MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Suzy St. John
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Caroline G. Templeton
Deputy Attorney General

John Oosterhoff
Certified Legal Intern
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Roger Joe Bell, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 25, 2022

Court of Appeals Case No.
21A-CR-1723

Appeal from the Parke Circuit Court

The Honorable Sam A. Swaim,
Judge

Trial Court Cause No.
61C01-1807-F5-231

Darden, Senior Judge.

Statement of the Case

[1] Roger Joe Bell, Jr. appeals the trial court's revocation of his probation, claiming that the court abused its discretion by reinstating two years of his previously suspended five-year sentence to be executed in the Department of Correction (DOC) after his admission that he committed a new crime. We affirm.

Facts and Procedural History

[2] On July 27, 2018, the State charged Bell with Level 5 felony failure to register as a sex offender having had a prior conviction. Bell later entered into a plea agreement with the State on November 27, 2018, wherein he agreed to plead guilty as charged. On January 8, 2019, pursuant to the plea agreement, the trial court imposed a sentence of five years; immediate release with time served and the remainder of the sentence suspended to probation subject to the terms and conditions imposed by the trial court. *See* Appellant's App. Vol. 2, p. 27. The conditions of his probation included the terms that he shall not violate the laws of the State of Indiana and that he report to his probation officer once a month. *See id.* at 46.

[3] On February 10, 2021, Bell and his wife were evicted from their residence for non-payment of rent; subsequently, the landlord conducted a final inspection. The landlord discovered and reported to police that the home was returned in poor living condition that was well beyond normal wear and tear, and that a washer and dryer provided for tenants' use per the terms of the rental agreement were also missing from the residence. The landlord showed the responding

officer receipts for the washer and dryer, with the value of the items totaling $1200.

[4] Based upon that report, Sergeant Shay Vandivier of the Parke County Sheriff's Department located Bell and his wife's new residence, but only Bell's wife was present when he arrived. After first denying having knowledge about what had happened to the missing washer and dryer, Bell's wife later admitted to the officer that she and Bell sold the appliances five months earlier for $200. She said their plan was to use the money to pay their rent and later replace the washer and dryer. She claimed that they had planned to do so after she received her tax refund, but were evicted before they had the chance to complete the plan. She stated that she also had been involved in the scheme and that Bell had handled the transaction. Police arrested Bell on February 12, 2021 for the theft of the washer and dryer.

[5] That same day, a probation officer filed a notice of probation violation alleging Bell had been charged with Level 6 felony theft, and had not reported to his probation officer since September 29, 2020. Bell and the State entered into a plea agreement wherein Bell agreed to plead guilty to the theft and admit the probation violation in exchange for the dismissal of charges in two other ongoing cases alleging failure to register as a sex offender and driving while suspended. *See id.* at 65-69.

[6] At the sanction hearing after Bell's agreed upon admissions, the court found that Bell had violated the terms of his probation and entered a judgment of

conviction for theft. Bell requested that he be continued on probation or serve his sentence on work release or home detention. The Court entered its order, making findings of aggravating circumstances and mitigating circumstances from the bench as follows:

> [T]he presentence report does indicate a significant criminal history. Two prior misdemeanor convictions, five prior felony– five prior felony convictions. You've had numerous probation violations filed in those causes, or most of those causes. So[,] you do have a very significant criminal history. You violated probation in the past numerous times. The Court has considered the evidence of mitigating circumstances today, particularly the fact that [sic] the evidence of the children of the defendant. I'm sure that will be a hardship. The fact that a parent is incarcerated is always going to be a hardship. I think that the legislature understood that. I think the mitigating circumstance in this regard is undue hardship. It was the defendant's decision to commit these offenses, to not–I want to get back to probation for a second. In addition to the [washer and dryer] situation the defendant had not been reporting to probation as he'd been required to do. But, in any event, if the defendant was concerned about being a supportive parent the defendant would not continue to commit one offense after another and spend most of his time in jail 30 days–life in jail 30 days at a time so far. We can keep doing catch and release and it's just not working, Mr. Bell. So[,] I'm not–we're not going to do that any further. You're no longer a candidate for probation at this point in time. The Court, as the Prosecutor indicated, could reinstate five years. I'm going to adopt the recommendation from Probation and reinstate 730 days [two years]. That will be all executed. Getting back to your sentence by your agreement. Which you're getting quite a break just by the agreement itself. So[,] in 2102-F6-50, Theft, a level 6 felony, 180 days, all executed, Parke County Jail. Court costs $185.00, a fine of $50.00. The fine will be suspended. Reimburse the County $100.00 for court appointed attorney fees.

> Defendant will be given credit for 90 days already served, plus good time credit so that sentence is essentially completed. In the probation violation, 18-F5-231, as the Court has previously indicated the Court is reinstating 730 days of that sentence. That will be consecutive to the sentence in 2102-F6-50.

Tr. Vol. 2, pp. 54-55.

Discussion and Decision

[7] Bell appeals, arguing that the court abused its discretion by reinstating two years of his previously suspended five-year sentence to be executed in the DOC after his admission that he committed a new crime. We disagree.

[8] It is well-settled that probation revocation is a two-step process. *See Sanders v. State*, 825 N.E.2d 952, 955 (Ind. Ct. App. 2005), *trans. denied*. First, the court must make a factual determination that a violation of a condition of probation has occurred. *Id.* If a violation is proven, then the court must determine if the violation warrants revocation of probation. *Id.* Here, Bell admitted to the violation, so the court proceeded to the second step. The court determined that the admitted violation warranted the revocation of Bell's probation and imposed its sanction.

[9] Probation serves as an alternative to incarceration and is granted at the sole discretion of the trial court. *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999). Probation is not a right conferred to defendants but rather a "matter of grace" and a "conditional liberty that is a favor." *Id.* If the trial court finds that an individual has violated a condition of probation, the court is empowered to

"[o]rder execution of all or part of the sentence that was suspended at the time of the initial sentencing." Ind. Code § 35-38-2-3(h)(3) (2015).

[10] Once a court has exercised its grace by ordering probation, the judge should have "considerable leeway" in deciding how to proceed. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). Therefore, we seldom intervene and take away such control. A court's sanction decisions for probation violations are reviewable using an abuse of discretion standard. *Id.* An abuse of discretion occurs where the court's decision is clearly against the logic and effect of the facts and circumstances. *Id.*

[11] We would find it extremely unusual if a court did not include as a mandatory condition of probation that the probationer must not commit any criminal offenses while on probation. After all, the commission of a new offense is not a mere technical violation of probation. *See Knecht v. State*, 85 N.E.3d 829, 840 (Ind. 2017). And in the version of Indiana Code section 35-38-2-1(b) (2012) (non-substantial amendment in 2022 legislation) applicable at the pertinent time here, it provides that "[i]f the person commits an additional crime, the court may revoke probation." The court's order here included such a condition, and that was one of the bases clearly addressed by the trial court on the record at the hearing. We have observed that one violation of a condition of probation is enough to support a probation revocation. *See Knecht*, 85 N.E.3d.at 839. This alone is enough to support the court's sanction.

[12] The court, however, mentioned in passing that Bell had also failed to meet with his probation officer since September 29, 2020. The State had made that additional allegation in its petition, but did not present any evidence to prove it by a preponderance of the evidence at the hearing. Here, the court's order addressed both the plea agreement regarding the theft charge and the admission to the probation violation and as a result looks less like the traditional written order on probation revocation including written findings of the facts and reasons for revoking Bell's probation. *See, e.g.*, *Hubbard v. State*, 683 N.E.2d 618, 620 (Ind. Ct. App. 1997) (due process requires setting forth in writing facts and reasons for revocation). Though that is the best practice that should be followed, we have held that a trial court's oral presentation from the bench expressing the findings of fact supporting the reasons for revocation in the presence of the defendant and counsel is sufficient. *See Clark v. State*, 580 N.E.2d 708, 711 (Ind. Ct. App. 1991) (written transcript of the probation revocation hearing showing statement from the bench meets writing requirement). As such, the transcript satisfies the writing requirement.

[13] Although the record lacks live testimony from the probation officer regarding Bell's failure to attend probation meetings, however, Bell and his lawyer acknowledged in open court on the record that he had violated the term and condition of probation, i.e., failure to attend meetings, and would leave the disposition and sanction to the trial court. As a result, we now find this should not result in a reversal. At most, this is harmless error. Harmless error is defined as an error that does not affect the substantial rights of a party. *See*

Thomas v. State, 774 N.E.2d 33, 36 (Ind. 2002). "We will not overturn a defendant's conviction if a trial court's error was harmless." *Id.*

[14] It is true that abuse of discretion may occur if the court considers improper factors. *See Puckett v. State*, 956 N.E.2d 1182, 1188-89 (Ind. Ct. App. 2011). To the extent that the trial court's comment could be considered an improper finding, the finding was not challenged by way of an objection at the hearing. Thus, the failure to object, as in this case, waives any claim of error. *See Shanholt v. State*, 448 N.E.2d 308, 316 (Ind. Ct. App. 1983).

[15] However, waiver notwithstanding, Bell admitted that he had committed a new crime. And as we noted above, the finding of one condition of probation is enough to support a probation revocation. *See Knecht*, 85 N.E.3d at 839. We find no reversible error in the court's mention of this allegation about his failure to attend probation meetings as ordered in passing when pronouncing the sanction and the reason therefor.

[16] Returning to the criminal act to which Bell admitted, he argues that the circumstances of his case are much like those in *Puckett v. State*, 956 N.E.2d 1182 (Ind. Ct. App. 2011). We disagree as we find *Puckett* to be distinguishable in several ways.

[17] Bell argues that the underlying offense for which he was placed on probation occurred during a time when he "and his family were homeless." Appellant's Br. p. 9. He further argues that "the record reveals nothing particularly egregious or harmful about Bell's theft of the washer and dryer" and that the

"stolen appliances were eventually returned to their owner." *Id.* at 9-10. He says that "the record suggests it was a desperate act, fueled by poverty, so that Bell could provide for a pregnant wife and four children." *Id.* at 10.

[18] In *Puckett*, we found that the judge who had originally been involved in the defendant's case was no longer on the bench and the prosecutor at the time of the defendant's original sentencing was now the new trial court judge. 956 N.E.2d at 1184. Supporting our decision that reversal was warranted, we found that: 1) the new court judge inappropriately expressed his displeasure about the underlying plea agreement the defendant had received; 2) the trial court judge relied upon probation violation allegations that the State had dismissed and on which it did not present any evidence; 3) the trial court judge suggested that because the defendant's brothers looked up to him, they likely would grow up and have intercourse with twelve-year-old girls; 4) the trial court judge expressed its opinion and beliefs about the importance of the sex offender registry; and 5) the trial court judge imposed the full four-year sentence after the defendant admitted to the probation violation. *Id.* at 1185, 1187-88.

[19] In contrast herein, the trial court judge, in passing, made one reference to Bell's failure to attend probation meetings before returning to Bell's admission that he violated the terms of his probation by the commission of another offense. The court observed that Bell had a significant criminal history marked by two prior misdemeanor convictions and five prior felony convictions. He had numerous probation violations in most of those cases.

[20] More specifically, in 2004, Bell was convicted of sexual battery for which he was sentenced to six years of probation. Bell admitted violating the terms of that probation in 2007. Next, in 2014, Bell was placed on probation once more after having committing burglary. He admitted to a violation of that probation later that same year. Based in part on those specifics, the trial court determined that Bell was not a good candidate for probation anymore because of the repeated violations of probation and failure to reform his behavior. The plea agreement he reached relative to his theft charge resulted in the dismissal of two pending charges. The trial court's decision is supported by the record demonstrating that Bell's criminal behavior has not been deterred despite numerous occasions of leniency. Because of his experience with the judicial system, he had to be aware that further criminal conduct would likely lead to a period of incarceration and that his family would bear the hardship from that incarceration. Further, though Bell could have received up to five years for his probation violation, the court imposed only two years as his sanction.

[21] Based on the foregoing, we conclude that the sole factor of Bell's admission to the commission of a criminal offense, plus Bell's criminal history, his responses to prior periods of probation, and the dismissal of two charges, support the trial court's determination. We find no reversible error.

Conclusion

[22] In light of the foregoing, we affirm the court's reinstatement of two years of Bell's previously suspended five-year sentence to be executed in the DOC after evidence of his admission that he committed a new crime.

[23] Affirmed.

Mathias, J., and Pyle, J., concur.