

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Carl Z. Swallow,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 25, 2021

Court of Appeals Case No.
20A-CR-1825

Appeal from the
Delaware Circuit Court

The Honorable
Marianne L. Vorhees, Judge

Trial Court Cause No.
18C01-1710-F5-154

Kirsch, Judge.

- [1] Carl Z. Swallow (“Swallow”) appeals the trial court’s order revoking his probation and ordering him to serve the entirety of his suspended sentence in

the Indiana Department of Correction (“DOC”). He raises one issue, which we restate as whether the trial court abused its discretion when it revoked his probation and imposed his suspended sentence.

[2] We affirm.

Facts and Procedural History

[3] On October 17, 2017, the State charged Swallow with Count I, domestic battery as a Class A misdemeanor, and Count II, arson as a Level 5 felony. *Appellant’s App. Vol. 2* at 4-7. On that same day, the State amended Count I, domestic battery, to elevate the charge from a Class A misdemeanor to a Level 5 felony on the basis of a prior domestic battery conviction. *Id.* at 12. On January 4, 2018, Swallow posted bail and was placed on a pretrial home detention program administered through Delaware County Community Corrections (“DCCC”). *Id.* at 23, 33, 64. On July 26, 2018, the trial court issued a warrant for Swallow’s arrest due to violations of the conditions of his pretrial home detention, which included testing positive for drugs and alcohol in five separate screens and failure to properly charge his GPS tracking device, and Swallow was arrested on August 1, 2018. *Id.* at 64-65, 71-75; *Appellant’s App. Vol. 3* at 25. On August 7, 2018, the trial court revoked Swallow’s pretrial home detention and ordered that he remain incarcerated. *Appellant’s App. Vol. 3* at 26.

[4] On October 8, 2018, Swallow executed a plea agreement in which he agreed to plead guilty as charged to both counts. *Appellant’s App. Vol. 2* at 105-08. On that same day, Swallow was released on pretrial supervision pending placement

on electronic home detention while he awaited sentencing on the plea agreement. *Appellant's App. Vol. 3* at 29. On November 8, 2018, the trial court issued a warrant for Swallow's arrest due to Swallow's failure to abide by the terms of his pretrial supervision, including that he failed to complete the intake process with his pretrial probation officer and that he failed to be "hooked up" on electronic home detention, and the trial court ordered that he remain incarcerated until sentencing. *Appellant's App. Vol. 2* at 110-11, 113-16; *Appellant's App. Vol. 3* at 30.

[5] On January 2, 2019, the trial court accepted Swallow's guilty plea, and, pursuant to the plea agreement, sentenced him to an aggregate sentence of four years with two of those years executed as a direct placement on home detention through DCCC and two years suspended to supervised probation. *Appellant's App. Vol. 2* at 152-54. He was also ordered to submit to an alcohol and substance abuse evaluation and comply with any treatment recommendations, enroll in and complete within one year the Central Integrity Program, which was a battery intervention program, and if he did not complete the program within that time frame he was required to re-enroll and complete the program and perform forty hours of community service. *Id.* at 153-54.

[6] On January 25, 2019, Swallow's probation officer and home detention case manager filed a "PETITION FOR WARRANT ON REVOCATION OF DIRECT COMMITMENT[.]" alleging that Swallow had failed to comply with the terms of his placement on electronic home detention due to not having appropriate housing. *Id.* at 157. The trial court issued the warrant that same

day. *Id.* at 159. On February 4, 2019, the trial court released Swallow back to home detention. *Id.* at 163. On March 12, 2019, DCCC filed another “PETITION FOR WARRANT ON REVOCATION OF DIRECT COMMITMENT[,]” alleging Swallow had failed to comply with the program’s terms for failure to obtain appropriate housing. *Id.* at 164. The petition also alleged that on February 12, 2019 Swallow tested positive for methamphetamine, that on February 20, 2019 he tested positive for amphetamine, and that on March 5, 2019 he tested positive for amphetamine, methamphetamine, and THC, all in violation of the terms of his home detention. *Id.* at 164. The trial court issued the warrant that same day. *Id.* at 166.

- [7] Following an April 29, 2019 fact-finding hearing, the trial court entered an order finding that the State carried its burden to prove that Swallow had violated the terms of his direct placement on home detention by using controlled substances, failing to complete required coursework in the Central Integrity Program, and failing to obtain “appropriate housing to complete his sentence on electronic home detention.” *Id.* at 176-77; *Appellant’s App. Vol. 3* at 34. On May 6, 2019, the trial court held a dispositional hearing after which it ordered Swallow to serve an aggregate sentence of four years on his Level 5 felony domestic battery conviction, with two years executed in the DOC and

two years suspended to supervised probation.¹ *Appellant's App. Vol. 2* at 183-84; *Appellant's App. Vol. 3* at 35. He was also ordered to submit to an alcohol and substance abuse evaluation and to complete the Central Integrity Program. *Appellant's App. Vol. 2* at 183-84. Swallow's two years of supervised probation commenced on May 10, 2019, and Swallow initialed and signed the terms and conditions of his supervised probation. *Id.* at 187-92.

[8] On February 14, 2020, Swallow's probation officer filed a "PETITION FOR HEARING ON REVOCATON OF SUPERVISED PROBATION." *Id.* at 193-94. The petition alleged that Swallow failed to report to probation as directed by the terms of his probation, that he failed to appear for a February 12, 2020 "administrative hearing," that he failed to participate in the Central Integrity Program, which was required by the terms of his probation, that on November 12, 2019, he was charged under Cause Number 18H01-1911-CM-2010 with Class A misdemeanor trespass, and that on February 10, 2020, he was charged under Cause Number 05D01-2002-CM-48 with Class A misdemeanor resisting law enforcement. *Id.*

[9] On September 14, 2020, the trial court held a fact-finding hearing. *Appellant's App. Vol. 3* at 39. At the hearing, Carl Barber, Jr. ("Chief Barber"), the chief of police for the Town of Gaston, testified that on September 29, 2019, he was dispatched to a residence at Gaston Village Green Trailer Park, where

¹ The trial court ordered Swallow to serve one year of his sentence on Level 6 felony arson in the DOC concurrent to his sentence on Level 5 felony domestic battery. *Appellant's App. Vol. 2* at 184.

Swallow's mother lived. *Tr. Vol. 2* at 5-9; *State's Ex. 1*. At that time, Chief Barber trespassed Swallow from his mother's residence, which meant that the information he relayed from the incident was "put in a computer system" showing that Swallow had "been trespassed and he's told not to return to the property." *Tr. Vol. 2* at 7-9. Chief Barber testified that he was dispatched to Swallow's mother's residence on November 12, 2019, because she wanted Swallow to leave the residence. *Id.* at 5-6, 11-12. Chief Barber then arrested Swallow for criminal trespass after Swallow refused to leave the residence when Chief Barber asked him to do so, and Swallow was transported to the jail. *Id.* at 11-12; *State's Ex. 1*.

[10] Swallow's probation officer, Lyndsey Wilmes ("Wilmes") also testified at the hearing. *Tr. Vol. 2* at 14. Wilmes testified that she had reviewed with Swallow the conditions of his probation, which included that he would obey the law, regularly report to probation, and complete the Central Integrity Program. *Id.* at 16; *State's Ex. 2*. She testified that after Swallow's probation began on May 10, 2019, she met with Swallow on two occasions but had her last in-person meeting with Swallow on October 24, 2019. *Tr. Vol. 2* at 18-19. Swallow was in jail in November 2019 on criminal trespass charges, and after rescheduling, Swallow failed to appear for a December 17, 2019 meeting. *Id.* at 19. Wilmes then scheduled "an administrative hearing" with the chief probation officer for February 12, 2020, but Swallow failed to attend that meeting, and Wilmes later learned that Swallow did not appear for the administrative hearing because he had been arrested in a different county on February 9, 2020. *Id.* Swallow did

not report the February 9, 2020 arrest as required by the terms of his probation. *Id.* at 20. As to his failure to complete the Central Integrity Program, Wilmes testified that Swallow went to the class when he was first referred but that he did not have transportation, and she stated that “the last discussion I had with him in October 2019 was that I would give him to the end of the year to try to figure out a way to get this class completed.” *Id.*

[11] At the conclusion of the hearing, the trial court found that the State had met its burden to prove by a preponderance that Swallow had violated his probation by failing to report to probation as directed, failing to enroll in the Central Integrity Program, and committing the new offense of criminal trespass at his mother’s house. *Id.* at 23; *Appellant’s App. Vol. 2* at 221. On September 21, 2020, the trial court held the dispositional hearing. *Appellant’s App. Vol. 3* at 39. Swallow’s mother asked the trial court to show Swallow leniency and allow him to seek medical treatment because he was “a very sick man and is willing to go to treatment.” *Tr. Vol. 2* at 29. Swallow testified that he had owned his own business, that, until he was in and out of jail in the instant matter, he had had sole custody of his oldest son since his son was two years old, that he had started the Central Integrity Program, attending four of the classes, and that he was willing to resume probation. *Id.* at 31-34. Swallow stated that his mother was trying to “get the court to show mercy on [his] behalf” and that she was “try[ing] to make up something” and denied that he had any psychiatric or mental health issues or needed drug or alcohol treatment. *Id.* at 35. Swallow stated that he did not have any “incapacity, mental stability issues, or anything

like that other than . . . a little anxiety and emotional distraughtness [sic]” because he had “lost [his children] due to this case.” *Id.* at 34. On multiple occasions during the hearing, Swallow interrupted the proceedings and accused his mother of stealing \$10,000 from him. *Id.* at 30, 36. At the conclusion of the hearing, the trial court ordered Swallow to serve his suspended two-year sentence in the DOC.² *Id.* at 41; *Appellant’s App. Vol. 2* at 27-28. Swallow now appeals.

Discussion and Decision

[12] Swallow contends that the trial court abused its discretion when it ordered him to serve his suspended sentence in the DOC. “‘Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled.’” *Cain v. State*, 30 N.E.3d 728, 731 (Ind. Ct. App. 2015) (quoting *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007)), *trans. denied*. “Courts in probation revocation hearings ‘may consider any relevant evidence bearing

² In its order on the dispositional hearing, the trial court also amended its prior order on fact-finding to state as follows:

The Court finds the State has met its burden of proof by a preponderance of the evidence that [Swallow] has violated the terms of supervised probation. [Swallow] signed the Rules of Supervised Probation on May 10, 2019. [Swallow] failed to appear at the February 12, 2020, scheduled visit and did not meet with the Probation Officer after that date. The State proved by a preponderance of the evidence that [Swallow] committed the crime of criminal trespass at his mother’s house as charged in Cause No. Number 18H01-1911-CM-2010. [Swallow] did not enroll at all in the Batterer’s Intervention Program as ordered by the Court.

Appellant’s App. Vol. 2 at 227.

some substantial indicia of reliability.’” *Id.* (quoting *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999)). “It is within the discretion of the trial court to determine the conditions of a defendant’s probation and to revoke probation if the conditions are violated.” *Id.* Probation revocation is a two-step process. *Johnson v. State*, 62 N.E.3d 1224, 1229 (Ind. Ct. App. 2016). First, the court must make a factual determination that a violation of a condition of probation actually occurred. *Id.* If a violation is proven, then the trial court must determine if the violation warrants revocation of the probation. *Id.* One violation of a condition of probation is enough to support a probation revocation. *Pierce v. State*, 44 N.E.3d 752, 755 (Ind. Ct. App. 2015).

[13] If the trial court determines a probationer has violated a term of probation, then the court may impose one or more 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 year beyond the original probationary period; or (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). We review a trial court’s sentencing decisions for probation violations under an abuse of discretion standard. *Knecht v. State*, 85 N.E.3d 829, 840 (Ind. Ct. App. 2017). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

[14] Swallow does not contest that he violated his probation but argues only that the totality of the circumstances demonstrates that “it was unreasonable for the trial court to determine Swallow’s violation warranted provoking his probation.”

Appellant's Br. at 10. Without citation to the record, Swallow contends that the trial court abused its discretion by imposing the entirety of his suspended sentence because the evidence showed that the basis for the revocation of his probation was due to his issues with his mother, that his mother's testimony at the dispositional hearing was that Swallow needed treatment not incarceration, and that his circumstances are analogous to those presented in *Johnson v State*, 62 N.E.3d 1224 (Ind. Ct. App. 2016) and support reversal.³ We disagree.

[15] In *Johnson*, the defendant received an eleven-year sentence with seven years executed on home detention through community corrections and four years suspended to probation. 62 N.E.3d at 1227. Because the defendant failed to fully pay fees and follow instructions about where and when to be outside his apartment unit, the trial court revoked the defendant's entire executed sentence and ordered him to serve it in the DOC. *Id.* at 1227-29. Citing various factors in the record, including the defendant's mental limitations, limited resources, previous success on work release, nature of the violation, and severity of the revocation sentence, our court held that the trial court had abused its discretion by finding that the defendant's violation "warranted serving the entirety of the

³ Swallow does not cite to the record in the argument section of his brief. Indiana Appellate Rule 46(A)(8) provides that the argument section of an appellant's brief "must contain the contentions of the appellant on the issues presented, supported by cogent reasoning," and that "[e]ach contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22." Indiana Appellate Rule 22(C) governs references to the record on appeal and provides that "[a]ny factual statement shall be supported by a citation to the volume and page where it appears in an Appendix, and if not contained in an Appendix, to the volume and page it appears in the Transcript or exhibits, e.g., Appellant's App. Vol. II p. 5; Tr. Vol. I, pp. 231-32."

remaining portion of his executed sentence in the DOC.” *Id.* at 1226, 1228, 1231-32.

[16] Here, the trial court’s decision to order Swallow to execute the entirety of his suspended sentence was not an abuse of discretion as there was ample evidence to support the sentence, and Swallow’s case is readily distinguishable from *Johnson*. Swallow committed several violations of his probation, including the commission of a new criminal offense, Class A misdemeanor criminal trespass, failure to report to probation, and failure to complete the Central Integrity Program. *Appellant’s App. Vol. 2* at 227-28; *Tr. Vol. 2* at 5-9, 11-12, 14-21; *State’s Exs. 1-5*. In addition, Swallow had repeatedly failed to comply with the terms of his pretrial supervision while his case was ongoing and failed to comply with the terms of his electronic home detention after he was sentenced. *Appellant’s App. Vol. 2* at 64-65, 71-75, 110-11, 113-16, 157-69, 176-77, 183-84; *Appellant’s App. Vol. 3* at 25-26, 30, 32-35. Swallow’s violations of probation along with his failure to comply with the terms of his electronic home detention supports the trial court’s finding that Swallow “has not taken advantage of the opportunities provided him through the direct commitment to electronic home detention and the second opportunity to serve the suspended sentence on supervised probation.” *Appellant’s App. Vol. 2* at 227. Unlike in *Johnson*, Swallow does not argue that he has limited intellectual ability or that he had difficulty understanding that the terms of probation prohibited him from committing new crimes. In addition to the Class A misdemeanor trespass that he committed while on probation, Swallow also has extensive adult criminal history, which

includes convictions for Class C felony attempted burglary, Class D felony domestic battery, Class A misdemeanor domestic battery, Class B misdemeanor obstructing traffic, and Class A misdemeanor driving while suspended. *Id.* at 227-28; *Appellant's Conf. App. Vol. 2* at 126-29. While Swallow acknowledges that the trial court was not obligated to credit his mother's assessment that he needed treatment and not incarceration, he ignores his own testimony from the dispositional hearing in which he stated that his mother was trying to "get the court to show mercy on [his] behalf," that she was "try[ing] to make up something," and denied that he had any psychiatric or mental health issues or needed drug or alcohol treatment. *Id.* at 29-30, 34-35. Accordingly, the trial court's sanction was not an abuse of discretion and *Johnson* does not compel a different result.

- [17] To the extent Swallow argues that *Livingston v. State*, 113 N.E.3d 611 (Ind. 2018) supports his position, we disagree. *Livingston* involved circumstances that our Supreme Court described as "rare and exceptional" in which the defendant, after committing several drug offenses: (1) pleaded guilty without a plea agreement; (2) voluntarily placed herself in a county community corrections program; (3) used her own money and donations to start a home for women recovering from addiction; and (4) reported twice a week and took random drug screens, which were all negative. *Livingston*, 113 N.E.3d at 612. In light of those factors, the Indiana Supreme Court revised the defendant's sentence. *Id.* at 612-14. Unlike in *Livingston*, where the defendant's sentence was imposed following a guilty plea and revised on appeal, Swallow's sentence was imposed

as a sanction for a probation violation. The Indiana Supreme Court has stated that a “trial court’s action in a post-sentence probation violation proceeding is not a criminal sentence as contemplated by the rule. The review and revise remedy of [Appellate Rule] 7(B) is not available.” *Jones v. State*, 885 N.E.2d 1286, 1290 (Ind. 2008). *Livingston* is entirely inapposite to Swallow’s circumstances.

[18] Affirmed.

Bradford, C.J., and May, J., concur.