

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

David Edward Jackson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 17, 2023

Court of Appeals Case No.
22A-CR-2693

Appeal from the Lake Superior
Court

The Hon. Natalie Bokota, Judge

The Hon. Kathleen A. Sullivan,
Magistrate

Trial Court Cause Nos.
45G02-1803-F3-11
45G02-1803-F4-11
45G02-1803-F4-9

Memorandum Decision by Judge Bradford
Judges May and Mathias concur.

Bradford, Judge.

Case Summary

- [1] Between 2014 and 2018, David Jackson molested three girls between the ages of fourteen and sixteen years old in Hobart and ultimately pled guilty to two counts of Level 6 felony and one count of Level 5 felony sexual misconduct with a minor. The trial court imposed an aggregate sentence of three years of incarceration, with 534 days executed and the balance suspended to probation. As part of a plea agreement and as a term of probation, Jackson was required to receive counseling at Project Pro, a facility in Porter County. In April of 2022, Lake County Probation (“Probation”) petitioned to have Jackson’s probation revoked on the basis that he had been unsuccessfully discharged from Project Pro. After a hearing, the trial court found that Jackson had violated the terms of his probation and ordered that he serve the balance of his suspended sentence. Jackson contends that the trial court erred in abrogating its discretion to impose alternative or lesser sanctions. Because we agree, we affirm in part, reverse in part, and remand for further proceedings.

Facts and Procedural History

- [2] Between 2014 and 2018, when Jackson was over thirty years old, he repeatedly and “on numerous occasions” molested three different girls who were fourteen to sixteen years old. Appellant’s App. Vol. III p. 76. Jackson compelled two girls to submit to being kissed by him and to his fondling of their genitals, breasts, or buttocks at two different game stores in Hobart. Jackson committed this fondling behavior against his third victim and also compelled her to touch

his penis. On March 14, 2018, the State charged Jackson with a total of ten felonies under three different cause numbers. On February 23, 2021, Jackson pled guilty to one count of Level 5 felony sexual misconduct with a minor in each of these three cases. On March 26, 2021, the trial court accepted Jackson's guilty pleas and sentenced him to concurrent terms of three years of incarceration for each count.

[3] Jackson thereafter began post-conviction proceedings, which resulted in an agreement on November 23, 2021, pursuant to which Jackson's guilty pleas would be set aside and his convictions vacated. Jackson, however, would plead guilty in all three cases pursuant to a new plea agreement, in which he agreed to plead guilty to two counts of Level 6 felony and one count of Level 5 felony sexual misconduct with a minor. Jackson agreed to sentences of two and one-half years each for his Level 6 felony convictions, with 534 days executed and the balance suspended to probation, and a sentence of three years for his Level 5 felony conviction, with 305 days executed and the balance suspended to probation, all sentences to be served concurrently. Jackson also agreed that he would be "required to participate in Project Pro through Porter County PACT[.]" Appellant's App. Vol. III p. 74. Jackson pled guilty pursuant to the new agreement and was sentenced accordingly on November 23, 2021.

Because Jackson's pretrial detention had satisfied the executed portions of his sentences in all three cases, he was released to probation.

[4] On April 21, 2022, Probation petitioned to revoke Jackson's probation, alleging that Jackson had been discharged unsatisfactorily from Project Pro. The trial

court held a hearing on the petition on July 28, 2022. Jackson's probation officer testified that Jackson had enrolled in Project Pro toward the end of 2021. Jackson had later told Project Pro that his attorney had told him not to discuss his case, which is a requirement of Project Pro therapy. Project Pro had been willing to accommodate Jackson's concerns until it learned that he had been recording treatment sessions, which represented a breach of confidentiality necessary for the program to treat all of the sex-offenders involved in meetings and sessions and threatened the program's certification. Although Jackson and Probation had proposed alternatives to Project Pro, for various reasons none were found to be satisfactory. The trial court found that Jackson had violated the terms of his probation and set the matter for a dispositional hearing.

[5] The dispositional hearing occurred on October 13, 2022. At the conclusion of the hearing, Jackson argued that the trial court had discretion to remove the requirement for sex-offender counseling altogether or to allow him to participate in remote counseling, one of the alternatives to Project Pro that he had proposed. Jackson asked for the same disposition at a second hearing, arguing that he should be allowed to participate in counseling with a Bloomington therapist remotely via Zoom. The State argued that removing a counseling obligation would amount to altering the plea agreement and noted Jackson's history of "playing the victim, casting blame on everybody else, [and] failing to accept responsibility" for his rehabilitative obligations. Tr. Vol. II p. 58.

[6] When the trial court asked an attending probation officer for input, the officer said that she had been

involved at the very beginning of the case when Mr. Jackson decided he was going to tell us how to supervise him, then he wants to tell the various therapists everywhere he went how he would report, when he would report, if he could report, and it's just been an ongoing issue for the entire term of probation.

Tr. Vol. II p. 59.

[7] The trial court announced its decision as follows:

Alright, we've had the sentencing hearing today. It is an agreed sentence pursuant to the plea. Having considered all of the arguments made this afternoon, I just, to me, aside from the whole fact that Project Pro isn't supervising him, which was part of the plea agreement, to me Zoom supervision in group sessions is mind boggling. There's a problem with confidentiality when you have a Zoom session of a counseling-group counseling session. I would be very opposed to something like that. Had I known about that with them, it would have been a problem for me. But having said that, at this point I'm not in a position to change the sentence. It's agreed to, it's a contract. So the sentence that was imposed at the time is now imposed to be executed instead of suspended.

Tr. Vol. II pp. 59–60.

Discussion and Decision

[8] Jackson contends that the trial court erred by abrogating its discretion to order a lesser or alternative sanction when ordering him to execute his previously-

suspended sentences.¹ “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) (citing *Sanders v. State*, 825 N.E.2d 952, 955 (Ind. Ct. App. 2005), *trans. denied*). The Indiana Supreme Court has held that “a trial court’s sentencing decisions for probation violations are reviewable using the abuse of discretion standard[,]” explaining 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. If 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 187. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances. *Id.*

[9] Probation revocation is a two-step process. *Cox v. State*, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006). First, there must be a factual determination that a violation of a probation condition occurred by a preponderance of the evidence. *See id.* Where a violation of the terms of probation has been established, Indiana Code subsection 35-38-2-3(h)(3) allows the trial court to “[o]rder execution of all or part of the sentence that was suspended at the time of initial sentencing[,]” and the “[c]onsideration and imposition of any alternatives to

¹ Jackson also claims that the trial court abused its discretion in failing to determine whether his violation of the terms of his probation warranted revocation, but limits his actual argument to its decision to order the entirety of his previously-suspended sentence to be executed.

incarceration is a ‘matter of grace’ left to the discretion of the trial court.”

Monday v. State, 671 N.E.2d 467, 469 (Ind. Ct. App. 1996) (citation omitted).

[10] Jackson argues that the trial court erred by impermissibly abrogating its discretion to continue probation with modified terms or order that less than his entire suspended sentence be executed. Put another way, Jackson argues that the trial court mistakenly believed that it had no choice but to order execution of his entire suspended sentence when, in fact, it retained discretion to order different sanctions. As mentioned, in ordering that Jackson serve the balance of his suspended sentence, the trial court stated the following on the record: “[A]t this point I’m not in a position to change the sentence. It’s agreed to, [the plea agreement]’s a contract. So the sentence that was imposed at the time is now imposed to be executed instead of suspended.” Tr. Vol. II p. 60. This statement leaves no doubt that the trial court felt bound by the terms of the plea agreement and that it had no discretion in the matter. We agree with Jackson that the trial court was mistaken in concluding that it had no discretion to exercise.

[11] As the Indiana Supreme Court has noted, decisions regarding probation are “within the *sole* discretion of the trial court.” *Woods v. State*, 892 N.E.2d 637, 639 (Ind. 2008) (emphasis added). In *Woods*, the Indiana Supreme Court addressed a case in which a probationer had been placed on “‘strict compliance,’” which meant that “[any] other violation of any terms or conditions of his probation will result in full backup of 15 years.” *Id.* (record citation omitted). When Woods failed to report for drug testing, report to

probation as required, and make a good-faith effort to pay fees, the State filed a notice of probation violation. *Id.* When Woods asked at the hearing if he could explain why he had “missed[,]” the trial court said no, citing the strict-compliance terms of his probation. *Id.*

[12] Although the *Woods* Court affirmed on other grounds, it concluded that, regardless of the terms of probation, “even 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.” *Id.* at 640 (citing *U.S. v. Holland*, 850 F.2d 1048, 1051 (5th Cir.1988) (per curiam)). The *Woods* Court also noted that

even in the face of a probation violation the trial court may nonetheless exercise its discretion in deciding whether to revoke probation. *Clark County Council v. Donahue*, 873 N.E.2d 1038, 1039 (Ind. 2007) (“Indiana trial court judges have the authority to award, supervise, and revoke probation. The probationary scheme is deliberately designed to give trial judges the flexibility to make quick, case-by-case determinations.”).

Woods, 892 N.E.2d at 641.

[13] Even more to the point, we have concluded, in a case with facts similar to those before us today, that “a plea agreement cannot bind the trial court’s hands as to an appropriate sanction.” *Holsapple v. State*, 148 N.E.3d 1035, 1042 (Ind. Ct. App. 2020). In *Holsapple*, the defendant’s sixteen-year sentence was stayed pending participation in a problem-solving-court program. *Id.* at 1036. After her stint in problem-solving court proved unsuccessful, Holsapple was returned to the trial court, which noted that “[a]s a result of that termination, that

triggers your plea agreement and the Court sentence that followed your plea agreement.” *Id.* at 1038 (record citation omitted). The trial court, concluding that it had “no discretion whatsoever[,]” ordered that she execute the entirety of her previously-suspended sentence. *Id.* (record citation omitted). We reversed and remanded for resentencing, concluding that “the trial court was not obligated to impose the sanction stated in a strict liability agreement between the State and Holsapple upon finding a violation[.]” *Id.* at 1042. So it is here. Regardless of the terms of Jackson’s plea agreement, the trial court was not required to order that the entirety of his suspended sentence be executed upon the finding of any violation of the terms of probation. Because the trial court always has sole discretion in matters of probation violations, we affirm the trial court’s finding that Jackson violated the terms of his probation, reverse its order that he serve the entirety of his suspended sentence, and remand for the trial court—exercising its discretion—to determine the appropriate sanction.

[14] We affirm the judgment of the trial court in part, reverse in part, and remand with instructions.

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