

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ronald E. Burke,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 30, 2022

Court of Appeals Case No.
22A-CR-1119

Appeal from the Vermillion Circuit
Court

The Honorable Jill D. Wesch,
Judge

Trial Court Cause No.
83C01-2108-F6-99

Brown, Judge.

- [1] Ronald E. Burke appeals the revocation of his probation and asserts his sentence is inappropriate in light of the nature of the offense and his character. We affirm.

Facts and Procedural History

- [2] Burke was convicted of arson as a level 4 felony in April 2021 under cause number 83C01-2010-F4-9 (“Cause No. 9”), and the trial court later sentenced him to “a total sentence of 9 years in the Indiana Department of Correction[] with 2560 day(s) suspended to probation.” Appellant’s Appendix Volume II at 18. On February 11, 2021, Burke received approval for home detention and electronic monitoring. On July 19, 2021, Burke called Duke Energy, answered the security questions, and requested a power shutoff. According to Burke, he made the shutoff request to make his roommates miserable because he was upset over a nursing home’s refusal to allow him to transfer his home detention to its facility.
- [3] On August 9, 2021, the State charged Burke with identity deception as a level 6 felony under cause number 83C01-2108-F6-99 (“Cause No. 99”). On October 7, 2021, the State filed a petition to revoke Burke’s probation under Cause No. 9. On February 23, 2022, Burke pled guilty as charged under Cause No. 99 and admitted that he violated the terms of his probation under Cause No. 9.
- [4] On March 30, 2022, the court held a joint dispositional hearing in Cause No. 9 and sentencing hearing in Cause No. 99 at which Burke testified and agreed with the statements that he “received a diagnosis for schizophrenia . . . [and] a

diagnosis for paranoia and borderline retardation,” and these conditions existed prior to his official diagnosis. Transcript Volume II at 32. He stated that he had received treatment since his discharge from the National Guard in 1979, he currently received counseling, and he agreed that he has “heart [issues] and diabetes.” *Id.* at 35. He agreed with the statements that he “called . . . Duke Energy and pretended [he was] someone else to get someone’s electricity shut off,” “at that time [he was] in a dispute with . . . some other gentleman that lived with [him],” and he took responsibility for his actions. *Id.* at 39. After asking if Burke had any further remarks, the court stated the following:

Then in [Cause No. 99] the Court is going to enter a judgment of conviction for the offense of Identity Deception, a level 6 felony, and sentence you to a period of 360 days. That sentence will be served by the time that you have already spent in the Vermillion County Jail. You will be ordered by your good time credit and good time credit. That will leave some credit time to be applied to your revocation. We’ll go over that here in just a moment, but you’re going to be ordered to pay a \$1.00 fine in that case, \$185.00 in court costs and reimbursement for the cost of your appointed counsel in the amount of \$100.00. And that case will be closed. All right? In [Cause No. 9] the Court is going to find that you did, in fact, violate the terms and conditions of your probation. The Court is going to give you credit for the 50 remaining days that you would have, as well as the one for four good time credit that you would have because this is a level 4. All right. So you will get those – that 50 days will apply to this case. As to your – the rest of your sentence in this cause – I don’t know that I stated, but the Court will find that you did, in fact, violate the terms and conditions of your community corrections placement as well as your revocation of probation. The Court is going to revoke – let’s see – 1,460 of those days to the Department of Corrections. The remainder of that sentence will

be on in home detention. There are no fines and fees in this cause. All right. Anything else from the State?

Id. at 51.

- [5] The court sentenced Burke to 360 days in the Indiana Department of Correction for his conviction under Cause No. 99. With respect to Cause No. 9, the court revoked “1,460 days of probation which shall be executed at the Indiana Department of Correction[],” with “[t]he balance of the term of probation [to] be served by way of a direct commitment to West Central Regional Community Corrections at a level to be determined by them.” Appellant’s Appendix Volume II at 56.

Discussion

I.

- [6] Burke concedes that he violated his probation by committing an additional criminal offense but asserts the court abused its discretion “in failing to issue an adequate sentencing statement and in omitting mitigating factors supported by the record” for the revocation of his probation.¹ Appellant’s Brief at 9. The

¹ To the extent Burke argues the court abused its discretion by issuing an insufficient sentencing statement for his conviction for identity deception, we need not address this issue because we find that his sentence is not inappropriate under Ind. Appellate Rule 7(B). See *Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007) (holding that, in the absence of a proper sentencing order, Indiana appellate courts may either remand for resentencing or exercise their authority to review the sentence pursuant to Ind. Appellate Rule 7(B)), *reh’g denied*; *Shelby v. State*, 986 N.E.2d 345, 370 (Ind. Ct. App. 2013) (holding that “even if the trial court did abuse its discretion by failing to consider the alleged mitigating factor of residual doubt, this does not require remand for resentencing”), *trans. denied*; *Chappell v. State*, 966 N.E.2d 124, 134 n.10 (Ind. Ct. App.

State claims the court did not abuse its discretion in revoking Burke’s probation, and any error in failing to provide an adequate sentencing statement is harmless.

- [7] Ind. Code § 35-38-2-3(h), which sets forth a trial court’s sentencing options if the court finds a probation violation, 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.

- [8] 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

2012) (holding that any error in sentencing is harmless if the sentence imposed is not inappropriate), *trans. denied*; *Mendoza v. State*, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007) (citing *Windhorst* and holding that, “even if the trial court is found to have abused its discretion in the process it used to sentence the defendant, the error is harmless if the sentence imposed was not inappropriate”), *trans. denied*.

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. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

[9] While a probationer who admits the allegations against him must still be given an opportunity to offer mitigating evidence suggesting that the violation does not warrant revocation, *Woods v. State*, 892 N.E.2d 637, 640 (Ind. 2008), Ind. Code § 35-38-2-3 “imposes no requirement upon the trial court to balance aggravating and mitigating circumstances and issue a sentencing statement when imposing a sanction for a probation violation.” *Porter v. State*, 117 N.E.3d 673, 675 (Ind. Ct. App. 2018). This stems from the fact that a probation revocation hearing does not involve the imposition of a sentence but is a proceeding to consider the execution of a sentence already imposed. *See Mitchell v. State*, 619 N.E.2d 961, 963-964 (Ind. Ct. App. 1993). As long as the proper procedures have been followed in conducting a probation revocation hearing, “the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence.” *Goonen v. State*, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999).

[10] The record reveals that Burke received the opportunity to present mitigating evidence, and he testified concerning his previous service in the National Guard, his mental health history, present treatment, physical health, and criminal history, and that he took responsibility for his past crimes. Burke admitted to violating his probation, and based on our review of the record, we

cannot say that the court abused its discretion in revoking 1,460 days of his probation.

II.

- [11] The next issue is whether Burke’s 360-day sentence for identity deception is inappropriate in light of his character and the nature of the offense. Ind. Appellate Rule 7(B) provides that we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).
- [12] Ind. Code § 35-50-2-7(b) provides that a person who commits a level 6 felony shall be imprisoned for a fixed term of between six months and two and one-half years, with the advisory sentence being one year.
- [13] Our review of the nature of the offense reveals that Burke learned that he could not have his home detention transferred to a nursing home and used his roommate’s identifying information, including his social security number, to request a shutoff of power to their residence to “make everyone in the residence miserable.” Appellant’s Appendix Volume II at 13.
- [14] Our review of the character of the offender reveals that Burke pled guilty as charged. According to the presentence investigation report (“PSI”), Burke’s

criminal history began in 1979 and include seven felony convictions and twenty-three misdemeanor convictions. His felony convictions include criminal mischief, criminal recklessness, strangulation, and resisting law enforcement, and his misdemeanor convictions include battery, criminal conversion, public intoxication, disorderly conduct, resisting law enforcement, harassment, and the unlawful use of 911. He was unsatisfactorily discharged from probation in 1980, had his probation revoked in 2015 and 2016, and was terminated unsatisfactorily from probation in 2019. With respect to his health, Burke testified, agreeing that he had been diagnosed with schizophrenia, “paranoia[,] and borderline retardation,” and he stated that he had maintained the treatment and was in counseling and on medication during July 2021. Transcript Volume II at 32, 34. The PSI states that he receives treatment, medication, and counseling for schizophrenia, and he reports receiving medical treatment for his heart and diabetes.

[15] After due consideration, we conclude that Burke has not sustained his burden of establishing that his sentence is inappropriate in light of the nature of his offense and his character.

[16] For the foregoing reasons, we affirm the trial court.

[17] Affirmed.

Altice, J., and Tavitas, J., concur.