

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Lisa M. Johnson
Brownsburg, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Evan Matthew Comer
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Brandon D. Winn,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 20, 2021

Court of Appeals Case No.
21A-CR-623

Appeal from the Gibson Circuit
Court

The Honorable Jeffrey F. Meade,
Judge

Trial Court Cause No.
26C01-1806-F5-640

Darden, Senior Judge.

Statement of the Case

- [1] Brandon Winn appeals the trial court's finding that he violated the terms of his probation and the imposition of his previously suspended sentence. We affirm.

Issues

[2] Winn presents four issues for our review, which we restate as follows:

- I. Whether the State presented sufficient evidence of a probation violation.
- II. Whether the trial court abused its discretion by ordering Winn to serve his previously suspended sentence.

Facts and Procedural History

[3] On June 12, 2018, the State charged Winn with battery resulting in serious bodily injury, a Level 5 felony;¹ two counts of strangulation, Level 6 felonies;² two counts of domestic battery in the presence of a child, Level 6 felonies;³ invasion of privacy, a Class A misdemeanor;⁴ resisting law enforcement, a Level 6 felony;⁵ operating a vehicle while intoxicated, endangering a person, a Class A misdemeanor;⁶ and operating a vehicle while intoxicated, a Class C misdemeanor.⁷ The State also issued no contact orders prohibiting Winn from

¹ Ind. Code § 35-42-2-1 (2016).

² Ind. Code § 35-42-2-9 (2017).

³ Ind. Code § 35-42-2-1.3 (2016).

⁴ Ind. Code § 35-46-1-15.1 (2017).

⁵ Ind. Code § 35-44.1-3-1 (2016).

⁶ Ind. Code § 9-30-5-2 (2001).

⁷ Ind. Code § 9-30-5-1 (2001).

having any contact with his wife or ex-wife, the victims of these offenses. On July 3, the State added one count of intimidation, a Level 6 felony.⁸

[4] Pursuant to a plea agreement, Winn pleaded guilty on April 4, 2019 to battery resulting in serious bodily injury, a Level 5 felony; one count of domestic battery in the presence of a child, a Level 6 felony; resisting law enforcement, a Level 6 felony; operating a vehicle while intoxicated, endangering a person, a Class A misdemeanor; and intimidation, a Level 6 felony, with sentencing left to the discretion of the trial court. The trial court accepted the plea agreement and sentenced Winn to an aggregate sentence of four years, with two years executed and two years suspended to probation.

[5] While incarcerated, Winn wrote to the Gibson County Probation Department and requested that his probation be transferred to Marion County. Gibson County Probation Officer Jodi Luttrell advised Winn that he could request a transfer when he was released from prison. Winn was released from prison and placed on probation in December 2019. He submitted paperwork to transfer his probation to Marion County, and the transfer was accepted. Although Winn was supervised by the Marion County Probation Department, he still had to abide by the terms and conditions of probation he signed with the Gibson County Probation Department, and Officer Luttrell was to be notified of any violations and was involved in decisions regarding sanctions for such. Winn

⁸ Ind. Code § 35-45-2-1 (2017).

was supervised by the Marion County Probation Department from December 2019 to September 2020.

[6] In September 2020, Winn informed the Marion County Probation Department that he was moving to Clay County. The Marion County Probation Department notified Officer Luttrell that Winn had moved to Clay County and provided her with Winn's address. Before Luttrell acted on this information, and without notice or permission, Winn moved back to Gibson County and failed to provide the probation department with his address. The State later filed new charges against him in December. Under cause number 26C01-2012-CM-1250 ("CM-1250"), the State charged Winn with resisting law enforcement and invasion of privacy, both Class A misdemeanors.

[7] The State then filed a petition to revoke Winn's probation in the present case, alleging that he (a) failed to remain on good behavior, (b) failed to notify the Gibson County Probation Department of his change of address, and (c) failed to complete a substance abuse program. Following an evidentiary hearing, the trial court found Winn had violated his probation by being charged with new offenses and failing to notify probation of his change of address. The trial court imposed Winn's entire previously suspended sentence. He now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

[8] Winn first contends there was insufficient evidence to show he violated his probation. We note that a probation revocation hearing is in the nature of a

civil proceeding, and the State must prove an alleged violation by a preponderance of the evidence. Ind. Code § 35-38-2-3(f) (2015); *Terpstra v. State*, 138 N.E.3d 278, 284 (Ind. Ct. App. 2019), *trans. denied* (2020). Our standard of review of the sufficiency of the evidence supporting the revocation of probation is similar to our standard of review for other sufficiency matters; that is, we consider only the evidence most favorable to the judgment, and we will not reweigh the evidence or reassess the credibility of the witnesses. *Id.* We will affirm if there is substantial evidence of probative value to support the trial court's conclusion that the probationer has violated any condition of probation. *Id.*

[9] On December 10, 2019, Winn signed his rules of probation, which contained the following relevant rules:

1. You shall remain on your good behavior. You shall refrain from the violation of any Federal, State or Local laws. *A finding of probable cause against you by any Court shall constitute a violation of the terms of probation* and may cause a revocation to be filed. A conviction shall not be necessary in order to constitute a violation. Any contact with law enforcement must be reported immediately.

. . . .

3. You shall work regularly at a lawful occupation and support your legal dependents. You shall notify the Probation Dept. of any change of address, phone, or employment. If you provide a cell phone number, you are required to setup voicemail and keep it empty. If you are unemployed, you will attend GED and/or Work One training classes immediately until you become

gainfully employed; you must provide proof of your attendance.
If ordered, you shall provide pay check stubs to your assigned
officer.

Exhibit Vol. 3, p. 4 (italics added).

[10] Winn initially asserts that Rule 1 is facially invalid because it makes the finding of a probation violation mandatory and automatic upon the finding of probable cause for new offenses. As such, he claims Rule 1 of the Gibson County Probation Department Rules directly contradicts Indiana Code section 35-38-2-3(f), which requires the State to prove a violation of probation by a preponderance of the evidence. While we agree that Rule 1 states an erroneous standard and should be revised, Winn did not object to the validity of Rule 1 in the trial court. As a result, he may not challenge the rule for the first time on appeal, and this issue is forfeited. *See Leonard v. State*, 80 N.E.3d 878, 884 n.4 (Ind. 2017) (quoting *Plank v. Cmty. Hosps. of Ind., Inc.*, 981 N.E.2d 49, 53 (Ind. 2013) (“Declining to review an issue not properly preserved for review is essentially a cardinal princip[le] of sound judicial administration.” (Internal quotation omitted))).

[11] Invalidity notwithstanding, the trial court’s finding that Winn violated Rule 1 is error. Winn argues there was insufficient evidence to find he violated Rule 1 because the trial court found a violation based merely on the fact that there was a finding of probable cause for the new offenses and not based on proof by a preponderance of the evidence as required for a probation violation. *See Ind. Code § 35-38-2-3(f)*; *see also Heaton v. State*, 984 N.E.2d 614, 617 (Ind. 2013) (correct burden of proof for trial court to apply in probation revocation

proceeding is preponderance of evidence standard, not probable cause standard). For its part, the State readily acknowledges that a finding of probable cause, by itself, is categorically insufficient to establish a probation violation and concedes that the trial court abused its discretion when it determined Winn violated Rule 1 based solely on the fact that probable cause had been found in CM-1250. Thus, we reverse the trial court's finding that Winn violated his probation under Rule 1.

[12] As to Winn's violation of Rule 3, the State alleged in the petition to revoke that Winn was residing in Gibson County and had failed to inform the probation department of his change of address from Clay County to Gibson County. Winn claims the State's evidence is insufficient to show that he failed to report a change of address.

[13] The evidence most favorable to the trial court's determination shows that at the evidentiary hearing State's Exhibit 6, the jail booking report from Winn's arrest for the incident that led to the new charges in CM-1250, was admitted and lists a Gibson County address for Winn. *See* Ex. Vol. 3, p. 22. Additionally, Exhibits 4 and 5, the chronological case summary ("CCS") for CM-1250 and the no contact order entered against Winn in CM-1250, respectively, list the same Gibson County address for Winn as that in Exhibit 6 and were admitted without objection at the hearing. *Id.* at 15, 18. Further, Exhibit 3 contains the charging information and the probable cause affidavit for CM-1250 and was admitted without objection. In the affidavit for probable cause, Sergeant John Fischer of the Gibson County Sheriff's Department attests that he was sent to a

residence in Gibson County on a report that Winn had threatened his wife, Megan. Winn was apprehended at the residence and reported to Sergeant Fischer that he “had been back with his wife Megan for the last 8 months or so.” *Id.* at 14. The address of the Gibson County residence where Winn was apprehended is the same address listed in Exhibits 4, 5, and 6. Finally, Luttrell testified that Winn did not contact the probation department to inform it of his change of address from Clay County to Gibson County, as required by the rule of his probation. *See* Tr. Vol. 2, p. 35.

[14] Although Winn attempts to shift his responsibility to Luttrell by arguing that “she was supposed to contact” him, his probation rules clearly state it is his duty to “comply with every rule” and, specifically, that he “shall notify the Probation Dept. of any change of address.” Appellant’s Br. p. 17; *see* Ex. Vol. 3, p. 4. Winn further asserts that the booking report, the CCS, and the no contact order are insufficient to show he actually lived in Gibson County because the State did not present evidence as to the identity of the individuals who recorded that address on the documents or the source of their information. This argument is simply a request for us to reweigh the evidence in his favor, which we cannot do. *See Holmes v. State*, 923 N.E.2d 479, 482-83 (Ind. Ct. App. 2010) (noting that absence of strict evidentiary rules in probation proceedings places particular importance on fact-finding role of judges in assessing weight, sufficiency, and reliability of proffered evidence). The evidence is sufficient to prove by a preponderance of the evidence that Winn violated a condition of his probation by failing to notify the probation department of his change of address.

II. Sanction

[15] Probation is a matter of grace and a conditional liberty that is a favor, not a right. *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999). That is to say, probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment. *Bratcher v. State*, 999 N.E.2d 864, 873 (Ind. Ct. App. 2013), *trans. denied* (2014). 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. *Jones v. State*, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005). “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.” *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). Accordingly, a trial court’s sentencing decisions for probation violations are reviewed for an abuse of discretion. *Wilkerson v. State*, 918 N.E.2d 458, 464 (Ind. Ct. App. 2009). An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

[16] Indiana Code section 35-38-2-3(h) (2015) offers the trial court the following options when it finds a defendant has violated the terms of his probation: (1) continue the person on probation, with or without modifying the conditions; (2) extend the person’s probationary period for not more than one year; and/or (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing.

[17] Here, the trial court revoked Winn’s probation and ordered him to serve the entirety of his previously suspended sentence. Winn first claims the judge’s comment at the evidentiary hearing constitutes an abuse of discretion because it shows the court failed to consider a disposition other than revocation. At the outset of the hearing, this dialogue took place following a statement of the three alleged probation violations by defense counsel:

THE COURT: Okay. And, sir, you understand if the State can meet any of them, then the Court **will** revoke, right?

THE DEFENDANT: Yes.

THE COURT: You understand that?

THE DEFENDANT: Yes, I understand that.

THE COURT: It’s not like elements of a case where the State has to meet all of them. Any violation that’s proven or admitted, that’s enough, right?

THE DEFENDANT: Yes, I understand, Your Honor.

THE COURT: Okay, just so you understand. All right. State go ahead.

Tr. Vol. 2, pp. 22-23 (emphasis added).

[18] Based on our review of the record, and taken in context, we believe the court’s comments were meant to advise Winn that the State was not required to prove all three of the alleged probation violations before his probation could be revoked. In doing so, we believe the court merely misspoke and used the word “will” instead of “can” or “may.” At the end of the evidentiary hearing, the trial court discussed each allegation of probation violation and its reasoning and findings on each. We find no abuse of discretion.

[19] Even assuming the court's comment amounted to error, Winn cannot prevail on this issue. Winn made no objection to the trial court's comment that he now claims was improper. "Where a defendant fails to object or otherwise challenge a trial judge's remarks, any alleged error is waived on appeal." *Garrett v. State*, 737 N.E.2d 388, 391 (Ind. 2000). Accordingly, Winn's claim regarding the trial court's comment is waived.

[20] Lastly, Winn alleges that failing to report a change of address is a technical violation that does not warrant execution of his entire suspended sentence. However, the violation of a single condition of probation can be sufficient to revoke probation. *Luke v. State*, 51 N.E.3d 401, 421 (Ind. Ct. App. 2016), *trans. denied*. Moreover, contrary to what Winn claims, this is not merely a technical violation but rather a substantive violation of the probation conditions to which he agreed that demonstrates he is not a good candidate for probation. The violation of probation conditions, such as the requirement to update the probation office of one's whereabouts, not only impedes the ability of the probation office to supervise the probationer but also enables the probationer to conceal other violations, such as illegal activity.

[21] In addition, the record reveals some troubling facts that Winn fails to acknowledge, such as the fact that he is facing new charges, including invasion of privacy for violating the no contact order previously issued to protect the same person who was the victim of the original battery and intimidation that landed him in prison and on probation in the first place—his wife, Megan. Furthermore, Luttrell testified that, on at least one occasion, Winn had failed a

drug screen and, on another occasion, had missed a scheduled drug screen. Therefore, based on the record before us, we conclude that the trial court did not abuse its discretion by ordering Winn to serve his previously suspended sentence.

Conclusion

[22] For the reasons stated, we conclude that the State presented sufficient evidence to prove by a preponderance of the evidence that Winn violated Rule 3 of his probation and that the trial court properly exercised its discretion in ordering Winn to serve the balance of his previously suspended sentence upon revocation of his probation.

[23] Affirmed.

Vaidik, J., and Weissmann, J., concur.