

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Alan Dean Bivens,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 29, 2022

Court of Appeals Case No.
22A-CR-705

Appeal from the Jefferson Circuit
Court

The Honorable Donald J. Mote,
Judge

Trial Court Cause Nos.
39C01-2110-F6-1110
39C01-2102-F6-114

Brown, Judge.

[1] Alan Dean Bivens appeals the revocation of his probation. We affirm.

Facts and Procedural History

[2] On February 4, 2021, the State charged Bivens under cause number 39C01-2102-F6-114 (“Cause No. 114”) with nonsupport of a child as a level 6 felony. On October 19, 2021, the State charged Bivens under cause number 39D01-2110-F6-1110 (“Cause No. 1110”) with: Count I, domestic battery as a level 6 felony; Count II, criminal confinement as a level 6 felony; and Count III, interference with the reporting of a crime as a class A misdemeanor.

[3] Bivens and the State entered into a plea agreement pursuant to which Bivens agreed to plead guilty to nonsupport of a child as a level 6 felony under Cause No. 114 and an amended count of domestic battery as a class A misdemeanor under Cause No. 1110. On November 10, 2021, the court accepted the plea agreement and sentenced Bivens to consecutive sentences of 900 days under Cause No. 114 and 180 days under Cause No. 1110. The court ordered the sentences suspended to probation supervised by the Jefferson County Community Corrections.

[4] On December 2, 2021, the Jefferson County Community Corrections filed a petition to revoke his probation alleging that Bivens tested positive and/or admitted using methamphetamine, amphetamine, and THC on November 17 and 24, 2021, failed to complete certain classes as ordered by the court, failed to attend an appointment on November 22, 2021, and failed to pay fees in the amount of \$175.

[5] On February 28, 2022, the court held a hearing. Jefferson County Probation Officer Ani Bridges testified that Bivens had an initial assessment with a different officer on November 17, 2021, and that she met with Bivens on November 19, 2021, and made the expectations clear to him. She testified that Bivens tested positive for methamphetamine, amphetamine, THC, and alcohol on November 17, 2021, tested positive for methamphetamine, amphetamine, and THC, on November 24, 2021, and tested positive for methamphetamine and amphetamine on December 3, 2021. She testified that, when she discussed the positive results from Bivens’s initial assessments, Bivens “denied use” and she “could not confirm that until we got lab results back.” Transcript Volume II at 16. Bivens admitted that he violated his probation by testing positive and testified regarding his participation in classes and his contact with LifeSprings.

[6] The court found that the State established by a preponderance of the evidence that Bivens violated the terms of his probation by testing positive for methamphetamine, amphetamine, and THC on November 17 and 24, 2021. The court revoked 900 days of Bivens’s previously suspended sentence in Cause No. 114 and ordered his probation under Cause No. 1110 be “terminated as unsuccessful.” Appellant’s Appendix Volume II at 29.

Discussion

[7] Bivens concedes that he tested positive for drugs on two occasions after reporting to probation but argues that his violation did not warrant a revocation of the entirety of his fully suspended sentence in Cause No. 114. He asserts his violation was “merely a technical violation” and he was not given enough time

to address his drug use. Appellant’s Brief at 11. The State argues that Bivens repeatedly violated his probation in a short time, his decision to use drugs multiple times indicated that he was not a candidate for continued treatment in alternative placements in a community setting, and reversing the trial court would diminish the likelihood of community corrections placements being made in the first place.

[8] Ind. Code § 35-38-2-3 provides:

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.

[9] We review trial court probation violation determinations and sanctions for an abuse of discretion. *Heaton v. State*, 984 N.E.2d 614, 616 (Ind. 2013) (citing *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007)). The Indiana Supreme Court has explained that “[o]nce a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed” and that “[i]f 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.” *Prewitt*, 878 N.E.2d at 188.

[10] The record reveals that the court initially sentenced Bivens on November 10, 2021, to a suspended sentence of 900 days for nonsupport of a child as a level 6 felony under Cause No. 114. Bivens tested positive for methamphetamine, amphetamine, and THC on November 17 and 24, 2021. In light of Bivens’s multiple positive drug tests, we cannot say the trial court abused its discretion in revoking Bivens’s probation under Cause No. 114 and ordering that he serve the remainder of his previously suspended sentence.

[11] Affirmed.

May, J., and Mathias, J., concur.