

Brief of Appellant
Joshua A. Wilson

IN THE INDIANA COURT OF APPEALS

CAUSE NO. 19A-CR-02245

JOSHUA A. WILSON)	Appeal from the
)	Grant Superior Court 2
Appellant/Defendant)	27D02-7-F6-000408
v.)	
)	The Honorable
)	Dana J. Kenworthy, Judge
STATE OF INDIANA,)	
)	
Appellee/Plaintiff)	

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE

- I. Whether the trial court erred in imposing Wilson's entire suspended sentence.

STATEMENT OF THE CASE

In October of 2018, Wilson entered a guilty plea to domestic battery as a level 6 felony and interference with reporting a crime as a class A misdemeanor. (Appendix Pg. 14). Wilson was sentenced to two and one-half years in jail, all suspended to probation except for time served of 158 days. (Appendix Pg. 21). Upon his release from jail, Wilson signed Rules of Probation, which were filed with the court on October 15, 2018, and his two-year and 22-day term of probation began on that same date. (Appendix Pg. 19). One of the rules of probation required Wilson to begin BASS classes within thirty days. (Appendix Pg. 19).

Approximately 9 months later, on July 11, 2019, Grant County Probation filed their Petition for Revocation of Probation, alleging that Wilson failed to report as directed on April 10th, April 24th, and May 8th of 2019, and that Wilson had failed to complete the BASS Program at Family Services as required by his rules of probation. (Appendix Pg. 25).

A fact-finding hearing was held on August 26, 2019. The court entered its Order on Fact Finding Hearing for Probation Violation on that same date, finding that Wilson had violated his rules of probation and sentencing him to two years and 22 days in jail, his entire suspended sentence. This appeal ensued.

STATEMENT OF THE FACTS

Grant County Probation Officer Josh Garcia alleged that Wilson violated his rules of probation as follows:

MR. GARCIA: he last reported on March 26th and I provided an appointment for him to report on again on April 10th, 2019, um, he failed to report on this date. I sent a failure to report letter to the address that he last provided and requested that he report in on April 24th. Um, he failed to report on that date, um, I sent an additional letter, um, requesting that he report on May 8th of 2019 and he failed to do so, um, then as well. (Transcript Pg. 5).

Wilson himself testified as follows:

THE STATE: Were you told by probation officers to state your intake for the BASS Class?

DEFENDANT: Yes.

THE STATE: Did you ever start intake for BASS Class?

DEFENDANT: I went to, uh, I went to the offices and they told me that—to not start ‘til I could provide. Until I had steady income where I could pay for the classes on—on a regular basis.

THE STATE: Which office did you go to?

DEFENDANT: The Family Services Office.

THE STATE: And did you notify probation of what they had told you?

DEFENDANT: Yes Sir.

THE STATE: Did you report to probation at any time after March 26th?

DEFENDANT: N–No, but I received, uh, the first letter I received, um, as soon as I opened the letter, I called him to let him know that I received a letter from him, explain—explaining my situation.

THE STATE: And the letter gave you a date to go to probation?

DEFENDANT: Yes Sir.

THE STATE: And did you go on that date?

DEFENDANT: No Sir.

THE STATE: Nothing further, Your Honor. (Transcript Pg. 8).

When sentencing Wilson for his probation violation, the trial court noted the following:

This is the third crime involving the same victim. The Court takes judicial notice of Cause 27D02-1512-F6-464, in which Defendant was convicted of Battery, Class A Misdemeanor on the same victim as in the current Cause. In Cause 27D02-1512-F6-464, Defendant was ordered to have no contact with the victim and was ordered to complete the Domestic Violence (BASS) program. Defendant violated the terms of probation in Cause 27D02-1512-F6-464 by failing to complete the Domestic Violence (BASS) program, and by committing a new offense in Cause 27H02-1710-CM-885. The Court takes judicial notice of Cause 27H02-1710-CM-885. The new offense in Cause 27H02-1710-CM-885 was Invasion of Privacy, Class A Misdemeanor, which involved Defendant violating the No Contact Order issued in Cause 27H02-1710-CM-885. Defendant was later convicted of more serious offenses involving the same victim: Domestic Battery in the Presence of a Child, Level 6 Felony and Interference with the Reporting of a Crime, Class A Misdemeanor in the current Cause. This is a *very strong* aggravator.

Defendant recently violated the conditions of probation in Cause 27D02-1512-F6-464. His violation behavior in that case was similar to his current violation behavior and demonstrates a pattern of complete disregard for the orders of the court. More alarming, Defendant has developed a pattern of continuing to abuse the same victim. His most recent offenses involve the abuse of the victim in the presence of Defendant's and victim's young child.

(Appendix Pg. 27).

The court's entire order on fact finding hearing on probation violation is e-filed as a separate attachment for easy reference.

SUMMARY OF THE ARGUMENT

Wilson contends that the court abused its discretion in ordering him to serve the entire suspended sentence for a violation because he was financially unable to begin the BASS program, and the remainder of the violations were three missed appointments. Furthermore, the court cited improper aggravating factors in that all of those factors were for cases that occurred before the instant case was filed or resolved by plea and before the probation rules in this case were filed.

ARGUMENT

Standard of Review

The decision to revoke probation is within the sole discretion of the trial court. Woods v. State, 892 N.E.2d 637, 639 (Ind. 2008). An appellate court will review a trial court's decision to revoke probation for an abuse of discretion. Whatley v. State, 847 N.E.2d 1007, 1009 (Ind. App. 2006). "An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court." Id.

A probation revocation hearing is in the nature of a civil proceeding. Marsh v. State, 818 N.E.2d 143, 148 (Ind. App. 2004). Therefore, an alleged

violation of probation only has to be proven by a preponderance of the evidence. Id. When reviewing the determination that a probation violation has occurred, an appellate court will neither reweigh the evidence nor reassess witness credibility. Id. Rather, if there is substantial evidence of probative value to support the trial court's decision that a defendant has violated any terms of probation, the reviewing court will affirm its decision to revoke probation. Woods, 892 N.E.2d at 639-40.

Here, Wilson does not contest the court's finding that he violated his probation rules by failing to report as directed; he admitted as much in the hearing. However, Wilson does contest the court's finding that he failed to begin his BASS program when that failure was for lack of financial ability to pay the fees. In addition, the court took judicial notice of and relied on previous cases that had no relation to the present offence and occurred before Wilson even began his probation for the present offence.

Sentencing on Probation Violation

Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled. The trial court determines the conditions of probation and may revoke probation if the conditions are

violated. Once 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). Rather than the independent review afforded criminal sentences under Rule 7(B), a trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. *Id.* An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

Wilson argues that the trial court abused its discretion in imposing a fully executed sentence. Pursuant to Indiana Code section 35-38-2-3, a trial court has three options if a defendant violates probation. It may: (1) continue the defendant's probation with no modifications to the probationary conditions; (2) extend the probationary period for not more than one year beyond the original probationary period; or (3) order execution of all or part of the suspended sentence. Ind. Code § 35-38-2-3(h); Williams v. State, 883 N.E.2d 192, 195 (Ind. App. 2008). A trial court's sentencing decision in probation revocation proceedings is reviewed for an abuse of discretion. Sanders v. State, 825 N.E.2d 952, 956 (Ind. App. 2005), *trans. denied*). An abuse of discretion occurs if the trial court's decision is against the logic and effect of

the facts and circumstances before the court. Abernathy v. State, 852 N.E.2d 1016, 1020 (Ind. App. 2006).

Wilson acknowledges that when a trial court follows proper procedures 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. App. 1999). However, here, while the trial properly found that Wilson had violated the terms of his probation by missing appointments with his probation officer, the trial court also "took judicial notice" as aggravating factors of many factors not presented as evidence during the fact-finding hearing, and took issue with other instances of probation violation that were not the basis for this particular finding. These "aggravating factors" were the court taking judicial notice of cases with cause numbers from 2015 and 2017, when the instant case was not filed until July of 2018. (See Appendix Pg. 27).

While it is true that Wilson's three consecutive missed appointments are a "technical violation" of his probation rules, Wilson contends that his lack of funds should be considered in mitigation of his sanction for not getting started on his BASS program in the first 9 months of his 2-year probation term. Furthermore, the court's use of older previous causes numbers as aggravating

factors in this probation hearing was an abuse of discretion. Cases that happened before Wilson was even on probation in this cause should not be used as aggravating factors in this case. The facts of this particular case call for less than the maximum sentence for Wilson's probation violation.

CONCLUSION

Because the trial court's decision to impose Wilson's entire suspended sentence for a probation violation was an abuse of discretion, Wilson should be sentenced to a lesser executed term.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing documents on December 6, 2019, using the Indiana E-filing system (“IEFS”). I also certify that the following persons were electronically served with the foregoing documents.

Indiana Attorney General’s Office, Attorney General Greg Zoeller at
efile@atg.in.gov

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