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IN THE
COURT OF APPEALS OF INDIANA

No. 19A-CR-02245

JOSHUA A. WILSON, *Appellant-Defendant,*	Appeal from the Grant Superior Court,
v.	No. 27D02-1807-F6-408,
STATE OF INDIANA, *Appellee-Plaintiff.*	The Honorable Dana J. Kenworthy, Judge.

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUE

Whether the trial court abused its discretion when it imposed Wilson's suspended sentence following a violation of probation.

STATEMENT OF THE CASE

Nature of the Case

Joshua A. Wilson appeals the imposition of his suspended sentence following the violation of his probation.

Course of Proceedings

Wilson was charged with domestic battery in the presence of a child, a Level 6 felony; interference with the reporting of a crime, a Class A misdemeanor; and domestic battery, a Level 6 felony (App. Vol. II 11–12). The two counts of domestic battery were alleged to occur on July 27, 2018 and July 29, 2018 (App. Vol. II 11–12). Wilson pled guilty to one count of domestic battery in the presence of a child and to interference with reporting a crime (App. Vol. II 11, 14–15). Wilson received a sentence of two and half years, suspended to probation, except for time served (App. Vol. II 6, 14–15).

On July 10, 2019, the Grant County Probation Department filed a petition for revocation of probation, seeking to revoke Wilson's probation (App. Vol. II 25). On August 26, 2019, the court held a fact finding hearing and found Wilson had violated his probation (App. Vol. II 27–28; Tr. Vol. II 16). Wilson's probation was revoked and the court imposed his entire suspended sentence of two years and 22 days (App. Vol. II 29).

STATEMENT OF THE FACTS

On October 15, 2018, Wilson pled guilty to domestic battery in the presence of a child, a Level 6 felony, and interference with reporting a crime, a Class A misdemeanor (App. Vol. II 14–15). Pursuant to his plea agreement, his two and half year sentence was suspended to probation except for time already served (App. Vol. II 15). Wilson's probation required that he attend the BASS domestic violence program and to report to his probation officer as directed (App. Vol. II 19–20; Tr. Vol. II 7–8).

Wilson went to the Family Services Office after his release to probation to register for BASS classes (Tr. Vol. II 7). He testified that he was told at the Family Services Office that he should not start the BASS program until he had a steady income and could pay for the classes on a regular basis (Tr. Vol. II 7). Wilson also testified that he called his probation officer, Joshua Garcia, after he received a letter from the probation officer requiring Wilson to report on March 26, 2019 (Tr. Vol. II 7–8).

Garcia stated that Wilson last reported on March 26, 2019 (Tr. Vol. II 5). Wilson failed to report on his next appointment set for April 10, 2019 (Tr. Vol. II 5). After Wilson's failure to report on April 10, 2019, Garcia sent a failure to report letter and set a new appointment for April 24, 2019 (Tr. Vol. II 5). Wilson failed to appear on April 24, 2019 and then again on May 8, 2019, after Garcia set an additional appointment (Tr. Vol. II 5). Garcia sent failure to report letters to the most recent address on file for Wilson for the missed appointments (Tr. Vol. II 5). Garcia did not remember or have record of Wilson contacting him by phone after

March 26, 2019 (Tr. Vol. II 7). Wilson did not report to probation after March 26, 2019, despite receiving notice by mail regarding his appointments (Tr. Vol. II 8).

On July 10, 2019, the State filed a petition to revoke Wilson's probation (App. Vol. II 25–26). On August 26, 2019, the trial court held a fact finding hearing on the petition (App. Vol. II 27–28; Tr. Vol. II 4). The trial court found that Wilson had violated his probation and revoked his probation (App. Vol. II 29–30; Tr. Vol. II 16).

The trial court found several aggravating factors and no mitigating factors. First, the trial court found aggravating factors in Wilson's prior criminal history and probation violations when it took judicial notice of Wilson's prior criminal cases including 27D02-1512-F6-464, in which Wilson had previously failed to complete the BASS program and had his probation revoked (App. Vol. II 27; Tr. Vol. II 16). The trial court also took judicial notice of 27H02-17110-CM-885 which involved charges of invasion of privacy with the same victim in 27D 02-1512-F6-464 and the present case that led to Wilson's probation (App. Vol. II 27). The trial court found a second aggravating circumstance in that the current case occurred in front of a minor child (App. Vol. II 27; Tr. Vol. II 16).

SUMMARY OF THE ARGUMENT

Wilson has failed to show an abuse of discretion when the trial court revoked his probation. The court may order the execution of part or all of a defendant's suspended sentence where a defendant has violated probation. A trial court may take judicial notice of other cases and find aggravating factors during probation revocation.

ARGUMENT

The trial court's imposition of the suspended sentence was not an abuse of discretion.

The trial court did not abuse its discretion. When a probation violation is committed and probation is revoked the trial court may "[o]rder execution of all or part of the sentence that was suspended at the time of initial sentencing." Ind. Code § 35-38-2-3(h). On appeal a decision to revoke probation and the sentence imposed is reviewed for an abuse of discretion. *Woods v. State*, 892 N.E.2d 637, 640 (Ind. 2008); *see also Abernathy v. State*, 852 N.E.2d 1016, 1019 (Ind. Ct. App. 2006). However, "[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." *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). It is an abuse of discretion "only where the decision is clearly against the logic and effect of the facts and circumstances." *Guillen v. State*, 829 N.E.2d 142, 145 (Ind. Ct. App. 2005). Because the trial court is in the best position to determine the factual context surrounding something left to its discretion, "[appellate courts] will second-guess the fact-finding court only when it responds to that factual context in an unreasonable manner." *Tapia v. State*, 753 N.E.2d 581, 585 (Ind. 2001). This Court has found that, "[s]ince the trial court's order that Defendant serve time executed was authorized by statute, the trial court's order was not excessive." *Kincaid v.* State, 736 N.E.2d 1257, 1259 (Ind. Ct. App. 2000).

The trial court did not abuse its discretion when it revoked Wilson's probation and imposed a fully executed sentence. "Proof of any one violation is

sufficient to revoke a defendant's probation." *Brooks v. State,* 692 N.E.2d 951, 953 (Ind. Ct. App.1998), *trans. denied; see also Figures v. State*, 920 N.E.2d 267, 273 (Ind. Ct. App. 2010) (upholding imposition of full execution during probation revocation despite other options being available). The evidence was clear that Wilson was required to report to the probation department but that he failed to report to his scheduled appointments (Tr. Vol. II 5). Wilson received the letters which gave him a date to present himself at the probation department, and he did not appear (Tr. Vol. II 8). The defendant acknowledges that he violated his probation by missing appointments with his probation officer (Br. 11). Wilson's noncompliance with appointments along with his failure to communicate with his probation officer regarding his difficulties entering the BASS program show significant disregard for the trial court's order of probation. This is sufficient for the court to have revoked and imposed Wilson's entire sentence. *See Brooks*, 692 N.E.2d at 953.

The trial court also did not abuse its discretion when it took judicial notice of Wilson's other cases, including probation violations in those cases, and considered those violations to be aggravating factors. When determining the sentence upon revocation, the State asked the court to consider that "this is a repeating situation between Mr. Wilson [and] … the victim in this case … and his failure to comply with probation rules" (Tr. Vol. II 15). Based on this request, the court properly took notice of Wilson's related causes. While the Indiana Rules of Evidence do not apply to probation revocation hearings, a court is permitted even under those rules to take

notice of court records. *See* Ind. Evid. R. 101, 201(b)(5); *see also Horton v. State*, 51 N.E.3d 1154, 1160 (Ind. 2016) (stating that Indiana Rule of Evidence 201(b)(5) permits courts to take judicial notice of "records of a court of this state"). Additionally, this same evidence would have already been considered in this cause when the court decided to accept Wilson's fixed term plea agreement. Thus, the trial court's consideration of Wilson's prior probation violations when determining his sentence upon probation revocation was not an abuse of discretion.

Even if this Court were to consider the trial court's application of judicial notice or consideration of Wilson's non-compliance with court ordered programs an abuse of discretion, which it is not, it would be harmless error. Remand for resentencing is appropriate only if the court "cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Anglemyer v. State,* 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g,* 875 N.E.2d 218. Because Wilson's sentence upon revocation is strongly supported by his repeated failures to report and his lack of effort to complete the BASS program, this Court should affirm.

CONCLUSION

Because Wilson has failed to show an abuse of discretion at his probation revocation hearing, this Court should affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 3, 2020, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on January 3, 2020, the foregoing document was electronically served upon the following person(s) via IEFS:

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