MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Henry Lee Savage,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 24, 2022

Court of Appeals Case No. 21A-CR-2510

Consolidated Appeal from the Vanderburgh Circuit and Superior Courts

The Honorable Kelli E. Fink, Magistrate
The Honorable Jill R. Marcrum, Magistrate

Trial Court Cause Nos.
82C01-2004-F5-2172
82D05-2101-CM-554

Bradford, Chief Judge.

Case Summary

[1] In November of 2020, Henry Lee Savage was convicted under Cause Number 82C01-2004-F5-2172 ("Cause No. F5-2172") of two counts of Level 5 felony intimidation following a domestic incident with his then-girlfriend. He was placed on probation for an aggregate term of 1238 days. As a condition of his probation, he was ordered to stay away from both his girlfriend and her residence. Savage did not stay away from her residence and, on January 29, 2021, was charged with Class A misdemeanor invasion of privacy under Cause Number 82D05-2101-CM-554 ("Cause No. CM-554"). Savage was convicted in Cause No. CM-554. The trial court imposed a one-year sentence with time served. He was also found to be in violation of his probation in Cause No. F5-2172 and the trial court revoked all of his previously-suspended sentence. In this consolidated appeal, Savage challenges his conviction and sentence under Cause No. CM-554 and the revocation of his probation under Cause No. F5-2172. We affirm.

Facts and Procedural History

[2] On March 30, 2020, Savage was involved in a domestic altercation during which he pointed a gun at his then-girlfriend, K.L.G., and her daughter. Savage was subsequently charged under Cause No. F5-2172 with two counts of Level 5 felony intimidation and one count of Level 6 felony criminal recklessness. On November 2, 2020, he pled guilty to two counts of Level 5 felony intimidation. On November 23, 2020, the trial court sentenced Savage

to concurrent terms of 1238 days and ordered that his sentence be suspended to probation. As a condition of his probation, Savage was ordered to have no contact with K.L.G. and no-contact orders prohibited him from having any contact with K.L.G. or visiting her home.

[3] On January 9, 2021, while serving his probation, Savage visited K.L.G.'s home in violation of the terms of his probation and the no-contact order. As a result, Savage was charged with one count of Class A misdemeanor invasion of privacy under Cause No. CM-554. During an initial hearing, Savage indicated that he had retained private counsel. He subsequently indicated that he would not be retaining private counsel and, after the trial court offered to appoint a public defender, Savage indicated that he wished to proceed *pro se*. Savage subsequently changed his mind, and a public defender was appointed. Savage later requested that his public defender be discharged and again indicated that he wished to proceed *pro se*. After questioning Savage about his desire to proceed *pro se* and informing him of the risks of self-representation, the trial court granted this request.

[4] On February 1, 2021, Savage's probation officer filed a petition for the revocation of Savage's probation under Cause No. F5-2172 alleging that he had "violated rule number one (1) of the Order of Probation by being charged with Invasion of Privacy and violating a no contact order" and that he had "violated rule number seven (7) of the Order of Probation by failing to keep program fees

current." Prob. App. Vol. II 120.[1] Savage was represented by counsel in the probation-revocation proceedings. Following a hearing on May 6, 2021, the trial court found Savage to be in violation of the terms of his probation. The court took the matter of Savage's sanction under advisement pending the resolution of Cause No. CM-554.

[5] On October 15, 2021, the trial court conducted a bench trial in Cause No. CM-554, at which Savage proceeded *pro se*. At the conclusion of the trial, Savage was found guilty of Class A misdemeanor invasion of privacy. On October 18, 2021, the trial court sentenced Savage to one year in the Vanderburgh County Jail and awarded credit for time spent in jail prior to sentencing, effectively sentencing Savage to "time served." Misd. App. Vol. II p. 80. On October 21, 2021, the trial court ordered Savage's probation revoked in Cause No. F5-2172 and ordered him to serve out the balance of his suspended sentence.[2]

Discussion and Decision

[6] In this consolidated appeal, Savage contends that (1) he did not knowingly or voluntarily waive his right to counsel in Cause No. CM-554, (2) his sentence in

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[1] Savage has filed separate appendices and transcripts for each of the cause numbers at issue in this appeal. We will refer to the appendix and transcript from Cause No. F5-2172 as "Prob. [App./Tr.] Vol. II" and the appendix and transcript from Cause No. CM-554 as "Misd. [App./Tr.] Vol. II."

[2] On November 15, 2021, Savage initiated an appeal of his invasion-of-privacy conviction under Appellate Cause 21A-CR-2510. Then on November 23, 2021, he filed a notice of appeal in his probation-revocation case under Appellate Cause 21A-CR-2577. At Savage's request, on January 27, 2022, this Court ordered both appeals consolidated under Appellate Cause 21A-CR-2510.

Cause No. CM-554 is inappropriate, and (3) the trial court abused its discretion in revoking his probation and ordering him to serve the remainder of his previously-suspended sentence.

I. Waiver of Right to Counsel

[7] Savage contends that his waiver of counsel in Cause No. CM-554 was not knowing or voluntary.

> The Sixth Amendment to the U.S. Constitution and Article 1, section 13 of the Indiana Constitution guarantee a criminal defendant the right to appointed counsel. Accordingly, when a criminal defendant waives his right to counsel and elects to proceed *pro se*, we must decide whether the trial court properly determined that the defendant's waiver was knowing, intelligent, and voluntary. Waiver of assistance of counsel may be established based upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.

Jones v. State, 783 N.E.2d 1132, 1138 (Ind. 2003) (internal citations omitted).

[8] Upon reviewing a trial court's decision to allow a defendant to proceed *pro se*, we generally consider four factors: "'(1) the extent of the court's inquiry into the defendant's decision, (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation, (3) the background and experience of the defendant, and (4) the context of the defendant's decision to proceed *pro se*.'" *Kubsch v. State*, 866 N.E.2d 726, 736 (Ind. 2007) (quoting *Poynter v. State*, 749 N.E.2d 1122, 1127–28 (Ind. 2001)). These factors, however, "do not 'constitute a rigid mandate

setting forth specific inquiries that a trial court is required to make before determining whether a defendant's waiver of right to counsel is knowing, intelligent, and voluntary." *Jones*, 783 N.E.2d at 1138 (quoting *Leonard v. State*, 579 N.E.2d 1294, 1296 (Ind. 1991)). "Accordingly, we noted it is sufficient for the lower court to acquaint the defendant with the advantages to attorney representation and the drawbacks of self-representation." *Id.*

[9] In this case, the trial court adequately acquainted Savage of the advantages to attorney representation and the drawbacks of self-representation. In inquiring into Savage's decision, the trial court asked Savage the following:

> [THE COURT]: Mr. Savage, let me ask you this. Do you want me to discharge [trial counsel]?
>
> [SAVAGE] Yes, I do.
>
> [THE COURT]: Now you understand that if I discharge him you're going to be representing yourself?
>
> [SAVAGE]: Yes, I do.
>
> [THE COURT]: And you understand that at trial the State has the burden of proving that you committed the offense of invasion of privacy beyond a reasonable doubt. Do you understand that?
>
> [SAVAGE]: Right. Yes, I do.
>
> [THE COURT]: In order to try to do that they're going to call witnesses and any witnesses they call you have the right to see who it is. You have the right to hear the questions that the State asks and the answers that the witnesses give.

[SAVAGE]: Yes.

[THE COURT]: You will also have the right to ask those witnesses questions. Which means you have to listen to the questions that are asked and the answers the witnesses give and then you have to know what questions to ask to get the correct information before the Court.

[SAVAGE]: Yes.

[THE COURT]: And you think you're going to be able to do that?

[SAVAGE]: Yes, I will.

[THE COURT]: Now you also have the right to present your own witnesses and evidence and that means you call witnesses, you have to ask those witnesses questions. And when you're done asking your questions and getting the answers, then the State would have the right to ask those witnesses questions. Do you understand that?

[SAVAGE]: Yes, I do.

[THE COURT]: The State cannot call you as a witness in this case because you have that right to remain silent. You understand that?

[SAVAGE]: Yes, I do.

[THE COURT]: Now with that in mind, you also have the right to testify if you want to. So the State can't call you as a witness. They can't make you testify, and if you choose not to testify that's not considered evidence of anything. You understand that?

[SAVAGE]: Yes, I do.

[THE COURT]: But if you choose to testify then the State would have the right to ask you questions. You understand that?

[SAVAGE]: Yes, I do.

[THE COURT]: Now some people are able to represent themselves in Court. They listen to what's going on. They process the information and then they know what questions to ask the witnesses whether they're the State's witnesses or the Defendant's witnesses so that the Court gets the proper information and can make the correct decision. Other people, even though they're very smart, aren't able to do that. I went to law school with several people who've never set foot in a courtroom. Not because they're not smart, but because they don't think well on their feet. They don't do well under that kind of pressure. Because it is somewhat fast paced in a trial. A question is asked, answer is given, State asks another question. It has nothing to do with intelligence. There are lots of smart people who hire attorneys to represent them. Now I need to know if you think you're going to be able to do all that.

[SAVAGE]: Yes, I think I will be able to do all that.

[THE COURT]: Because this is a Class A Misdemeanor and if you're convicted then you face the year in jail. Any questions about that?

[SAVAGE]: No, no questions at all.

Misd. Tr. Vol. II pp. 34–36.

[10] During the above-quoted discussion between Savage and the trial court, Savage was informed of (1) the burden of proof that the State would be required to meet and how it would go about trying to meet it; (2) the challenges associated

with calling witnesses and cross-examining the State's witnesses; (3) that the State could not call him as a witness but that if he decided to testify during his case-in-chief, then the State would have the opportunity to question him; and (4) the difficulties of trial advocacy and the potential pitfalls of attempting to represent oneself. The trial court's statements and inquiry into Savage's desire to proceed *pro se* were sufficient to "acquaint the defendant with the advantages to attorney representation and the drawbacks of self-representation."[3] *Jones*, 783 N.E.2d at 1138. Further, Savage's proffered reasons for requesting to proceed *pro se*, including his belief that his court-appointed attorney had committed misconduct and was no longer serving his best interests and that there had been an irreparable breakdown in their attorney-client relationship, demonstrate a familiarity with the legal system and an unhappiness with what he perceived to be a lack of appropriate action by his court-appointed attorney. Thus, while the trial court did not specifically inquire into Savage's level of education, Savage's actions demonstrate a familiarity with the legal process that, when coupled with the trial court's line-of-questioning, was sufficient to establish a knowing, voluntary, and intelligent waiver of his right to counsel.

[3] While Savage was not fully apprised of the potential pitfalls of self-representation when he first asserted his desire to proceed *pro se* early on in the proceedings, he was advised of the potential pitfalls before he made the ultimate decision to proceed to trial *pro se*.

II. Appropriateness of Sentence

[11] Savage next contends that his one-year sentence in Cause No. CM-554 is inappropriate. Indiana Appellate Rule 7(B) provides that "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." In analyzing such claims, we "concentrate less on comparing the facts of [the case at issue] to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." *Paul v. State*, 888 N.E.2d 818, 825 (Ind. Ct. App. 2008) (internal quotation omitted). The defendant bears the burden of persuading us that his sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

[12] Indiana Code section 35-50-3-2 provides that "[a] person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one (1) year." In challenging the appropriateness of his sentence, Savage acknowledges that he has "had some recent criminal history," but argues that "[t]here was nothing particularly egregious about [his] conduct that would justify the maximum sentence." Appellant's Br. p. 32. We disagree. Within two months of being ordered to stay away from K.L.G., her children, and her property after pointing a loaded gun at K.L.G. and her daughter during an argument, Savage visited K.L.G.'s property with the apparent intent to enter her home. We are

not persuaded that Savage's actions were less egregious by the mere fact that K.L.G. and her children were not home at the time.

[13] Moreover, Savage has contacts with the criminal justice system dating back to 1988 and criminal convictions dating back to 1990, and he has committed criminal behavior in various states, including California, Georgia, and Indiana.[4] In addition, three months after he pointed a handgun at K.L.G. and her daughter, he was alleged to have stalked K.L.G. He also committed the underlying offense of invasion of privacy less than two months after being told to stay away from K.L.G. Savage has failed to convince us that his one-year sentence is inappropriate in light of either the nature of his offense or his character.

III. Revocation of Probation

[14] Savage also contends that the trial court abused its discretion in revoking his probation and ordering that he serve the remainder of his previously-suspended sentence.

> Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled. The trial court determines the conditions of probation and may revoke probation if the conditions are violated. Once a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in

[4] His criminal history also includes two separate criminal cases in Alabama, but the disposition of the two cases in Alabama is unknown.

> deciding how to proceed. If 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. Accordingly, a trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances.

Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007) (internal citations omitted).

[15] "Probation revocation is a two-step process. First, the court must make a factual determination that a violation of a condition of probation actually occurred. If a violation is proven, then the trial court must determine if the violation warrants revocation of the probation." *Woods v. State*, 892 N.E.2d 637, 640 (Ind. 2008).

> 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.

Ind. Code § 35-38-2-3(h).

A. Sufficiency of the Evidence to Prove Violation

[16] Savage argues that the State failed to sufficiently prove that he had violated the terms of his probation. "A probation hearing is civil in nature and the State need only prove the alleged violations by a preponderance of the evidence." *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999). "In reviewing the sufficiency of the evidence, we use the same standard as in any other sufficiency question." *Smith v. State*, 727 N.E.2d 763, 765 (Ind. Ct. App. 2000). "When the appellant challenges the sufficiency of the factual basis for revocation, we neither reweigh the evidence nor judge the credibility of the witnesses." *Id.* "We will consider all the evidence most favorable to supporting the judgment of the trial court without reweighing that evidence or judging the credibility of witnesses." *Cox*, 706 N.E.2d at 551. "If there is substantial evidence of probative value to support the trial court's conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation." *Id.*

[17] Although Savage was ultimately convicted of the charged offense of Class A misdemeanor invasion of privacy, he was found to have violated the terms of his probation before he was found guilty in Cause No. CM-554. However, in proving that Savage violated the terms of his probation by committing a new criminal offense, the State did not have to show that he was convicted of a new crime. *Lampley v. State*, 31 N.E.3d 1034, 1037 (Ind. Ct. App. 2015). Rather, the State need only demonstrate the commission of a new crime "by a preponderance of the evidence." *Id*.

[18] The evidence submitted during the probation revocation hearing is sufficient to support the trial court's determination that Savage violated the terms of his probation by committing a new criminal offense. Savage's probation officer testified during the probation revocation hearing that Savage had violated the terms of his probation by committing a new criminal offense, pointing to the fact that new criminal charges had been filed against him on January 29, 2021. Savage's probation officer also testified that Savage had violated the terms of his probation by failing to pay certain probation fees. In addition, the probable cause affidavit outlining the facts that led to the invasion of privacy charge was admitted into evidence. The probable cause affidavit established the factual basis for the criminal charge and contained statements from K.L.G. indicating that Savage had been recorded by her surveillance cameras being at her residence after he had been ordered to stay away from her, her children, and her property.

[19] While Savage correctly points out that a probable cause determination does not, in and of itself, establish that a probationer has violated probation based on the commission of a new offense, the trial court in this case specifically noted that the "burden is by a preponderance of the evidence," and found that "the State has met its burden by a preponderance of the evidence." Prob. Tr. Vol. II p. 12. Given the totality of the facts and circumstances, we cannot say that the trial court abused its discretion in finding that the State satisfied its burden of

proving, by a preponderance of the evidence, that Savage had violated the terms of his probation.[5]

B. Revocation of Placement on Probation

[20] Savage also argues that "the trial court's decision to fully revoke [his] probation and require him to serve over 3 years in prison for visiting [K.L.G.'s] home when she was not there, in violation of a protective order, was an abuse of discretion." Appellant's Br. p. 33. Again, if the court finds that the person has violated a condition of probation, the court may "[o]rder execution of all or part of the sentence that was suspended at the time of initial sentencing." Ind. Code § 35-38-2-3(h). Violation of a single condition "is sufficient to revoke placement." *Treece v. State*, 10 N.E.3d 52, 60 (Ind. Ct. App. 2014). The facts of this case reveal that within two months of being ordered to stay away from K.L.G. and her property, Savage visited her property, seemingly with the intent to gain entry into her home while she was away. We agree with the State that "despite receiving a considerable benefit by being placed on probation, Savage was undeterred from committing new criminal acts against K.L.G." Appellee's Br. p. 33. We further agree with the State that "the trial court was not required to wait until Savage committed more serious crimes or until he accrued

[5] Our conclusion is bolstered by the fact that Savage has since been convicted of the charged offense and any potential error is therefore harmless because if sent back for further proceedings the trial court would be within its discretion to again find, based on Savage's conviction, that Savage violated the terms of his probation by committing a new criminal offense.

additional violations before revoking his placement" on probation. Appellee's Br. pp. 33–34. The trial court did not abuse its discretion in this regard.

[21] The judgment of the trial court is affirmed.

Bailey, J., and Mathias, J., concur.