

# MEMORANDUM DECISION

Pursuant to [Ind. Appellate Rule 65\(D\)](#), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



---

## ATTORNEYS FOR APPELLANT

R. Patrick Magrath  
Justice D. Ennis  
Alcorn Sage Schwartz & Magrath, LLP  
Madison, Indiana

## ATTORNEYS FOR APPELLEE

Theodore E. Rokita  
Attorney General of Indiana  
  
Evan M. Comer  
Deputy Attorney General  
Indianapolis, Indiana

---

# IN THE COURT OF APPEALS OF INDIANA

---

Joni Rena Hermesch,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff*

August 22, 2023

Court of Appeals Case No.  
23A-CR-868

Appeal from the Decatur Superior  
Court

The Honorable Matthew D.  
Bailey, Judge

Trial Court Cause No.  
16D01-2005-F6-485  
16D01-2009-F6-1040

**Memorandum Decision by Judge Mathias**  
Judges Vaidik and Pyle concur.

**Mathias, Judge.**

[1] Joni Rena Hermesch appeals the Decatur Superior Court’s revocation of her probation and order that she serve portions of her previously suspended sentences with the Department of Correction. Hermesch raises two issues for our review:

1. Whether the State presented sufficient evidence to prove that she violated the conditions of her probation.

2. Whether the trial court abused its discretion when it ordered her to serve portions of her previously suspended sentences executed with the Department of Correction.

[2] We affirm.

### **Facts and Procedural History**

[3] On August 31, 2020, Hermesch pleaded guilty in Cause No. 16D01-2005-F6-485 (“F6-485”) to Level 6 felony obstruction of justice, Class A misdemeanor possession of marijuana, and Class C misdemeanor operating while intoxicated. The trial court imposed an aggregate sentence of 365 days, with 357 days suspended to probation. On that date, Hermesch also pleaded guilty in Cause No. 16D01-2009-F6-1040 (“F6-1040”) to Level 6 felony theft. The trial court in that cause imposed a sentence of 730 days, with 365 days suspended to probation.

[4] On February 11, 2023, the State filed notices of probation violations in both F6-485 and F6-1040. In those notices, the State alleged that Hermesch had been charged with Level 6 felony possession of methamphetamine on February 8. At

an ensuing consolidated probation-violation hearing, the State presented evidence that Hermesch was driving a friend to work when, during a traffic stop, officers found methamphetamine on the driver's side floorboard. Hermesch denied that the methamphetamine belonged to her. The trial court did not believe Hermesch and found that she had violated the conditions of her probation in both causes. The court then revoked portions of Hermesch's previously suspended sentences and ordered her to serve consecutive sentences of 178 days in F6-485 and 182 days in F6-1040 executed with the Department of Correction. This appeal ensued.

## **Discussion and Decision**

### ***Issue One: Probation Revocation***

[5] Hermesch first appeals the trial court's revocation of her probation. As our Supreme Court has explained:

“Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled.” *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). It is within the discretion of the trial court to determine probation conditions and to revoke probation if the conditions are violated. *Id.* In appeals from trial court probation violation determinations and sanctions, we review for abuse of discretion. *Id.* An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances, *id.*, or when the trial court misinterprets the law. . . .

Probation revocation is a two-step process. First, the trial court must make a factual determination that a violation of a condition of probation actually occurred. *Woods v. State*, 892 N.E.2d 637,

640 (Ind. 2008). Second, if a violation is found, then the trial court must determine the appropriate sanctions for the violation. *Id.*

*Heaton v. State*, 984 N.E.2d 614, 616 (Ind. 2013).

[6] Hermesch maintains that the State failed to present sufficient evidence to support the revocation of her probation. Our standard of review of the sufficiency of the evidence supporting the revocation of probation is similar to our standard of review for other matters: “[W]e consider only the evidence most favorable to the judgment—without regard to weight or credibility—and will affirm if ‘there is substantial evidence of probative value to support the trial court’s conclusion that a probationer has violated any condition of probation.’” *Murdock v. State*, 10 N.E.3d 1265, 1267 (Ind. 2014) (quoting *Braxton v. State*, 651 N.E.2d 268, 270 (Ind. 1995)). One violation of a condition of probation is enough to support a probation revocation. *Hubbard v. State*, 683 N.E.2d 618, 622 (Ind. Ct. App. 1997).

[7] When the alleged probation violation is the commission of a new crime, conviction of the new crime is not required. *Richeson v. State*, 648 N.E.2d 384, 389 (Ind. Ct. App. 1995), *trans. denied*. Instead, the State is required to prove – by a preponderance of the evidence – that the defendant committed the offense. *Heaton*, 984 N.E.2d at 617.

[8] To prove that Hermesch possessed methamphetamine as a Level 6 felony, the State was required to show that she, without a valid prescription, knowingly or

intentionally possessed methamphetamine. [Ind. Code § 35-48-4-6.1 \(2023\)](#). And because Hermesch’s possession of the methamphetamine was not exclusive or actual, the State had to prove that she constructively possessed the methamphetamine.

A person constructively possesses contraband when the person has (1) the capability to maintain dominion and control over the item, and (2) the intent to maintain dominion and control over it. [Gray v. State, 957 N.E.2d 171, 174 \(Ind. 2011\)](#).

“To prove capability, the State must show that the defendant is able to reduce the contraband to [his] personal possession.” [K.F. v. State, 961 N.E.2d 501, 510 \(Ind. Ct. App. 2012\)](#), *trans. denied*.

To prove intent, the State must establish the defendant’s knowledge of the presence of the contraband. *Id.* When possession of the premises where the contraband is found is non-exclusive, the defendant’s knowledge may not be inferred absent some additional circumstances indicating knowledge of the presence of the contraband and the ability to control it. [Gaynor v. State, 914 N.E.2d 815, 819 \(Ind. Ct. App. 2009\)](#), *trans. denied*.

“Among the recognized ‘additional circumstances’ are: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the contraband; (5) contraband is in plain view; and (6) location of the contraband is in close proximity to items owned by the defendant.” *Id.* at 819-20 (quoting [Holmes v. State, 785 N.E.2d 658, 660-61 \(Ind. Ct. App. 2003\)](#)).

It is well-settled that “conviction for possessory offenses does not depend on the accused being ‘caught red-handed’ in the act by the police.” [Wilburn v. State, 442 N.E.2d 1098, 1101 \(Ind. 1982\)](#). Moreover, it is “not necessary that the evidence ‘overcome every reasonable hypothesis of innocence.’ The evidence is sufficient if an inference may reasonably be drawn from it to support the

verdict.” *Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007)  
(citation omitted).

*Smith v. State*, 113 N.E.3d 1266, 1270 (Ind. Ct. App. 2018), *trans. denied*.

- [9] Hermesch acknowledges that officers found the methamphetamine in close proximity to her, since it was found on the driver’s side floorboard, on top of the floor mat. But she argues that there was no evidence that she knew that the methamphetamine was there, which is required to show that she intended to maintain dominion and control over it. *See id.* We cannot agree.
- [10] The State presented evidence that, despite the fact that the car was registered in the name of Hermesch’s passenger, Hermesch told officers that the car was hers. And the State presented a photograph showing the baggie of methamphetamine in plain view on the floor mat underneath where Hermesch’s right leg would have been positioned while driving. Finally, the State presented evidence that Hermesch attempted to evade the traffic stop. Specifically, Officer Kaitlin Jackowicz testified that, when she had caught up to Hermesch’s vehicle, before the traffic stop, Hermesch “took an abrupt right to go south . . . and into a closed gas station” before leaving and driving north. Tr. p. 8. Thus, the State presented ample evidence to show, by a preponderance of the evidence, Hermesch’s constructive possession of the methamphetamine. And the trial court did not abuse its discretion when it revoked Hermesch's probation.

## *Issue Two: Sentence*

- [11] Hermesch next contends that the trial court abused its discretion when it ordered her to serve portions of her previously suspended sentences executed with the Department of Correction.<sup>1</sup> A trial court’s sentencing decisions for probation violations are reviewable using the abuse of discretion standard. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007).
- [12] Hermesch maintains that her criminal history shows large “gaps in the time between” convictions, and she challenges her probation officer’s testimony that she is “not a good candidate for probation due to consistently getting new offenses while on probation.” Tr. p. 29. And she argues that committing her to the DOC “would cause serious financial hardship” on her. Appellant’s Br. at 22. But the State presented evidence that on August 31, 2020, one day before her probation term started in F6-485, Hermesch was charged with Level 6 felony theft. The State had filed a notice of probation violation and Hermesch admitted to the violation, but the trial court declined to impose any sanction. Because of Hermesch’s prior probation violation, we cannot say that the trial court abused its discretion when it ordered her to serve portions of her previously suspended sentences for the instant probation violation. *See, e.g., Goonen v. State*, 705 N.E.2d 209, 212-13 (Ind. 1999) (holding no abuse of

---

<sup>1</sup> Hermesch erroneously alleges that the trial court imposed the entire previously suspended sentences.

discretion in reinstating entire previously suspended sentence where court followed proper procedures in conducting probation revocation hearing).

[13] For all these reasons, we affirm the trial court's revocation of Hermes' probation and imposition of sentences.

[14] Affirmed.

Vaidik, J., and Pyle, J., concur.