MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joseph A. Tindall,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 20, 2023

Court of Appeals Case No. 22A-CR-1960

Appeal from the Marion Superior Court

The Honorable James B. Osborn, Judge

Trial Court Cause No. 49D21-2007-F5-23871

Memorandum Decision by Judge Brown
Judges Bailey and Weissmann concur.

Brown, Judge.

[1] Joseph A. Tindall claims one of his convictions for domestic battery should be vacated, there is a discrepancy between the trial court's verbal and written statement regarding his community service requirement, and he was required to serve days in excess of his sentence for criminal confinement. We reverse in part and remand.

Facts and Procedural History

[2] On July 31, 2020, the State charged Tindall with: Count I, domestic battery resulting in serious bodily injury as a level 5 felony; Count II, domestic battery resulting in moderate bodily injury as a level 6 felony; and Count III, criminal confinement as a level 6 felony. In June 2022, the court held a bench trial and found Tindall guilty on all counts.

[3] On July 29, 2022, the court held a sentencing hearing. The court stated that, on Count I, it sentenced Tindall to two years with 180 days executed in the Marion County Jail, 365 days on home detention through community corrections, and "then the remainder, the 180 days" on standard reporting probation. Transcript Volume II at 108. It ordered Tindall to complete 120 hours of community service work and stated "for each 12 hours you do not complete, . . . I will sentence you to a day in jail." *Id*. The court also stated that it merged Count II into Count I and sentenced him to one year with 180 days executed on Count III to be served concurrently with Count I.

[4] The court's written sentencing order indicates the court entered a sentence of 730 days with 545 days suspended under Count I and 365 days with 180 days

suspended under Counts II and III. Under "Confinement Comments," the order states with respect to Count I: "Split – 180 days MCJ followed by 365 days h/d supervised by community corrections as a condition of probation then 180 days on SRP." Appellant's Appendix Volume II at 24 (capitalization omitted). With respect to Counts II and III, the order states: "Split – 185 days MCJ followed by 180 days SRP." *Id*. (capitalization omitted). Under "Credit Time Calculation," the order states "49" under number of actual days confined and "16" under credit days earned. *Id*. at 25. Under Sentencing Conditions, the order states: "120 hrs community service. For every hour not completed, court will order defendant to serve 1 day in jail." *Id*. (capitalization omitted). The court's abstract of judgment, under "Disposition" in Part I, states "Finding of Guilty" for each of Counts I, II, and III. *Id*. at 26. Under Part II, the abstract of judgment indicates a sentence of 730 days with 180 days executed under Count I and a sentence of 365 days with 185 days executed under each of Counts II and III. Under Part V, the abstract of judgment, under Additional Comments and Recommendations, states: "180 days MCJ." *Id*. at 27 (capitalization omitted).

Discussion

I.

[5] Tindall first argues that his conviction for domestic battery under Count II was an included offense of Count I and must be vacated. The State concedes the trial court was required to vacate the conviction under Count II.

[6] The record reveals that the trial court, in finding Tindall guilty, stated:

> Count I was battery with serious bodily injury. Count II was battery with moderate bodily injury and Count III was confinement. . . . As to the bodily injury, there's no question in my mind based upon the testimony and the very vivid photographs that were provided by the State in evidence that [the victim] was battered and battered to the point that she suffered serious bodily injury . . . . [A]s to the battery with moderate bodily injury, I think the only real difference is that . . . the bodily injury standard is a little bit lower . . . but it was clear that [the victim] mentioned that she had extreme pain. That in and of itself is enough to show serious bodily injury. However, in addition to that, she had the significant bruising and swelling. She also had the nasal fracture that is evidenced in the medical record. . . . So, I'm going to find that he is guilty as to all three counts. I'll enter a judgment of conviction as to the Level 5 and Level 6 battery, and the confinement Level 6.

Transcript Volume II at 81-83. At the sentencing hearing, the court stated:

> As to the Level 5 felony, I will sentence him to a total of 2 years. Of that 2 years, 180 days will be executed with . . . the Marion County Jail. 545 days will be suspended. Of that sentence, 365 days will be through probation, but on Community Corrections home detention with GPS monitoring. And then the remainder, the 180 days that remain will be on standard reporting probation. . . . Now, as to the two, the Level 6 felony, first of all, the domestic battery, I'll sentence you on the Level felony [sic] to one year with 180 days executed and then six months on standard reporting probation. We'll note that the domestic battery . . . with serious bodily injury and the domestic battery with moderate bodily injury merge, so that'll be just the one sentence for Level 5 offense.

Id. at 108-109. The court's written sentencing order lists Counts I, II, and III and, under Count II, shows a sentence of 365 days with 180 days suspended. Also, the abstract of judgment, under "Disposition," states "Finding of Guilty" for Count II. Appellant's Appendix Volume II at 26.

[7] In its brief, the State concedes:

> Because the trial court attempted to merge the two domestic battery convictions at the sentencing hearing after having already entered judgments of conviction, remand with instructions to vacate the conviction for Level 6 felony domestic battery resulting in moderate bodily injury to the trial court is appropriate. The trial court entered a judgment of conviction on all three of Tindall's convictions at the conclusion of the bench trial . . . . The trial court's later attempt to merge the two domestic battery convictions would not cure any double jeopardy issues resulting from the two convictions being lesser included offenses. The trial court was required to vacate the Level 6 felony conviction for domestic battery after having entered a judgment of conviction for both domestic battery charges. . . . Accordingly, [it] is appropriate to remand to the trial court to vacate the Level 6 felony domestic battery conviction.

Appellee's Brief at 10-11.

[8] We therefore remand with instructions to vacate Tindall's conviction for domestic battery as a level 6 felony under Count II and amend the abstract of judgment and sentencing order accordingly.

II.

[9] Tindall argues "[t]he written sentencing order must be corrected to show that [he] will be required to serve a day in jail for every 12 hours of uncompleted

community service work, as the judge told him" and "[t]he written sentencing order does not match the judge's verbal statement at the sentencing hearing." Appellant's Brief at 15. The State agrees that remand for the trial court to clarify Tindall's sentence is appropriate.

[10] The record reveals that at sentencing the court stated:

> During his time on that sentence [Count I], he is to complete 120 hours of community service work. Now, for each 12 hours you do not complete, Mr. Tindall, . . . I will sentence you to a day in jail. So, you have a potential extra 10 days of jail facing you if you do not complete the community service work.

Transcript Volume II at 108. However, in its written sentencing order, under a section titled Sentencing Conditions, the court states: "120 hrs community service. For every hour not completed, court will order defendant to serve 1 day in jail." Appellant's Appendix Volume II at 25 (capitalization omitted).

[11] In its brief, the State acknowledges:

> There is a discrepancy in how much the trial court intended to sanction Tindall in the event that he does not complete the ordered community service. It is unclear from the record whether the trial court intended to sanction Tindall for every 12 hours of community service that he failed to complete, or whether it intended to sanction him for every hour of community service left unserved. Considering the trial court's conflicting statements at sentencing and in the sentencing order, remand to the trial court to clarify Tindall's sentence on this matter is appropriate.

Appellee's Brief at 12.

[12] In light of the court's statement that Tindall was facing "a potential extra 10 days of jail" if he did not complete his 120 hours of community service, it is clear the written sentencing order contains a scrivener's error. Transcript Volume II at 108. We remand to correct the sentencing order to state "For every 12 hours not completed, court will order defendant to serve 1 day in jail."

III.

[13] Tindall next argues that he "spent five more days in jail than the trial court intended, due to an error in the written sentencing order for Count 3." Appellant's Brief at 17. He argues that the court's verbal sentencing statement called for a sentence of one year with 180 days executed under Count III but that the written sentencing order specifies that he serve 185 days in the Marion County Jail. He argues: "Part II of the abstract of judgment also indicates 185 days jail time on Count[] . . . 3. But Part V of the abstract of judgment has the '180 days MCJ' as an 'additional comment.'" *Id*. (quoting Appellant's Appendix Volume II at 27). He further argues, "[u]nfortunately, [he] has already served the five extra days in jail," *id*., asserts that, "like jail time, community service 'materially add[s] to the punitive obligation,'" *id*. (citing *Freije v. State*, 709 N.E.2d 323, 325 (Ind. 1999)), and asks this Court to remand "with instructions to reduce the 120 hour community service requirement to 60 hours, to reflect that [he] has already (inadvertently) served that time." *Id*. at 17-18.

[14] The State argues that "Tindall provides no support for his contentions that it is appropriate to revise his community service time if he served additional time in jail" and that, "[e]ven if a discrepancy exists between the oral sentencing statement and the sentencing order, it is not clear that Tindall has in fact served 185 days for his confinement conviction." Appellee's Brief at 12-13. In reply, Tindall argues that "[t]here is a presumption that the sheriff held [him] in jail as he was ordered to do." Appellant's Reply Brief at 5.

[15] The record reveals that, at sentencing, the court stated: "And then as to the Level 6 confinement, you'll be sentenced to one year with 180 days executed and six months on standard reporting probation." Transcript Volume II at 109. The court's written sentencing order, with respect to Count III, states: "Split – 185 days MCJ followed by 180 days SRP." Appellant's Appendix Volume II at 24 (capitalization omitted). Part II of the abstract of judgment, with respect to Count III, states "Jail Executed: 185 Days." *Id*. at 26. Part V of the abstract of judgment states: "180 days MCJ." *Id*. at 27 (capitalization omitted).

[16] On remand, the trial court should determine whether Tindall served in excess of his sentence on the criminal confinement conviction, determine any appropriate adjustment, and amend the abstract of judgment and sentencing order accordingly.

[17] For the foregoing reasons, we reverse and remand consistent with this opinion.

[18] Reversed in part and remanded.

Bailey, J., and Weissmann, J., concur.