

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Phillip G. Mourey,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 30, 2022

Court of Appeals Case No.
22A-CR-1983

Appeal from the Ripley Superior
Court

The Honorable Jeffrey Sharp,
Judge

Trial Court Cause No.
69D01-1908-F2-8

Brown, Judge.

[1] Phillip G. Mourey appeals the revocation of his probation. We affirm.

Facts and Procedural History

[2] On February 22, 2019, the State charged Mourey with: Count I, possession of methamphetamine as a level 4 felony; Count II, conspiracy to commit bribery as a level 5 felony; Count III, attempted obstruction of justice as a level 6 felony; Count IV, conspiracy to commit obstruction of justice as a level 6 felony; and Count V, possession of a narcotic drug as a level 6 felony. The State also alleged that Mourey was an habitual offender.

[3] In August 2019, the State filed an amended information charging Mourey with amended counts of Count I, possession of methamphetamine as a level 4 felony, and Count II, conspiracy to commit bribery as a level 5 felony. The State also charged Mourey with: Count VI, conspiracy to commit dealing in methamphetamine as a level 2 felony; Count VII, dealing in methamphetamine as a level 2 felony; Count VIII, conspiracy to commit dealing in a narcotic drug as a level 5 felony; Count IX, dealing in a narcotic drug as a level 5 felony; Count X, conspiracy to commit trafficking with an inmate as a level 5 felony; Count XI, trafficking with an inmate as a level 5 felony; Count XII, conspiracy to commit trafficking with an inmate as a level 5 felony; Count XIII, attempted trafficking with an inmate as a level 5 felony; Count XIV, conspiracy to commit bribery as a level 5 felony; Count XV, attempted bribery as a level 5 felony; Count XVI, conspiracy to commit obstruction of justice as a level 6 felony; Count XVII, conspiracy to commit money laundering as a level 6 felony; Count XVIII, money laundering as a level 6 felony; and Count XIX, criminal gang

activity as a level 6 felony. It also alleged a criminal gang enhancement. In February 2020, the State charged Mourey with: Count XX, conspiracy to commit dealing in methamphetamine as a level 4 felony; Count XXI, conspiracy to commit dealing in methamphetamine as a level 4 felony; and Count XXII, attempted dealing in methamphetamine as a level 4 felony.

[4] On November 10, 2021, the State and Mourey filed a Joint Motion in Tender of Conditional Negotiated Plea pursuant to which Mourey agreed to plead guilty to Count XX, conspiracy to commit dealing in methamphetamine as a level 4 felony, for which he would receive a sentence at the discretion of the court of between two and twelve years. He also agreed to plead guilty to Count XXI, conspiracy to commit dealing in methamphetamine as a level 4 felony, and Count XXII, attempted dealing in methamphetamine as a level 4 felony, and that he would receive a sentence at the discretion of the court of between two to twelve years and that the sentences for Counts XXI and XXII would be served concurrently. The plea agreement provided that the court shall determine whether to impose the sentence for Count XX consecutively or concurrently with Counts XXI and XXII. The State agreed to dismiss all remaining counts and sentencing enhancements.

[5] On October 26, 2021, the court entered a sentencing order which found the fact that the offenses were committed in a penal facility where Mourey was serving another sentence was an aggravating factor and his prior criminal history was a significant aggravating factor. It noted that Mourey's risk assessment score as indicated in the presentence investigation report ("PSI") indicated that he was

in the very high risk to reoffend category. It found Mourey's guilty plea and cooperation with law enforcement to be mitigating factors. Specifically, it took into consideration that the State and Indiana State Police Detective Chip Ayers had advocated that Mourey should not serve an executed sentence in the Department of Correction ("DOC") because he had cooperated with law enforcement, Mourey's willingness and ability to infiltrate a violent street gang was unparalleled, and Mourey placed himself and possibly his family at great risk by cooperating with law enforcement. The court observed that Detective Ayers testified at the sentencing hearing that if Mourey was incarcerated in the DOC "his life would be in grave danger – it would very likely be a death sentence." Appellant's Appendix Volume II at 205. It sentenced Mourey to ten years for Count XX with 3,277 days suspended to probation, ten years for Count XXI with 3,277 days suspended to probation, and ten years for Count XXII with 3,277 days suspended to probation. The court ordered that the sentences be served concurrently. That same day, the court granted Mourey's request for transfer of his probation from Ripley County to Johnson County.

[6] On May 24, 2022, Probation Officer Justin Lynette filed a "Petition for Probation Violation Hearing and Order Issue Warrant" alleging that Mourey had violated the terms of his probation because a drug screen returned preliminarily positive for methamphetamine, amphetamine, marijuana, MDMA (Ecstasy), and alcohol, and Mourey reported that he had recently snorted methamphetamine. On June 1, 2022, Officer Lynette filed an Amended Petition for Probation Violation Hearing alleging that Mourey had

also been charged with the new criminal offenses of possession of methamphetamine as a level 5 felony and maintaining a common nuisance as a level 6 felony under cause number 41D03-2205-F5-45 (“Cause No. 45”) as well as criminal trespass as a class A misdemeanor under a separate cause number. On June 27, 2022, Officer Lynette filed a Second Amended Petition for Probation Violation Hearing alleging that Mourey had also been charged with leaving the scene of an accident as a class B misdemeanor.

[7] On July 19, 2022, the court held a hearing. When asked for a factual basis, the prosecutor asserted that the State would prove by a preponderance of the evidence that a drug screen on May 24, 2022, returned positive for methamphetamine, amphetamine, MDMA (Ecstasy), and alcohol; Mourey reported he snorted methamphetamine; and that he had been charged and probable cause was found in Cause No. 45 with respect to possession of methamphetamine as a level 5 felony and maintaining a common nuisance as a level 6 felony. Mourey admitted these violations.

[8] Mourey testified that he had his own house and moved his mother in with him, but later learned that the person to whom he made payments kept the money instead of paying the mortgage. He stated he had the same job for two and one-half years and saved enough money to start his own landscaping business. He testified that a woman said she was pregnant with his baby and that he reported her to her probation officer because she was doing drugs and he did not want his child to be on drugs. He testified she gave the baby up for adoption and he relapsed because of that as well as “people calling me, my mother and my wife,

due to my last case, telling me that they [were] going to kill me or they [were] going to kill my mother” Transcript Volume II at 15. He stated he went to “two rehabs” and “reached out” to a rehab in Anderson “and they have said that they have a bed open for me today” *Id.* at 16-17. He also testified that he moved Zach Carter, who had cancer and was on probation, into his home and transported him to radiation and chemotherapy. He admitted to previously being a drug dealer, a drug user, and affiliated with the “brotherhood.” *Id.* at 22.

- [9] The court stated that it was revoking eight years of the suspended sentence. That same day, the court entered an order granting the petition to revoke probation and revoking 2,920 days of Mourey’s suspended sentence.

Discussion

- [10] Mourey argues that the trial court abused its discretion by sentencing him to serve eight years in the DOC which was the equivalent to what the trial court termed a “death sentence.” Appellant’s Brief at 18. He argues that he had previously assisted the State, he had been in the process of purchasing a home for himself and his mother until he was arrested on the probation violation, he had maintained the same employment delivering newspapers for two and one-half years, he had saved sufficient money to start his own landscaping business, and he used what resources he had to take care of others. He asserts that unforeseen traumatic events drove him to relapse, he regretted backsliding, and he had made arrangements to attend a rehabilitation center. He also contends that his mother needed hip surgery and was being evicted. He requests that we

reverse the trial court with “instructions to place him under strict supervision with the requirement that he complete intensive substance abuse treatment.”

Id. The State argues that the trial court did not abuse its discretion when it sanctioned Mourey, notes that Mourey presented no evidence at the hearing to show that the DOC would be unable to attend to his safety while he is incarcerated, and asserts that he points only to the speculative claim of a witness from his underlying sentencing hearing, who was not a DOC employee.

[11] Ind. Code § 35-38-2-3 provides:

If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may impose one (1) 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 (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.

[12] We review trial court probation violation determinations and sanctions for an abuse of discretion. *Heaton v. State*, 984 N.E.2d 614, 616 (Ind. 2013) (citing *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007)). The Indiana Supreme Court has explained that “[o]nce a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed” and that “[i]f 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.” *Prewitt*, 878 N.E.2d at 188.

[13] Mourey does not challenge his admissions that a drug screen on May 24, 2022, returned positive for methamphetamine, amphetamine, MDMA (Ecstasy), and alcohol or that he reported he snorted methamphetamine. He also does not challenge his admission related to Cause No. 45 with respect to the new offenses of possession of methamphetamine as a level 5 felony and maintaining a common nuisance as a level 6 felony.

[14] At the July 19, 2022 hearing, the court referenced the offenses for which Mourey was sentenced in October 2021 included conspiracy to commit dealing in methamphetamine, conspiracy to commit dealing in methamphetamine, and attempted dealing in methamphetamine as level 4 felonies. The court stated:

In fashioning that sentence, he pled to those cases and the sentencing was at the discretion of the Court. Quite frankly, . . . the Court entered that sentence, based pretty much solely on the testimony from Detective Chip Ayers that Mr. Mourey had gone above and beyond in his cooperation with the Indiana State Police because this case was bad. We are talking about dealing methamphetamine within the Ripley County Jail on numerous occasions. Basically, it was a, I would call it a methamphetamine dealing ring where it was being brought in and peddled to inmates while the Court is trying to keep people safe in the jail. So, I mean the case, the facts of the case were atrocious and quite frankly a ten year sentence with nine years suspended was no where near what an individual would deserve for a case of those facts, but once again, the Court listened to

Detective Ayers talk about the work that Mr. Mourey had done and quite frankly the only reason the Court gave Mr. Mourey that benefit and gave him that sentence was I felt that the amount of the work that he had done pretty much left him with no option but to live the straight and narrow, that he couldn't return to that way of life. I was wrong. He has returned to that way of life, using methamphetamine, being charged in a new criminal offense. We are headed down the same path that we have time and time and time again. The Court does consider his prior criminal history as outlined in the Pre-Sentence Investigation. . . . So, the prior criminal history speaks for itself as a significant aggravating factor. The Court considers the IRAS score with a high risk to reoffend, which he has done.

Transcript Volume II at 38-40. The PSI dated August 16, 2021, indicated that Mourey's legal history consisted of at least three prior misdemeanor convictions and at least eight prior felony convictions including two convictions for dealing as class B felonies in 2004, trafficking a deadly weapon with an inmate as a class C felony in 2008, and two counts of battery resulting in bodily injury as class D felonies in 2009. It stated that Mourey had previously violated the conditions of his probation at least six times. Under the heading Substance Abuse, it indicated that Mourey reported that he completed Therapeutic Community while incarcerated and had attended AA/NA classes in the past. In light of the record, we cannot say the trial court abused its discretion in revoking Mourey's probation and ordering that he serve 2,920 days of his suspended sentence.

[15] Affirmed.

Altice, J., and Tavitas, J., concur.