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IN THE
COURT OF APPEALS OF INDIANA

Corey Killebrew,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 17, 2021

Court of Appeals Case No.
20A-CR-1518

Appeal from the Marion Superior
Court

The Honorable Lisa F. Borges,
Judge

The Honorable Anne Flannelly,
Magistrate

Trial Court Cause No.
49G04-0508-FB-148980

Crone, Judge.

Case Summary

- [1] Corey Killebrew appeals the revocation of his probation, arguing that the trial court abused its discretion by revoking his probation and imposing his

previously suspended sentence. Concluding that the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

[2] In August 2005, James Banks was standing outside Wishard Hospital where his girlfriend was delivering a baby. Banks's girlfriend was Killebrew's ex-girlfriend. Killebrew approached Banks and shot him in the back and the arm. The State charged Killebrew with class B felony aggravated battery, class B felony unlawful possession of a firearm by a serious violent felon, and class C felony carrying a handgun without a license.¹ Appellant's App. Vol. 2 at 42-45. The State later filed a habitual offender enhancement, alleging that Killebrew had prior convictions for robbery and carrying a handgun without a license. In addition, the State amended the information, with leave of court, to add a charge of class A felony attempted murder. *Id.* at 47-48.

[3] In July 2006, pursuant to a written plea agreement, Killebrew agreed to plead guilty to class B felony aggravated battery, class B felony unlawful possession of a firearm by a serious violent felon, and being a habitual offender, and the State agreed to dismiss the remaining counts. *Id.* at 97. The State also agreed to recommend a sentencing cap of twenty-five years on the executed portion of his sentence and that the sentences for the two convictions be served concurrently,

¹ The State claims that Killebrew was also charged with class D felony assisting a criminal, but that charge was against Killebrew's brother. Appellant's App. Vol. 2 at 42-43.

but otherwise sentencing was left open to the court. The trial court held a hearing, accepted the plea agreement, and entered judgment of conviction per the plea agreement. Following a sentencing hearing in August 2006, the trial court issued a sentencing order in September 2006 and sentenced Killebrew to an executed term of twenty years for his aggravated battery conviction and a concurrent term of twenty years for his firearm possession conviction plus an additional ten years for the habitual offender enhancement, with twenty years executed and ten years suspended to probation. *Id.* at 23, 28-29.

[4] In early February 2015, Killebrew was released from incarceration and placed on probation. One of the conditions for probation was not to commit any criminal offenses. On April 14, 2020, the State filed a notice of probation violation, alleging that Killebrew had been charged on April 1, 2020, under cause number 49G12-2004-CM-12856 (Cause CM-12856), with class A misdemeanor battery resulting in bodily injury and class B misdemeanor criminal mischief for an event that allegedly occurred on January 7, 2020.² *Id.* at 162. The notice also provided the following additional information:

Mr. Killebrew has submitted 45 negative drug screens with the last being on 11/22/19. He is being tested quarterly by probation.

² The State requests that we take judicial notice of the charging information in Cause CM-12856. In his reply brief, Killebrew states that he has no objection. We take judicial notice as requested pursuant to Indiana Evidence Rule 201.

Mr. Killebrew successfully completed Anger Control Counseling with Fall Creek Counseling on 6/16/15.

Mr. Killebrew successfully completed Educational Services by obtaining his GED on 4/28/11.

Mr. Killebrew successfully completed Substance Abuse Treatment at New Castle Correctional Facility on 3/6/15.

Mr. Killebrew's last appointment was conducted via telephone on 3/20/20, and his next appointment is scheduled for 4/24/20.

Mr. Killebrew was assessed a financial obligation of \$4,350.00. To date he has paid \$1,020.00 towards his financial obligation. Mr. Killebrew is currently employed with Long John Silver's making \$8.00 an hour.

Id. On July 16, 2020, a bench trial was held in Cause CM-12856, and the trial court found Killebrew guilty of the lesser included offense of class B misdemeanor battery and class B misdemeanor criminal mischief.

[5] On August 7, 2020, the trial court held a probation violation hearing, at which Killebrew testified that prior to committing the two crimes, he had been fully compliant with the terms of his probation for five years, and he submitted numerous letters of support. His lawyer argued that Killebrew had been found guilty of class B misdemeanors and that otherwise he had been a model probationer. The trial court then ruled as follows:

The Court has reviewed the presentence investigation report that had been prepared in this case back before you were sentenced in

this cause, and I see that you had served a sentence in the Indiana Boys School and that you had prior felony convictions, and you had incidents of misconduct when you were incarcerated. I've also reviewed the charges and the probable cause affidavit in this cause. This was a very serious case, as you know, from your sentence. And the Court notes that you were convicted of count one, Aggravated Battery, Class B felony; and count two, Possession of a Firearm by a Serious Violent Felon, a Class B felony. Your ten-year suspended sentence you received on count two. And the Court notes that you have been convicted of two crimes in this case, Battery, a B misdemeanor; Criminal Mischief, a B misdemeanor.

The Court, in considering the serious nature of this offense, the fact that you committed two criminal offenses while you were on probation, the Court finds that your probation should be revoked; that I now sentence you as follows. I'm sentencing you to a total sentence of ten years, all executed, and it's going to be a split sentence. And that sentence will be served as follows. You will serve six years in the Indiana Department of Correction, followed by four years on Marion County Community Corrections in a component deemed appropriate with movement as deemed appropriate by Marion County Community Corrections.

Tr. Vol. 2 at 23-24. This appeal ensued.

Discussion and Decision

- [6] Killebrew challenges the trial court's decision to revoke his probation and impose his previously suspended sentence. "Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled." *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007).

The trial court determines the conditions of probation and may revoke probation if the conditions are violated. Once 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. Accordingly, a trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances.

Id. (citations omitted).

[7] Probation revocation is a two-step process, wherein the trial court first makes a factual determination as to whether the probationer violated the terms of his probation. *Woods v. State*, 892 N.E.2d 637, 640 (Ind. 2008). Then, if a violation is found, the court determines whether the violation warrants revocation. *Id.* If the trial court finds a probation violation, it may impose any 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).

[8] Killebrew argues that the trial court abused its discretion by imposing “his full suspended sentence without giving consideration to the rehabilitative progress he had made during five years on probation.” Appellant’s Br. at 8. We recognize that “a probationer who admits the allegations against him must still be given an opportunity to offer mitigating evidence suggesting that the violation does not warrant revocation.” *Ripps v. State*, 968 N.E.2d 323, 326 (Ind. Ct. App. 2012) (quoting *Woods*, 892 N.E.2d at 640). However, in determining the appropriate sentence upon finding a probation violation, trial courts are not required to balance aggravating and mitigating circumstances. *Treece v. State*, 10 N.E.3d 52, 59 (Ind. Ct. App. 2014), *trans. denied*. Proof of a single violation is sufficient to permit a trial court to revoke probation. *Beeler v. State*, 959 N.E.2d 828, 830 (Ind. Ct. App. 2011), *trans. denied*. “[S]o long as the proper procedures have been followed in conducting a probation revocation hearing pursuant to Indiana Code Section 35-38-2-3, the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence.” *Crump v. State*, 740 N.E.2d 564, 573 (Ind. Ct. App. 2000) (quoting *Goonen v. State*, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999)), *trans. denied* (2001); *see also Wilkerson v. State*, 918 N.E.2d 458, 464 (Ind. Ct. App. 2009) (same).

[9] Here, the trial court conducted the probation revocation hearing properly. The trial court heard Killebrew’s testimony and argument concerning his progress and admitted his evidence in support thereof. We also note that the State’s notice of probation violation included information regarding his rehabilitation. The court was aware of these circumstances but nevertheless found that in light

of Killebrew's criminal history and the serious nature of the crimes he had committed, his violation of his conditions of probation by committing two crimes warranted the imposition of his suspended sentence. Killebrew maintains that the trial court failed to say anything about his progress when imposing sentence, but the trial court was not required to do so and was not required to balance mitigating and aggravating circumstances. Killebrew also attempts to downplay his crimes by focusing on their misdemeanor level, but the commission of any crime is a consequential probation violation that directly and negatively impacts other people. Further, one of his crimes, the battery, is a crime of physical aggression. The trial court demonstrated leniency by ordering Killebrew to serve four of the ten years in community corrections. We cannot say that the trial court abused its discretion in sentencing Killebrew. Therefore, we affirm.

[10] Affirmed.

Najam, J., concurs.

Riley, J., dissents with opinion.

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Riley, J. dissenting

[11] I respectfully dissent from the majority’s decision to affirm the trial court’s imposition of Killebrew’s previously suspended sentence. It is generally accepted that probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment. *Bonner v. State*, 776 N.E.2d 1244, 1247 (Ind. Ct. App. 2002). As such, probation is a conditional liberty dependent upon the observance of certain restrictions. *Id.* These restrictions are designed to ensure that the probation serves as a period of genuine rehabilitation and that the public is not harmed by a probationer living within the community. *Id.*

[12] The evidence presented at the hearing reflects that after commencing his probation in 2015, Killebrew successfully served his probation for the next five years. During this time, Killebrew submitted forty-five negative drug screens, he successfully participated and completed anger management classes, substance abuse treatment, and obtained his GED. He was employed and had paid a substantial amount toward his financial obligation. Although Killebrew

did cause harm to the public when he committed the two Class B misdemeanor offenses that resulted in his probation being revoked, he was not convicted, as claimed by the prosecutor, of a crime of violence. *See* I.C. § 35-50-1-2. By revoking his previously suspended sentence in its entirety, the trial court gave no apparent consideration that Killebrew had been a model probationer for five years, without any violations filed against him and following all probationary requirements. Rather, the trial court ignored the significant rehabilitative progress Killebrew had attained.

[13] While I agree with the majority that “in determining the appropriate sentence upon finding a probation violation, trial courts are not required to balance aggravating and mitigating circumstances,” in light of the rehabilitative character of the probationary service in the community, all evidence should be considered. (*See* Slip op). Here, it was an abuse of discretion for the trial court to consider only the negative facts before it, while apparently ignoring Killebrew’s five years as a “model probationer.” (Appellant’s Br. p. 10). Therefore, I would reverse the trial court and remand with instruction to reconsider Killebrew’s sentence in light of all available evidence.