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IN THE COURT OF APPEALS OF INDIANA

Ronnie L. Brown,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 5, 2021

Court of Appeals Case No. 20A-CR-1550

Appeal from the Delaware Circuit Court

The Honorable John M. Feick, Judge

Trial Court Cause No. 18C04-1608-F4-57

Najam, Judge.

Statement of the Case

[1] Ronnie L. Brown appeals the trial court's revocation of his probation. Brown raises two issues for our review, which we consolidate and restate as whether the trial court abused its discretion when it revoked his probation and ordered

Brown to serve more than sixteen years of his previously suspended sentence when the evidence before the court showed only that Brown had missed an undetermined number of meetings with his probation officer. We reverse and remand with instructions.

Facts and Procedural History

[2] In December of 2016, the trial court sentenced Brown to an aggregate term of twenty years executed following Brown's convictions for dealing in cocaine, as a Level 1 felony; dealing in cocaine, as a Level 4 felony; and possession of marijuana, as a Class B misdemeanor. Thereafter, Brown moved for a modification of his sentence and placement. In March of 2018, the trial court granted Brown's motion and ordered that the remainder of Brown's sentence would be suspended if Brown successfully completed three years of supervised probation.

[3] On March 1, 2020, Delaware County Sheriff's Deputy Tyler Parks observed a vehicle being driven with no headlights on around midnight. Deputy Parks initiated a traffic stop and observed that Brown was the driver of the vehicle. The State filed its petition for the revocation of Brown's probation shortly thereafter. In its petition, the State alleged that Brown had committed the following violations of the conditions of his probation:

> 1. Failed to see his Probation Officer or make any future office appointments from September 13, 2018[,] to the date of his recent arrest . . . .

> 2. Being arrested, cited[,] and charged on 08/03/2019 for Count 1: Driving While Suspended, a Class A Misdemeanor and Count 2: A Class C Infraction in Cause 18H01-1608-CM-001263 . . . .
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> 3. Being arrested, cited[,] and charged on 12/08/2019 for Count 1: Driving While Suspended, a Class A Misdemeanor in Cause 18H01-1908-CM-002118 . . . .
>
> 4. Being arrested, incarcerated[,] and charged on 03/01/2020 for Charge 1: Possession of Cocaine, a Level 6 Felony, Charge 2: Obstruction of Justice, a Level 6 Felony, Charge 3: Resisting Law Enforcement . . . , a Class A Misdemeanor and Charge 4: Possession of Marijuana . . . , a Class A Misdemeanor in [Cause 18C02-2003-F5-31 ("Cause F5-31")] . . . .

Appellant's App. Vol. 2 at 230-31.

[4] While Cause F5-31 was pending, the trial court proceeded to consider the alleged probation violations. At the fact-finding hearing, Brown's counsel asked the court not to permit the State to go into the substantive allegations underlying Cause F5-31, as those allegations were pending and he had not yet had the opportunity to pursue discovery relating to those allegations. The State agreed to "not get into" the facts of that case, and the trial court instructed the parties to "stick to the elements" of the case at hand. Tr. Vol. 2 at 5.

[5] The State then called Deputy Parks, who testified that he had observed Brown committing the traffic offense of driving at night without headlights on, that he had initiated a traffic stop of Brown's vehicle, and that he had arrested Brown after Brown had been taken to a hospital following the traffic stop. Deputy

Parks was not asked, and he did not testify, about the factual basis for the arrest or the reason why Brown was transported to the hospital. The State then called Brown's probation officer, who testified that Brown had reported for four appointments, but that the probation officer then "lost track" of him around September of 2018. *Id.* at 13. However, Brown's probation officer agreed that Brown was also reporting to a second probation officer "in 2019" and that those appointments were in lieu of Brown meeting with him. *Id.* at 16. The State offered no testimony or other evidence concerning Brown's appointments with the second probation officer.

[6] In his closing argument to the court, Brown asserted that the State had not presented any evidence that he had committed a new offense and instead had only shown that he missed an undetermined number of appointments with his probation officer. As Brown's counsel summarized: "[It] puts a capital T in technical. Over a twenty-year sentence. These are status violations. There's no evidence before the Court of any substantive offense being committed. They are status violations." *Id.* at 29. The court then clarified with the parties that it was not taking judicial notice of the record in Cause F5-31 as that cause had nothing "to do with this." *Id.* at 31.

[7] The court then found that Brown had violated the conditions of his probation "as enumerated" in the State's petition for revocation, and the court revoked

Brown's probation.[1] Appellant's App. Vol. 3 at 73. The court ordered Brown to serve sixteen years and 205 days of his previously suspended sentence in the Department of Correction. This appeal ensued.

Discussion and Decision

[8] Brown asserts on appeal that the State failed to present sufficient evidence to support the revocation of his probation. As our Supreme Court has often stated:

> "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) (explaining that: "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."). A probation hearing is civil in nature, and the State must prove an alleged probation violation by a preponderance of the evidence. *Braxton v. State*, 651 N.E.2d 268, 270 (Ind. 1995); *see* Ind. Code § 35-38-2-3(f) (2012). When the sufficiency of evidence is at issue, we consider only the evidence most favorable to the judgment—without regard to weight or credibility—and will affirm if "there is substantial evidence of

[1] On appeal, the State notes that, during the probation officer's testimony, there was discussion about whether Brown had properly reported his arrests or any of his new charges to his probation officer, which the State asserts is evidence that supports the trial court's revocation of Brown's probation. The State also asserts that the evidence Brown had committed a headlight infraction supports the trial court's judgment. But the State's petition for revocation did not allege that Brown had failed to report his arrests or his new charges or that Brown had committed a headlight infraction, and the trial court's order revoking Brown's probation was expressly limited to the reasons enumerated in the State's petition. Accordingly, we must conclude that the trial court did not consider those purported violations as a basis for the court's revocation order.

> probative value to support the trial court's conclusion that a probationer has violated any condition of probation." *Braxton*, 651 N.E.2d at 270.

Murdock v. State, 10 N.E.3d 1265, 1267 (Ind. 2014).

[9] The trial court found that Brown had violated the conditions of his probation "as enumerated" in the State's petition. Thus, we must consider the evidence in support of the violations alleged in the petition. Appellant's App. Vol. 3 at 73. Count 1 of the State's allegations was that Brown violated the conditions of his probation when he missed appointments with his probation officer and failed to schedule other appointments. The State's evidence on this allegation was imprecise. Brown's probation officer testified that Brown missed some scheduled appointments, but also that Brown made up some of those appointments—the probation officer was just not sure which missed appointments specifically were made up because he did not keep records that showed when a later appointment replaced an earlier, missed appointment. *See* Tr. Vol. 2 at 15-16. He also testified that Brown kept some of those appointments with another probation officer. And he testified that his office did not always keep records of phone calls into the office Brown might have made. As Brown's counsel summarized to the court at the end of the hearing:

> the State . . . is asking the Court to execute twenty years based on . . . that [Brown] missed some appointments with [his probation officer]. He made most of them up. Now, the evidence established he didn't make all of them up, but he made most of them up, and that he also called and . . . [the probation officer] delegated supervision to [another officer] . . . .

Id. at 29.

[10] In Counts 2 and 3, the State alleged that Brown had committed traffic offenses under two different cause numbers. Brown's probation officer testified that Brown had been arrested and charged for those alleged offenses. But being arrested and charged is not, without more, evidence of a probation violation. *Jackson v. State*, 6 N.E.3d 1040, 1042 (Ind. Ct. App. 2014). As we explained in *Jackson*:

> "When a probationer is accused of committing a criminal offense, an arrest alone does not warrant the revocation of probation." *Johnson v. State*, 692 N.E.2d 485, 487 (Ind. Ct. App. 1998). Likewise, the mere filing of a criminal charge against a defendant does not warrant the revocation of probation. *Martin v. State*, 813 N.E.2d 388, 391 (Ind. Ct. App. 2004). Instead, when the State alleges that the defendant violated probation by committing a new criminal offense, the State is required to prove—by a preponderance of the evidence—that the defendant committed the offense. *Heaton [v. State]*, 984 N.E.2d [614,] 617 [(Ind. 2013)].

Id. Indeed, the new traffic offenses alleged in Counts 2 and 3 prove the point—Brown presented evidence, without objection, that the State had dismissed both of those offenses without an adverse finding against him. Thus, the State did not present sufficient evidence to support either Count 2 or 3 of its petition.

[11] Finally, Count 4 of the State's petition was that Brown had committed new criminal offenses as charged in Cause F5-31. But Brown is correct on appeal that the State's only substantive evidence at the probation revocation hearing

that he had committed a new offense in support of that allegation was that he had failed to use his headlights while driving at night, which was not, however, an offense included in the State's petition. Aside from that evidence, Deputy Parks testified that he had arrested Brown and had caused Brown to be transported to a local hospital, but the State did not ask, and Deputy Parks did not testify, as to why either of those events occurred.

[12] At the end of the evidentiary hearing, the trial court emphasized that the facts underlying Cause F5-31 were irrelevant to the petition for revocation and did not have "anything to do with this." Tr. Vol. 2 at 31. The court gave no weight to Count 4. Thus, the State's evidence did not include the commission of a new offense as alleged in Count 4 of the petition. And, again, the court did not revoke Brown's probation for the headlight infraction, which the State did not charge or include in the petition. *See id.*

[13] In sum, we cannot say that the trial court abused its discretion when it revoked Brown's probation for having missed an undetermined number of appointments with his probation officer. But we conclude that the court abused its discretion when it ordered Brown to serve the entire remaining term of sixteen years and 205 days in the Department of Correction as a result of those technical violations. As our Supreme Court has made clear:

> While it is correct that probation may be revoked on evidence of violation of a single condition, *the selection of an appropriate sanction will depend upon the severity of the defendant's probation violation* . . . . Given that the remaining . . . violations are technical in nature, the trial court, in its discretion, may decide to

> continue the probationer on probation without modification. In any event, such determination is better exercised by the trial court [on remand].

Heaton, 984 N.E.2d at 618 (emphasis added; citation omitted).

[14] We are mindful that the trial court had previously granted Brown's motion to modify his original sentence, and we do not mean to suggest that Brown has clean hands and is without fault. Nonetheless, while probation is a matter of grace and not a right, we are obliged to reverse the trial court's order that Brown serve his entire remaining suspended sentence. We remand to the trial court with instructions that the court resentence Brown in a manner commensurate with the severity of missed appointments with his probation officer, the only violation the State established on this record. *See id.*

[15] Reversed and remanded with instructions.

Riley, J., and Crone, J., concur.