC, failing to pay his probation and screening fees, possessing marijuana two times, and committing other new offenses, including possession of paraphernalia, public nudity, and disorderly conduct. "Evidence of a single probation violation is sufficient to sustain the revocation of probation." *Smith v. State*, 727 N.E.2d 763, 766 (Ind. Ct. App. 2000).

[25] The record makes clear that the trial court, after granting Perkins leniency in two earlier probation revocation proceedings in this same case, believed the only appropriate sanction for Perkins's continuing disregard of societal and probation rules was revocation. The trial court specifically noted that it was revoking Perkins's probation because he had multiple violations. Tr. Vol. II, p. 76. Referring to an earlier probation revocation hearing in this case, the court explained:

I'm not gonna give [you] another shot in the community. I gave ya [sic] a shot, you didn't work, uh, and you're telling me the exact same thing that you told me in January so I'm not gonna take that chance again.

Id.

[26] We are confident that, even without proof of Perkins's unlawful possession of a syringe, the trial court would have revoked Perkins's probation based on the many other violations.

IV. Abuse of Discretion

[27] Perkins's final claim is that the trial court abused its discretion in revoking Perkins's probation because the State failed to prove most of the alleged probation violations. As we have found sufficient evidence to support the trial court's finding of many probation violations, we also conclude that the trial court did not abuse its discretion in revoking Perkins's probation.

[28] We affirm the trial court's judgment.

Bailey, J., and Brown, J., concur.