MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Sean Nigel Hindman,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 6, 2022

Court of Appeals Case No. 21A-CR-2624

Appeal from the Madison Circuit Court

The Honorable David A. Happe, Judge

Trial Court Cause Nos. 48C04-1509-F4-1468 48C04-1910-F6-2478

May, Judge.

[1] Sean Nigel Hindman appeals following the revocation of his home detention under Cause Number 48C04-1509-F4-1468 ("F4-1468") and his sentence suspended to probation under Cause Number 48C04-1910-F6-2478 ("F6-2478"). After revocation, the trial court ordered Hindman to serve executed in the Department of Correction the aggregate six and one-half years remaining under those two cause numbers. Hindman first argues the trial court violated his Sixth Amendment right to the counsel of his choice by denying Hindman's request to change counsel on the morning of the evidentiary hearing. Second, Hindman asserts the trial court's sanctioning him to serve his consecutive sentences fully executed is "unduly harsh and should be revised." (Appellant's Br. at 16.) We affirm.

Facts and Procedural History

[2] On September 9, 2015, the State charged Hindman under cause number 48C04-1509-F4-1468 ("F4-1468") with Level 4 felony dealing in cocaine[1] and Class A misdemeanor possession of a controlled substance.[2] On February 5, 2016, Hindman pled guilty to both crimes pursuant to a plea agreement that left sentencing "[o]pen to the Court, with a cap of four (4) years on the executed portion of the sentence." (App. Vol. 2 at 38-9.) After a sentencing hearing, the court accepted the plea agreement, ordered an eight-year sentence for dealing

[1] Ind. Code § 35-48-4-1(a)(1)(c) & (c)(1).

[2] Ind. Code § 35-48-4-7(a).

and a one-year sentence for possession, and ordered the sentences served concurrently. The court ordered 3 years and 143 days of the sentence served executed. Following his executed sentence, Hindman needed to serve 1682 days of probation.

[3] On September 10, 2019, the State filed a notice of probation violation that alleged Hindman committed Class A misdemeanor carrying a handgun without a license,[3] Class B misdemeanor possession of marijuana,[4] Level 5 felony carrying a handgun without a license with a prior conviction,[5] Level 5 felony carrying a handgun while being a felon,[6] and Class A misdemeanor possession of marijuana.[7] The State charged Hindman with these offenses under cause number 29D01-1909-F5-7550 ("F5-7550").

[4] Then, on October 14, 2019, the State also charged Hindman under cause number 48C04-1910-F6-2478 ("F6-2478") with Level 6 felony resisting law enforcement,[8] Class A misdemeanor resisting law enforcement,[9] and Class C

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[3] Ind. Code § 35-47-2-1.

[4] Ind. Code § 35-48-4-11(a)(1).

[5] Ind. Code § 35-47-2-1.

[6] Ind. Code § 35-47-2-1.

[7] Ind. Code § 35-48-4-11(a)(1).

[8] Ind. Code § 35-44.1-3-1(a)(3) & (c)(1)(A).

[9] Ind. Code § 35-44.1-3-1(a)(3).

misdemeanor operating a motor vehicle without a license.[10] That same day the State filed another notice of probation violation under F4-1468.

[5] On January 14, 2020, at a hearing on the alleged probation violation under F4-1468, Hindman admitted violating probation by committing the offenses in F5-7750 and in F6-2478. On June 23, 2020, Hindman and the State entered an agreement whereby the sanction for probation violation under F4-1468 would be open to argument but executed time would be capped at two years. That same day, the court revoked two years of Hindman's probation and ordered it served executed. Hindman was, however, permitted to serve the executed time in home detention. Also on June 23, 2020, under F6-2478, Hindman pled guilty to all three charges pursuant to an agreement that provided he would be sentenced to two years, which would be suspended to formal probation and served consecutive to his sentence in F4-1468. One term of his probation in F6-2478 was that he successfully complete his sentence in F4-1468.

[6] On February 8, 2021, Fishers Police Officer Joseph Ryder saw a car making unsafe lane changes without proper signals, and he initiated a traffic stop. As he approached the car, Officer Ryder could smell a strong odor of raw marijuana coming from the car. Hindman was the driver and sole occupant of the car, and he informed Officer Ryder that he did not have a driver's license. When police searched the car, they found $26,200 in cash in a bag under the

[10] Ind. Code § 9-24-18-1.

driver's seat, cell phones with messages consistent with drug dealing, and a loaded semi-automatic handgun in the trunk. Officer Ryder collected a DNA sample from Hindman, which was sent to the lab with the firearm, and a technician found Hindman's DNA on the grip, front sight, rear slide, and trigger of the gun. For these activities, the State charged Hindman under cause number 29D01-2102-F4-803 ("F4-803") with Level 4 felony unlawful possession of a firearm by a serious violent felon,[11] Class A misdemeanor carrying a handgun without a license,[12] Class C misdemeanor operating a vehicle without a license,[13] Level 5 felony carrying a handgun without a license with a prior conviction within fifteen years,[14] and Class A misdemeanor operating a vehicle without a license with a prior offense of operating without a license.[15]

[7] On February 10, 2021, under F4-1468, the State filed a notice of violation of home detention that alleged Hindman had committed the new crimes under F4-803. The next day, the State filed a notice of probation violation in F6-2478 based on the new crimes alleged in F4-803 and Hindman's failure to successfully complete his sentence in F4-1468. Hindman hired an attorney,

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[11] Ind. Code § 35-47-4-5.

[12] Ind. Code § 35-47-2-1.

[13] Ind. Code § 9-24-18-1.

[14] Ind. Code § 35-47-2-1.

[15] Ind. Code § 9-24-18-1.

Allan Reid, who entered appearances to represent Hindman in the new proceedings under F4-803 and in the two revocation proceedings under F4-1468 and F6-2478.

[8] The trial court scheduled the revocation proceedings for a fact-finding hearing on August 16, 2021. At the beginning of that hearing, Hindman orally requested a continuance to retain new counsel. Hindman asserted he was unhappy with his counsel because, despite talking on the telephone weekly, they had never met in person prior to that morning. He had been dissatisfied for a few months, but he had not expressed his dissatisfaction to the court before that morning. The trial court denied Hindman's motion to continue the hearing so that he could hire new counsel, but the court took a recess so Hindman and his counsel could discuss the case before the hearing began. After the recess, the parties requested the hearing be bifurcated, so Officer Ryder's testimony could be taken that morning and the DNA analyst could be called to testify in person at a later date. The trial court agreed to bifurcate the hearing.

[9] Following completion of the bifurcated hearing on October 28, 2021, the trial court found by a preponderance of the evidence that Hindman had committed the new crimes in F4-803 and, based thereon, found Hindman had violated his home detention placement in F4-1468 and his probation in F6-2478. The court ordered Hindman to serve his remaining time – four and a half years under F4-1468 and two years under F6-2478 – incarcerated in the Department of Correction.

Discussion and Decision

1. Sixth Amendment right to counsel of choice

[10] Hindman first asserts the trial court denied his Sixth Amendment right to counsel by denying Hindman's request to change counsel on the morning of the scheduled evidentiary hearing on the State's petitions to revoke Hindman's home detention and suspended sentence. Hindman claims reversal of the trial court's denial of his motion is required by *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), so we begin there.

[11] Gonzalez-Lopez wanted an out-of-state lawyer to be his trial counsel in criminal proceedings, but the federal district court denied the lawyer's repeated motions to be admitted pro hac vice. *Id*. at 142-43. Gonzalez-Lopez therefore was represented by local counsel, and he was convicted of the crimes alleged. *Id*. at 143. Gonzalez-Lopez appealed to challenge the district court's denial of his Sixth Amendment right to the paid counsel of his choosing. The Supreme Court vacated Gonzalez-Lopez's conviction because – given that the district court misapplied the admission rules as it denied the pro hac vice motions – Gonzalez-Lopez erroneously had been denied his Sixth Amendment right to counsel of his choice. *Id*. at 144. The Supreme Court further held the Sixth Amendment right to counsel of one's choosing does not require a showing of prejudice:

> The right to select counsel of one's choice, by contrast [with an ineffectiveness of counsel analysis], has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has

> been regarded as the root meaning of the constitutional guarantee. Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Id. at 147-48 (internal citations and footnote omitted). Nor is the denial of the counsel of one's choosing subject to analysis for harmless error because courts ought not be left speculating about the impact of "different choices or different intangibles" between counsel. *Id*. at 151.

[12] Based thereon, Hindman asserts that he was denied his Sixth Amendment right to counsel of his choice on the morning of trial when the trial court refused to grant a continuance for Hindman to obtain counsel and that the trial court's denial is not subject to an analysis for prejudice or harmless error. However, in so arguing, Hindman fails to acknowledge *Gonzalez-Lopez* also stated:

> Nothing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them. As the dissent too discusses, the right to counsel of choice does not extend to defendants who require counsel to be appointed for them. Nor may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his

> waiver of conflict-free representation. **We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar.** The court has, moreover, an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." None of these limitations on the right to choose one's counsel is relevant here. **This is not a case about a court's power** to enforce rules or adhere to practices that determine which attorneys may appear before it, or **to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel.**

Id. at 149-50 (internal citations omitted) (emphasis added). Accordingly, as other courts have held, the holdings in *Gonzalez-Lopez* did not eliminate a trial court's authority to deny, on scheduling grounds, a motion to change counsel. *See*, *e.g.*, *United States v. Ensign*, 491 F.3d 1109, 1115 (9th Cir. 2007) (citing *Gonzalez-Lopez* to support holding district court's denial of pro hac vice motion filed as opening arguments were about to begin "was a reasonable exercise of its wide latitude in balancing the right to counsel against the demands of the court's calendar in an effort to maintain the fair, efficient and orderly administration of justice").

[13] Herein, Hindman requested a continuance to change counsel on the morning of the scheduled fact-finding hearing. The State objected to Hindman's request because Officer Ryder had arrived for the hearing and was prepared to testify. The trial court explained:

> We are dealing with allegations of violations that stem back from February of this year and generally when a person is on supervision, serving a court sentence, we try to, uh, litigate those typically within two (2) to three (3) weeks. So, we're well – well outside the typically [sic] window for resolving this. Um, there's been, um, fairly extensive time for a violation matter for the case to have been reviewed and for counsel to have any conversations that need to take place with defendant. Um, I think it's unfortunate if the defendant is not happy with counsel today, but that by itself does not constitute a legal reason for the court to extend the time. Even more than it's already been extended.

(Tr. Vol. 2 at 14.) The court then took evidence from Hindman about his desire to change counsel and explained:

> I have an obligation to keep cases moving. To give people a fair amount of opportunity to get ready, but once they've had that fair opportunity, time to get ready, then, to move the case forward. We have a case here which has been sitting for months longer than a case would typically sit in your posture. So, there's been abundant time to prepare. Certainly, much more than most defendants are able to have, in a violation case. We've got a law enforcement officer that's taking time out of his schedule to come to another county to testify about matters related to your case. And the burden of the, uh – continuing this matter to a later date, um, is too high. So I'm not going to do that.

(*Id*. at 24.) Given Hindman's request was made on the morning of the fact-finding hearing, for which the State's witness had come from out of county to testify, the trial court's denial of Hindman's motion was not a denial of Hindman's Sixth Amendment right to counsel of his choice. *See Ensign*, 491 F.3d at 1115; *and see Lewis v. State*, 730 N.E.2d 686, 689 (Ind. 2000) (discussing

that the right to counsel must be asserted at an appropriate stage in proceedings, that last minute continuances to hire new counsel are disfavored, and that trial court has discretion to deny motion in that context).

2. Revocation of all suspended time

[14] Hindman next argues the court erred by revoking all his remaining time under both cause numbers. For appellate review purposes, revocation of a community corrections placement is analogous to probation revocation because, like probation, community corrections placement is a matter of grace provided at the sole discretion of the trial court. *Monroe v. State*, 899 N.E.2d 688, 691 (Ind. Ct. App. 2009). Because the defendant's liberty was only conditional, a revocation proceeding is civil in nature and the State need prove the alleged violations only by preponderance of the evidence. *Id*. In conducting our review, we consider all the evidence most favorable to the trial court's judgment without reweighing the evidence or assessing credibility of the witnesses. *Id*.

[15] When a defendant has violated a term of his community corrections placement, the court has the following options for sanctions:

> (1) Change the terms of the placement.
>
> (2) Continue the placement.
>
> (3) Reassign a person assigned to a specific community corrections program to a different community corrections program.

> (4) [R]evoke the placement and commit the person to the county jail or department of correction for the remainder of the person's sentence.

Ind. Code § 35-38-2.6-5. Similarly, when a probationer violates probation, the trial court may:

> (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).

[16] Hindman argues the trial court's decision to revoke his "remaining six and a half years on both the Home Detention program and probation . . . was against the logic and effect of the facts and circumstances." (Appellant's Br. at 23.) Instead, "a more appropriate sanction would have been to extend his probation or allow him to serve his sanction in an appropriate community corrections program, such as work release." (*Id.*)

[17] At the end of the revocation hearings, the trial court made the following statement:

> Mr. Hindman has been under supervision for a significant amount of time here on felony convictions in this court. He has

> a history of, uh, significant felony criminal history. Um, including prior gun offenses and despite that he's in possession of a gun, committing driving offenses. Um, with circumstances that indicate he was involved again in drug dealing activity. Those factors together indicated that there is not a reasonable likelihood that community corrections or probation supervision are going to be successful with Mr. Hindman. We reach a point when a person has disregarded their rules to the extent and declined to comply with supervision to the extent, that we must conclude that Department of Corrections [sic] punishment is the only reasonable option left and that's what we've reached with Mr. Hindman. So, the court is going to revoke the balance of the defendant's sentences under both causes and order they be served in their entirety in the Department of Corrections [sic].

(Tr. Vol. 2 at 94-5.)

[18] Hindman began committing juvenile offenses at the age of eleven. In the past ten years, across six proceedings, Hindman has been convicted of Class D felony possession of cocaine, Level 4 felony dealing in cocaine, Level 6 felony resisting law enforcement with a vehicle, Class A misdemeanor battery resulting in bodily injury, Class A misdemeanor theft, Class A misdemeanor possession of a controlled substance, Class A misdemeanor carrying a handgun without a license, two counts of Class A misdemeanor possession of marijuana, and two counts of Class C misdemeanor driving without a license. In all six of those proceedings, the trial court ordered Hindman to serve probation, and in all six cases, Hindman failed to successfully complete probation. In light of these facts, we cannot say the trial court abused its discretion in ordering Hindman to serve his remaining time incarcerated. *See*, *e.g.*, *Cox v. State*, 850

N.E.2d 485, 491 (Ind. Ct. App. 2006) (trial court did not abuse its discretion in ordering defendant to serve six suspended years incarcerated after defendant violated probation).

Conclusion

[19] Hindman's Sixth Amendment right to counsel of his choosing was not asserted in a timely manner and, thus, was not violated by the trial court's denial of his motion for a continuance to hire new counsel on the morning of the evidentiary hearing. Nor can we find error in the trial court's execution of all remaining time on Hindman's consecutive sentences in light of Hindman's repeated violations of probation and other forms of conditional release. Accordingly, we affirm the execution of Hindman's four-and-one-half-year sentence under F4-1468 and his two-year sentence under F6-2478.

[20] Affirmed.

Riley, J., and Tavitas, J., concur.