

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Michael D. Keith,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff.

August 21, 2023

Court of Appeals Case No.
22A-CR-2495

Appeal from the Hamilton
Superior Court

The Honorable Michael A. Casati,
Judge

Trial Court Cause No.
29D01-2103-F3-1571

Memorandum Decision by Judge Pyle

Chief Judge Altice and Judge Riley concur.

Pyle, Judge.

Statement of the Case

[1] Michael D. Keith (“Keith”) appeals following the trial court’s entry of an order revoking his probation and community corrections placement. Keith argues that the trial court abused its discretion when it assessed a probation fee for a probationary term that was revoked before it commenced. Concluding that the trial court abused its discretion by imposing such a fee, we reverse and remand with instructions for the trial court to correct the fee amount to reflect the removal of any probation fees.

[2] We reverse and remand.

Issue

Whether the trial court abused its discretion when it assessed fees for probation.

Facts

[3] In March 2021, the State charged Keith with Level 3 felony dealing in a schedule I controlled substance, Level 6 felony resisting law enforcement, Level 6 felony possession of a narcotic drug, Class A misdemeanor driving while suspended, and two counts of Class A misdemeanor possession of a controlled substance. In June 2021, Keith entered into a plea agreement with the State. Pursuant to the agreement, Keith pleaded guilty to dealing in a schedule I controlled substance as a Level 5 felony and Level 6 felony resisting law enforcement. In exchange, the State agreed to dismiss the Level 6 felony

possession of a narcotic drug, Class A misdemeanor driving while suspended, and two counts of Class A misdemeanor possession of a controlled substance. The plea agreement also provided terms for Keith's sentence. Specifically, the plea agreement provided that Keith would serve an aggregate sentence of five (5) years, with one (1) year executed at the Indiana Department of Correction ("the DOC"), one (1) year served with community corrections, and three (3) years suspended and served on probation. Keith also agreed to not commit new offenses and to comply with community corrections as terms of his probation.

[4] The trial court sentenced Keith pursuant to the terms of the plea agreement. The trial court's order also included court costs of \$185 and a drug abuse, prosecution, interdiction, and correction fee of \$200. The trial court also assessed probation fees in the amount of \$660.¹

[5] In December 2021, the DOC released Keith into the custody of the county jail. When the county jail released Keith so that he could report to Hamilton County Community Corrections, Keith failed to report. Later that month, Hamilton County Community Corrections filed a notice of noncompliance, alleging that Keith had failed to report to community corrections after he had

¹ Although this fee does not appear in the trial court's sentencing order, the chronological case summary shows that Keith owes a total of \$1,045. After subtracting court costs of \$185 and a drug abuse, prosecution, interdiction, and correction fee of \$200, the remaining balance is \$660. Further, the online docket on MyCase shows that the trial court assessed probation fees in the amount of \$660 a week after Keith's sentencing, and the State concedes this fact.

left the county jail. The probation department filed a notice of violation alleging the same facts as the community corrections filing. The trial court issued a warrant for Keith's arrest, and officers arrested Keith and took him to the Hamilton County Jail.

[6] In February 2022, while still at the Hamilton County Jail, Keith and inmate Sean Hendrix ("Inmate Hendrix") got into an argument. During the argument, Keith jumped down from his bunk and repeatedly struck Inmate Hendrix in his face "twenty or thirty" times, causing damage to his eye and knocking out some of his teeth. (Tr. at 12). As a result, the State charged Keith with Level 5 felony battery resulting in serious bodily injury. The probation department filed a second notice of violation because of this new charge.

[7] In October 2022, the trial court held an evidentiary hearing. At the hearing, Keith admitted to violating community corrections and to the first alleged probation violation by failing to report to community corrections after he had been released from the county jail. Additionally, Inmate Hendrix testified to the facts of the fight as set forth above. After evidence was presented, the trial court stated, "[a]rgument, State?" (Tr. at 22). The State responded that it believed it had met its burden of proving the second alleged probation violation. The trial court then stated, "[a]nd your request as to disposition?" (Tr. at 22). The State responded that it was requesting that Keith's community corrections and probation be revoked and for him to serve the remainder of his sentence at the DOC. The trial court then stated, "All right, thank you. [Defense Counsel]?" (Tr. at 23). The following exchange then occurred:

[Defense Counsel]: Judge, no argument as to violation 2. We would ask that this be set out for disposition just for the purposes of seeing what happens with the jury trial [in his battery cause] on Monday and perhaps we can fashion something based on if he is found guilty at that time.

The Court: Okay. That request is denied.

(Tr. at 23). After the trial court denied the motion to continue the dispositional hearing, Keith offered no argument regarding disposition.

[8] At the conclusion of the evidentiary hearing, the trial court found that Keith had admitted that he had violated the terms of his community corrections by failing to report to community corrections after he had been released from the county jail. The trial court also found that Keith had violated the terms of his probation by committing a new offense. The trial court revoked Keith's community correction placement and probation. The trial court ordered that Keith serve the remainder of his community corrections sentence and suspended sentence at the DOC.

[9] Keith now appeals.

Decision

[10] Keith does not appeal the trial court's revocation of his probation and community corrections placement. Nor does he appeal the trial court's order that he serve his remaining sentence in the DOC. Instead, Keith argues that the trial court abused its discretion when it assessed fees against him.

- [11] It is well settled that a trial court’s sentencing decisions include decisions to impose fees and costs. *Fleming v. State*, 143 N.E.3d 987, 989 (Ind. Ct. App. 2020). Sentencing decisions are reviewed for an abuse of discretion. *McElroy v. State*, 865 N.E.2d 584, 588 (Ind. 2007). “An abuse of discretion has occurred when the sentencing decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Id.* at 588 (internal quotation marks omitted).
- [12] Keith argues that the trial court abused its discretion when it assessed probation fees against him in the amount of \$660.² Specifically, Keith argues that the trial court abused its discretion because it had assessed fees against him for probation that he had “never started.” (Keith’s Br. 7). We agree.
- [13] Our review of the record reveals that the trial court revoked Keith’s probation placement before the probationary term had even started. However, the \$660 probation fee from the original sentencing order had not been removed. Recently, our Court determined that a trial court abuses its discretion when it assesses probation fees on a defendant for probation that he had never started. *See Fleming*, 143 N.E.3d at 991. Although the trial court did not assess the probation fees at the time of his revocation, the trial court should have removed

² Keith contends that the \$660 probation fee is comprised of an initial probation fee of \$100, and administrative fee of \$100, and twenty-three months of \$20 monthly user fees. In support of this fee breakdown, Keith cites to INDIANA CODE § 35-38-2-1(d).

the \$660 in probation fees because Keith had his probation revoked before he had ever started probation. We remand to the trial court with instructions to recalculate Keith's fees without the \$660 in probation fees.³

[14] Reversed and remanded.

Altice, C.J., and Riley J., concur.

³ Keith also argues that the trial court denied him his right to counsel at his revocation hearing because the trial court did not allow his counsel "to give a closing argument[.]" (Keith's Br. 8). However, our review of the record reveals that the trial court invited Keith's counsel to make argument, and he declined to do so. Keith's counsel also requested a continuance for his disposition, and the trial court denied that request. At no point did Keith object or attempt to make a dispositional statement, nor has Keith argued how the lack of a dispositional statement has harmed him. Thus, Keith has waived this argument on appeal.