MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Shawn Jones,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 22, 2021

Court of Appeals Case No. 21A-CR-481

Appeal from the Marion Superior Court

The Honorable Sheila A. Carlisle, Judge

The Honorable Stanley E. Kroh, Magistrate

Trial Court Cause No. 49D29-1812-F3-42363

Mathias, Judge.

[1] Shawn Jones appeals the Marion Superior Court's revocation of both his community corrections placement and his probation, arguing that the evidence was not sufficient to support the trial court's decision. We disagree and we affirm.

Facts and Procedural History

[2] In 2019, Jones pleaded guilty to Level 3 felony robbery resulting in bodily injury. The trial court ordered him to serve a nine-year sentence, with two years executed at DOC and three years suspended to community corrections followed by two years of probation. Jones began his community corrections placement on August 31, 2020, at Duvall Residential Center.

[3] On September 29, the State filed a notice of community corrections violation alleging that Jones failed to comply with the terms of his placement by refusing an order, refusing to submit a drug test, and possessing or using a controlled substance. The State also filed a notice of probation violation asserting that Jones violated the conditions of his probation by failing to comply with the terms of his community corrections placement. In response, Jones admitted that he possessed or used an unauthorized substance, Appellant's Conf. App. p. 181, and the court ordered that Jones be returned to community corrections under strict compliance.

[4] Shortly thereafter, on November 9, Corrections Officer Aaron Ramsey noticed Jones appearing to fall asleep while sitting upright on his bunk at Duvall Residential Center. When Ramsey approached the bunk, Jones's fists were

clenched tightly, and Jones "wasn't even coherent." Tr. p. 21. Receiving no response from Jones, Ramsey pried Jones's fists open. Ramsey discovered two batteries and a rolled-up piece of paper containing a "green leafy substance," which Ramsey believed was K2/Spice. *Id*. at 23. In turn, the State filed a second notice of community corrections violation, as well as a corresponding notice of probation violation, alleging again that Jones possessed or used a controlled substance. Appellant's Conf. App. p. 184.

[5] The trial court held a revocation hearing on March 12, 2021, at which Ramsey testified about "the date of November 19th," Tr. p.15, and described the encounter he had with Jones in Jones's bunk. Ramsey explained that he "could smell K2/Spice" and that Jones "was nodding off," *id*. at 19, but that Jones was not subjected to a drug screen that day and that the video camera footage of Jones's dorm was unavailable. Ramsey further explained that the most common method residents rely on to smoke K2/Spice at Duvall Residential Center is "they take two batteries and usually a razor blade . . . and then they create a spark." *Id*. at 16–17. But the batteries Ramsey confiscated from Jones "were discarded" because "[t]here's nothing in [Ramsey's] protocols or [his] job description that says [he has to] put those into evidence." *Id*. at 34. As to why the batteries were thrown into the trash, Ramsey explained that "[t]hey're just batteries . . . . I can't prove that it was part of the contraband." *Id*.

[6] Jones maintained that he was asleep when Ramsey approached his bunk. He explained that he told Ramsey, "I'm not trying to have no confrontation with you . . . . I'm going back to sleep, man." *Id*. at 49. Jones also noted that he had

filed a grievance against Ramsey on November 1. *Id.* at 55; Ex. Vol. at 11. When asked whether, "on 11/9/2020," he had Spice or batteries in his hand, Jones responded that he did not. Tr. pp. 56–57.

[7] Ultimately, the trial court concluded that Jones violated Duvall Residential Center's rules against possessing and using controlled substances and revoked both Jones's community corrections placement and his probation.

[8] Jones now appeals.

Discussion and Decision

[9] For purposes of appellate review, we treat a hearing to revoke a community corrections placement the same as we do a hearing to revoke probation. *Holmes v. State*, 923 N.E.2d 479, 482 (Ind. Ct. App. 2010) (citing *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999)). The similarities between the two dictate this approach. Like a hearing to revoke probation, a hearing to revoke a community corrections placement is civil in nature, and the State must prove a violation of community corrections or of probation by a preponderance of the evidence. *Holmes*, 923 N.E.2d at 483 (quoting *Monroe v. State*, 899 N.E.2d 688, 691 (Ind. Ct. App. 2009)).

[10] Both probation and community corrections programs serve as alternatives to commitment to the DOC and both are made at the sole discretion of the trial court. *Holmes*, 923 N.E.2d at 482. A defendant is not entitled to serve a sentence in either probation or a community corrections program. *Id*. Rather, placement in either is a "matter of grace" and a "conditional liberty that is a favor, not a

right." *Monroe*, 899 N.E.2d at 691) (quoting *Million v. State*, 646 N.E.2d 998, 1002 (Ind. Ct. App. 1995)).

[11] Accordingly, we review a trial court's decision to revoke both a community corrections placement and probation for an abuse of discretion. *Id*. We consider only the evidence most favorable to the judgment, together with all reasonable inferences to be drawn therefrom, and we do not reweigh the evidence or judge the credibility of the witnesses. *Mateyko v. State*, 901 N.E.2d 554, 558 (Ind. Ct. App. 2009), *trans. denied*. A trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances, or if the trial court misinterprets the law. *Killbrew v. State*, 165 N.E.3d 578, 581–82 (Ind. Ct. App. 2021) (citing *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007)).

[12] Here, Jones claims the trial court abused its discretion in revoking his community corrections placement and probation because the State's evidence was insufficient to prove the alleged violation. Specifically, Jones argues that "[t]he State presented no evidence supporting its allegation Jones violated conditions of community corrections, and correspondingly probation, on November 9, 2020," and that "[t]he only evidence it presented which may have supported a violation, is for conduct on November 19, 2020." Appellant's Br. at 8–9.

[13] Jones's argument rests entirely on the variance between the date written in the State's notice of violation—November 9, 2020—and the State's mention of a different date—November 19, 2020—at the revocation hearing. However, as

Jones correctly points out, a variance between the alleged date of a violation and the State's proof at trial is not necessarily fatal. *See Bennett v. State*, 5 N.E.3d 498, 514 (Ind. Ct. App. 2014). Such a variance is only fatal if it "(1) misled the defendant in preparing a defense, resulting in prejudice, or (2) leaves the defendant vulnerable to future prosecution under the same evidence." *Blount v. State*, 22 N.E.3d 559, 569 (Ind. 2014); *see also Poe v. State*, 775 N.E.2d 681, 686 (Ind. Ct. App. 2002).

[14] Moreover, as a general rule, failure to make a specific objection to a material variance issue results in waiver. *Neff v. State*, 915 N.E.2d 1026, 1031 (Ind. Ct. App. 2009). Jones did not object at the revocation hearing when the State mentioned "November 19th," Tr. pp. 15, 18, even though the State's notice of violation alleged that Jones used or possessed K2/Spice, "on or about 11/9/2020." Appellant's Conf. App. p. 184.

[15] Yet, regardless of whether Jones objected, when time is not an element of a violation, or "of the essence of the offense," the State "is not required to prove the offense occurred on the precise date alleged." *Bennett*, 5 N.E.3d at 514 (quoting *Poe*, 775 N.E.2d at 686)). The precise date that Jones used or possessed an unauthorized substance is not an element of his community corrections violation. By extension, time is not an element of the corresponding probation violation. The State was therefore not required to prove that Jones's violation occurred on any particular date, and the State's mention of November 19 at the revocation hearing did not mislead Jones into believing the State would not present evidence related to the events of November 9. Indeed, Jones prepared

and maintained his defense, and Jones himself testified, all without objecting to or otherwise pointing out the date variance. As a result, any variance between the date alleged in the notice of violation and the date mentioned at the revocation hearing was not fatal to the State's proof.

Conclusion

[16] For all of these reasons, we conclude that the trial court did not abuse its discretion in revoking both Jones's community corrections placement and his probation.

[17] Affirmed.

Tavitas, J., and Weissmann, J., concur.