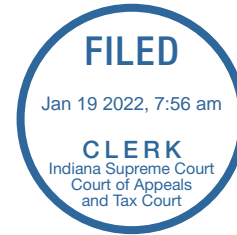


## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Patrick Smith,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

January 19, 2022

Court of Appeals Case No.  
21A-CR-492

Appeal from the Parke Circuit  
Court

The Honorable Heather L. Barajas,  
Special Judge

Trial Court Cause No.  
61C01-1810-FC-287

**Weissmann, Judge.**

[1] Patrick Smith pleaded guilty to Class D felony battery of a child in exchange for the State's dismissal of a Class C felony child molesting charge. The trial court sentenced Smith to three years' probation and, as a condition thereof, required him to register as a sex offender. Smith appeals this and other sex offender probation conditions, arguing that they are not reasonably related to his battery conviction.

[2] The transcript of Smith's plea and sentencing hearings is not available due to technology issues in the trial court. However, a post hoc record was created pursuant to Indiana Appellate Rule 31. This limited record does not reveal the factual basis for Smith's battery conviction but indicates that Smith denied any sexual conduct. We therefore reverse and remand with instructions to vacate the sex offender conditions of Smith's probation.

## Facts

[3] From the limited record, all we truly know is that Smith somehow touched 10-year-old M.T. sometime between October 9, 2013, and February 1, 2014. Four years later, the State charged Smith with one count of Class C felony child molesting, and nearly two years after that, the State added one count of Class D felony battery resulting in bodily injury to a child less than 14 years of age. Pursuant to a plea agreement, Smith pleaded guilty to the battery charge in exchange for the State's dismissal of the child molesting charge and a recommended sentence of three years' imprisonment, all suspended to

probation. The plea agreement left the terms of Smith's probation to the trial court's discretion.

[4] The trial court accepted Smith's guilty plea and imposed the recommended sentence with standard terms of probation. However, the court also imposed certain "Special Probation Conditions for Adult Sex Offenders," including a requirement that Smith register as a sex offender. App. Vol. II, p. 12. Smith challenged the sex offender conditions in a motion to correct errors, which the trial court denied. This appeal followed.

[5] Smith requested transcription of his plea and sentencing hearings, which were conducted via Zoom due to the COVID-19 pandemic. But according to an affidavit filed by the trial court reporter, Smith's plea hearing was not recorded, and the audio of Smith's sentencing hearing could not be retrieved. Therefore, transcripts of Smith's plea and sentencing hearings are not available.

[6] Lacking a transcript, Smith filed a verified statement of the evidence pursuant to Appellate Rule 31(A). Therein, Smith stated, in pertinent part:

During the [plea] hearing, I maintained that I was not guilty of any sexual actions with [M.T.]. . . . During the [sentencing] hearing Judge Barajas spoke to me about her personal feelings of sex charges against children and how she believed it was detestable that I would only be receiving probation. She asked me if I believed it was acceptable to touch a child in that way. I responded that I did not believe it would be acceptable that anyone do something like that. . . . I never replied with anything to indicate that I was guilty of the sex charge accusations.

App. Vol. II, p. 23.

[7] The State responded with its own verified statement of the evidence, in which the prosecuting attorney recalled his explanation to the trial court as to why the State was agreeing to dismiss the child molesting charge. Nothing in the State's verified statement refuted Smith's assertion that he denied the child molesting allegations and any other sexual conduct.

[8] The trial court did not certify either party's verified statement. Instead, the trial judge filed an affidavit setting forth her recollection of the proceedings pursuant to Appellate Rule 31(D). According to her affidavit, the judge took judicial notice of the probable cause affidavit, which indicates that M.T. told a forensic interviewer that Smith occasionally touched her vagina through her clothing while she was sleeping. The judge also stated, in pertinent part:

4. Defendant was advised of the charges, possible penalties, and his Constitutional rights. A factual basis was taken. To the extent that the Court inquired into whether the Defendant believed it was appropriate to touch the child, any such questioning was related to the battery to which he was pleading guilty.

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8. The Court noted that the Defendant had been charged in Sullivan County with Inappropriate Communication with a Child, which matter had been dismissed.

9. In another Sullivan County matter, the Defendant had also been convicted of Child Solicitation, a Level 5 Felony, in exchange for the dismissal of another Child Molesting charge. The Sullivan County incident occurred after the instant

charge had been filed. He had already violated his probation in that cause prior to sentencing in the instant matter.

13. The Court took judicial notice of the matters in Sullivan County, noted the similarities between the cases and commented on what appeared to be a pattern of conduct.

App. Vol. II, pp. 26-27.

## Discussion and Decision

- [9] On appeal, Smith challenges the trial court’s imposition of the sex offender probation conditions. A trial court has broad discretion in imposing conditions of probation, with the only limitation being that the conditions have a reasonable relationship to the defendant’s rehabilitation and the protection of the public. *Whitener v. State*, 982 N.E.2d 439, 446 (Ind. Ct. App. 2013). We will not set aside terms of probation unless the trial court abused its discretion. *Id.* An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.*
- [10] Smith argues that the sex offender conditions are not reasonably related to his rehabilitation because he was not convicted of a sex offense under Indiana Code § 11-8-8-4.5(a). That statute defines “sex offender” to include a person convicted of certain enumerated offenses, including child molesting, rape, and sexual misconduct. Ind. Code § 11-8-8-4.5(a)(1), (3), (8). Battery of a child is not an enumerated offense.

[11] This Court, however, has affirmed the imposition of sex offender conditions on non-sex offenders where the conduct underlying the convictions would have qualified as a sex offense. *E.g.*, *Whitener*, 982 N.E.2d 439 (probationer convicted of burglary and rape had the latter vacated on double jeopardy grounds); *Weiss v. Ind. Parole Bd.*, 838 N.E.2d 1048 (Ind. Ct. App. 2005); (parolee convicted of battery did not deny that battery involved rape). *But cf.* *Straw v. State*, 133 N.E.3d 765, 768 (Ind. Ct. App. 2019) (reversing sex offender registration requirement where probationer was convicted of voyeurism, a non-sex offense, but acquitted of sexual misconduct).<sup>1</sup>

[12] The State claims the trial court acted within its discretion in imposing the sex offender probation conditions because “[Smith’s] conduct was sexual in nature and against a 10-year-old minor.” Appellant’s Br. p. 17. Though the child molesting charge was dismissed, the State contends “[Smith] pled guilty to battery resulting in bodily injury based on his conduct of rubbing M.T.’s crouch through her clothing.” *Id.* The limited record before us reflects differently.

[13] Smith’s verified statement of the evidence indicates that he denied “any sexual actions” with M.T. and the “sex charge accusations” in general. Appellant’s App. Vol. II, p. 23. And neither the State’s verified statement nor the trial judge’s affidavit states otherwise. Although the trial court took judicial notice of

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<sup>1</sup> Though we reversed the sex offender registration requirement in *Straw*, we affirmed mandatory sexual perpetrator treatment and school-based residency restrictions, among other probation conditions, finding they were reasonably related to the probationer’s rehabilitation for voyeurism. 133 N.E.3d at 768.

the probable cause affidavit for the child molesting charge, the trial judge's affidavit indicates that "a factual basis was taken" for the battery charge only. *Id.* at 26. Thus, all we can say is that Smith touched M.T. "in a rude, insolent, or angry manner." *See* Ind. Code § 35-42-2-1(b) (2013).

[14] The State also claims the imposition of sex offender conditions is reasonably related to the protection of the public, citing Smith's conviction for child solicitation in Sullivan County. But Smith is already subject to sex offender probation conditions as part of his sentence in that case. *See State v. Smith*, Cause No. 77C01-1901-F4-000001. Without knowing the factual basis for Smith's battery conviction, we cannot say that public safety warrants the imposition of additional sex offender conditions here.<sup>2</sup>

[15] Given the limited record on appeal, we find the trial court abused its discretion by imposing sex offender probation conditions as part of Smith's sentence for battery of a child. We therefore reverse, remand, and instruct the trial court to vacate the sex offender conditions.

Najam, J., and Vaidik, J., concur.

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<sup>2</sup> We note that the trial court appears to have manually stricken the word "sex" from the phrase "sex offense" in several of the sex offender conditions, which the court selected with a checkmark from a pre-printed list. App. Vol. II, pp. 12-13.