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IN THE
COURT OF APPEALS OF INDIANA

James L. Mosley,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 21, 2021

Court of Appeals Case No.
20A-CR-2094

Appeal from the Ripley Circuit
Court

The Honorable Ryan J. King,
Judge

Trial Court Cause No.
69C01-1702-F5-8

Weissmann, Judge.

- [1] Six months after James Mosley was imprisoned for fraud, Mosley sent an apology letter to one of his victims. A no-contact order imposed as a condition of his probation barred that contact. Unbeknownst to the parties, the victim had died about two years before Mosley's sentencing, when the trial court entered the no-contact order. Nonetheless, the trial court found Mosley violated the terms of his probation by writing to the deceased woman, consequently revoked three years of Mosley's probation, and ordered him to spend those years in prison.
- [2] Finding a no-contact order cannot be issued to protect a dead person and that Mosley's probation cannot be revoked based on violation of that void order, we reverse the trial court's judgment.

Facts

- [3] Mosley engaged in a multi-county home improvement scam in which he accepted thousands of dollars in payments from homeowners—including B.P.—without performing the promised work. Mosley agreed to plead guilty in this case to corrupt business influence, a Level 5 felony, and admit to being a habitual offender in exchange for dismissal of other charges and a maximum executed prison sentence of three years. The plea agreement also provided:

10. Defendant shall be on reporting probation in Ripley County for 6 years following incarceration subject to the following terms:

. . .

E. No contact with any victim listed in Count 1.

App. Vol. II, pp. 163-64.

- [4] Consistent with the terms of the plea agreement, the trial court sentenced Mosley to nine years imprisonment, with six years suspended to probation. The sentencing order, which incorporated the written conditions of probation nearly verbatim, specified:

Once released from prison, the Defendant shall comply with the following terms of probation: . . .

13. Defendant shall have no contact with . . . [B.P.]

App. Vol. II, pp. 158, 160-62. Neither the parties nor the trial court were aware that B.P. had already died.

- [5] About six months after he was sentenced, Mosley wrote a letter to B.P. from prison. In the letter, Mosley apologized to B.P. and offered to buy the car that he had attempted to obtain from her during his earlier offense. Ex., p. 64. B.P.'s daughter wrote back to Mosley to inform him that B.P. had died. Mosley then wrote a lengthy letter to B.P.'s daughter, who contacted the Ripley County Prosecutor's Office to halt further correspondence from Mosley.

- [6] The State charged Mosley in the Ripley Superior Court with attempted invasion of privacy for writing the letter to B.P. when a no-contact order was in effect. App. Vol. II, p. 185. The State later petitioned the Ripley Circuit Court to revoke Mosley's probation in this case, arguing he had violated the terms of his probation by committing that new offense. *Id.*

- [7] The Ripley Superior Court granted Mosley’s motion to dismiss the criminal charge of attempted invasion of privacy. However, the Ripley Circuit Court determined the State proved by a preponderance of the evidence that Mosley had violated the terms of his probation by attempting to contact B.P. when the no-contact order was in effect. The court partially revoked Mosley’s probation, ordering him to serve in prison three of his original six years of probation. Mosely now appeals.

Discussion and Decision

- [8] Mosley claims the State did not prove he violated the conditions of his probation because those conditions were unconstitutionally vague and the no-contact order was void. We agree and reverse.

I. Standard of Review

- [9] Where, as here, the alleged violation is the commission of a new crime, neither an arrest nor the filing of criminal charges alone is enough to warrant probation revocation. *Jackson v. State*, 6 N.E.3d 1040, 1042 (Ind. Ct. App. 2014). Instead, the State must establish by a preponderance of the evidence that the accused has committed the offense. *Id.*; *see also* Ind. Code § 35-38-2-3(f).
- [10] Mosley was accused of committing attempted invasion of privacy under Indiana Code §§ 35-46-1-15.1 and 35-41-5-1. The former provides in relevant part:

(a) A person who knowingly or intentionally violates: . . .

(6) a no contact order issued as a condition of probation . . .
commits invasion of privacy, a Class A misdemeanor.

A person attempts to commit invasion of privacy when, acting with the culpability required for commission of that crime, “the person engages in conduct that constitutes a substantial step toward commission of the crime.”

I.C. § 35-41-5-1(a). The trial court’s decision to revoke probation is reviewed on appeal for an abuse of discretion. *Ripps v. State*, 968 N.E.2d 323, 326 (Ind. Ct. App. 2012). An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* We consider only the evidence most favorable to the judgment without reweighing the evidence or judging witness credibility. *Id.* We affirm the trial court’s judgment if it is supported by substantial evidence of probative value. *Id.*

II. State Failed to Prove Mosley Violated a Valid No-Contact Order

[11] Mosley first claims the State did not prove he knowingly or intentionally attempted to violate a valid no-contact order. Mosley reasons that the no-contact order is void because Indiana law does not authorize a judge to prohibit a probationer’s contact with a dead person. The State responds by arguing the no-contact order was voidable, not void, and that B.P.’s death prior to the no-contact order is irrelevant.

[12] The distinction between a void and voidable judgment normally “is no mere semantic quibble.” *Stidham v. Whelchel*, 698 N.E.2d 1152, 1154 (Ind. 1998). A

void order is invalid, and nothing can cure it. *Kitchen v. Kitchen*, 953 N.E.2d 646, 650 (Ind. Ct. App. 2011). A “voidable” order, by contrast, “exists when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it.” *Id.* A voidable order may be attacked only through a direct appeal, but a void judgment is subject to direct or collateral attack at any time. *Id.*

[13] We agree with Mosley that the no-contact order was void and could not support either a prosecution for attempted invasion of privacy or a probation revocation based on his commission of that offense. A trial court’s authority to impose a no-contact order as a condition of probation arises from Indiana Code § 35-38-2-2.3(a)(18), which specifies that the trial court may order the probationer to “[r]efrain from any direct or indirect contact with an individual.” Neither that statute nor any related laws define “individual.”

[14] When interpreting the meaning of a statute, the object and purpose of the law, as well as the effect and repercussions of a particular construction, must be considered. *Maynard v. State*, 859 N.E.2d 1272, 1274 (Ind. Ct. App. 2007). The obvious purpose of a no-contact order imposed as a condition of probation is to protect the victim of an offense from the perpetrator. That purpose is not served where, as here, the victim already has died. The only reasonable interpretation of “individual” in that statutory context is “a living person.” Reading “individual” to include dead people would be illogical and even absurd, both results to be avoided in statutory construction. *Id.* As the trial court lacked authority under Indiana Code § 35-38-2-2.3(a)(18) to issue a no-contact order

barring Mosley's contact with B.P., given her earlier death, the order was void at the outset.

[15] The State maintains that even if the no-contact order is invalid, the probation revocation should stand because the attempt statute provides: "It is no defense that, because of a misapprehension of the circumstances . . . it would have been impossible for the accused person to commit the crime attempted." I.C. § 35-41-5-1(b). In pursuing this argument, the State ignores its role in the issuance of the void no-contact order. If, prior to requiring the no-contact order as a condition of the plea agreement, the State had attempted to ascertain whether B.P. actually desired and/or needed the protection of a no-contact order, it easily would have discovered that the no-contact order as to B.P. was unmerited. The State essentially is asking us to find Mosley should spend three more years in prison for attempting to violate a no-contact order that the State should never have sought and the trial court should never have entered as to a victim who no longer needed protection.

[16] Regardless, the State's focus on the unavailability of an impossibility defense under Indiana Code § 35-41-5-1(b) is unavailing. A probation revocation cannot be based on the violation of a void condition of probation. *See, e.g., Foster v. State*, 813 N.E.2d 1236, 1239 (Ind. Ct. App. 2004) (reversing probation revocation based on violation of term of probation void for vagueness). As the no-contact order imposed as a condition of probation is void, the trial court abused its discretion in revoking Mosley's probation for attempting to violate that order. Borrowing the words of the United States Supreme Court, "That

seems to us to be the common sense of the matter; and common sense often makes good law.” *Peak v. United States*, 353 U.S. 43, 46 (1957).

[17] The judgment of the trial court is reversed.

Kirsch, J., and Altice, J., concur.