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ATTORNEY FOR APPELLANT:

JASON A. CHILDERS
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MONTRESS DEVAUN BROWN,)

Appellant-Defendant,)

vs.)

No. 48A05-0604-CR-189

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0209-FC-279

January 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Montress Devaun Brown appeals the revocation of his probation and the imposition of his entire suspended sentence. We affirm.

Issues

Brown raises two issues, which we restate as:

- I. whether there was sufficient evidence to support the revocation of Brown's probation; and
- II. whether the trial court abused its discretion by ordering Brown to serve his entire suspended sentence.

Facts

In October 2002, Brown pled guilty to theft as a Class D felony,¹ and forgery as a Class C felony. The trial court sentenced him to a suspended four-year term and placed him on probation for four years with the following relevant terms and conditions: 1) abstain from alcohol and drug use; 2) comply with all recommendations for substance abuse treatment; 3) find and maintain employment; 4) obtain a GED; 5) pay court costs and probation user's fees; and 6) obey all laws of the State of Indiana.

In January 2004, Brown's probation officer filed a notice of probation violation alleging that Brown had violated the terms and conditions of his probation by failing to 1) pay court costs and probation user's fees; 2) maintain employment; and 3) successfully complete treatment recommendations. The following month, the probation officer amended the notice of probation violation to include a violation of the condition that

¹ This felony was reduced to a Class A misdemeanor in 2003.

Brown abstain from drug use after Brown had a positive urine drug screen for benzodiazepines and marijuana. Brown admitted the violations at a hearing, and the trial court placed Brown back on probation with the terms and conditions previously set.

In June 2004, Brown's probation officer filed a second notice of probation violation alleging that Brown had violated the terms and conditions of his probation by failing to 1) obtain a GED; 2) pay court costs; and 3) successfully complete treatment. Brown admitted the violations, and the trial court placed him back on probation with the terms and conditions previously set.

In February 2006, the probation officer filed a notice of probation violation alleging that Brown had violated the terms and conditions of his probation by committing theft as a Class D felony when he stole \$650.00 from a former co-worker's purse and a payroll check from another woman. One week later, the probation officer amended the notice of violation to include two additional allegations that Brown committed theft as a Class D felony and fraud as a Class D felony when he stole the wallet of a patient at the convalescent center where he worked and used the patient's credit card to pay his \$350.00 cell phone bill.

At a hearing on the notice of violation, the evidence revealed that in November 2005, certified nursing assistant Brown spent the day with a patient at Rolling Hills Convalescent Center. During that time, Brown had access to everything in the patient's room. It was subsequently determined that the patient's wallet was stolen that day, and the patient's credit card was used to pay Brown's \$350.00 cell phone bill. Brown did not return to work after the theft was discovered.

The evidence further revealed that in February 2006, Brown went to Countryside Manor Convalescent Center for a pre-employment physical and general orientation. Brown had previously worked at Countryside Manor and was terminated in September 2005 for violating the absentee policy. Brown had repeatedly called the convalescent center and asked for his job back. Eventually Beth Bright convinced the Countryside administrator to allow Brown to return to work. Bright told Brown to report to the convalescent center on February 8 at 11:30 a.m. for the physical and orientation.

Bright was having lunch in the cafeteria that day when Brown arrived at 11:00. He told Bright that he was going to visit a few people and would return for the physical at 11:30. At 11:20, Bright returned to the office that she shared with co-worker Barbara Munson, and discovered Brown sitting in the office with the door closed. Bright asked Brown, who appeared nervous, what he was doing. He responded that he was just waiting. Bright asked Brown to follow her to another room to prepare for his physical. When Bright asked Brown to take off his jacket so that she could take his blood pressure, he appeared apprehensive and refused her request.

Bright then began reviewing the orientation paperwork with Brown, who was scheduled to work at 6:00 the following morning. After they had gotten through eight or nine of the fifty forms they had to go through, Brown suddenly told Bright that he had to leave to pick up his girlfriend. Despite his frequent requests to get his old job back, Brown did not report to work the following morning, and never called the convalescent center again.

Later that day, Bright's co-worker, Munson, noticed that her payroll check was missing from her purse. She kept her purse in an unlocked desk drawer in the office she shared with Bright. The following morning, Bright realized that there was \$650.00 in cash missing from the purse that she kept in an unlocked file cabinet in her office. The only time the women were not in their office was lunchtime.

Also at the hearing, Brown denied taking Bright's cash and the patient's wallet and credit card. Brown acknowledged that the patient's credit card was used to pay his cell phone bill, but stated that he had no idea how that happened. Brown asked the trial court to continue him on probation. Instead, the court ordered Brown to serve his previously suspended four-year sentence. Brown appeals.

Analysis

I. Sufficiency of the Evidence

Brown argues that the trial court erred in revoking his probation. Specifically, he contends that the State did not present sufficient evidence to support the revocation. A probation revocation hearing is in the nature of a civil proceeding. Whatley v. State, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006). Therefore, an alleged violation of probation need only be proven by a preponderance of the evidence. Id. When we review the determination that a probation violation has occurred, we neither reweigh the evidence nor reassess witness credibility. Id. Instead we look at the evidence most favorable to the trial court's judgment and determine whether there is substantial evidence of probative value to support the revocation. Id. If so, we will affirm. Id. Where, as here, the alleged probation violation is the commission of a new crime, the State does not need

to show that the probationer was convicted of the crime. Id. Rather, the trial court needs only to find that there was probable cause to believe that the defendant violated a criminal law. Id.

Here, our review of the evidence reveals that in November 2005, Brown spent the day with a patient at Rolling Hills Convalescent Center and had access to everything in the patient's room. It was subsequently determined that the patient's wallet was stolen that day and the patient's credit card was used to pay Brown's cell phone bill. Brown did not return to work after the theft was discovered.

Further, in February 2006, Brown went to Countryside Manor Convalescent Center for a physical and orientation. Brown arrived early and told Bright he was going to visit a few people before returning for his 11:30 physical. However, at 11:20, Bright found Brown sitting in the office she shared with Munson. When Bright asked Brown to remove his jacket so she could take his blood pressure, he appeared apprehensive and refused her request. Shortly thereafter, Brown suddenly told Bright that he had to leave.

Despite his frequent requests to get his job back, Brown did not return to the convalescent center to begin work the following morning. It was later determined that Bright's cash and Munson's payroll check had been taken from the purses that the women kept in their office. The only time the women were away from their office that day was during lunchtime, when Bright found Brown alone in the office.

Based upon this evidence, there was probable cause to believe that Brown committed theft and fraud. The evidence was therefore sufficient to support the revocation of Brown's probation.

II. Imposition of Sentence

Brown also argues that the trial court abused its discretion by ordering him to serve his entire four-year suspended sentence. We review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion. Abernathy v State, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006).

Probation is a matter of grace and a conditional liberty that is a favor and not a right. Million v. State, 646 N.E.2d 998, 1002 (Ind. Ct. App. 1995). So long as the proper procedures have been followed in conducting a probation revocation hearing pursuant to Indiana Code Section 35-38-2-3, the trial court may order execution of a suspended sentence upon a finding of any violation by a preponderance of the evidence. Goonen v. State, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999). Specifically, Indiana Code Section 35-38-2-3(g) provides:

If the [trial] 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:

- (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; or
- (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing.

Here, Brown violated a term of his probation by stealing a patient's credit card and using it to pay his cell phone bill, by stealing \$650.00 from Bright's purse, and by stealing Munson's payroll check. It was within the trial court's discretion to determine which sanction to impose under IC Section 35-38-2-3(g). See Abernathy, 852 N.E.2d at

1022. Further, Brown previously was found to have violated the terms of his probation on two occasions and was shown leniency by the trial court, yet this did not reform his behavior. Rather, Brown then committed the same offenses that led to him being placed on probation in the first place. The trial court did not abuse its discretion by ordering Brown to serve his entire suspended sentence.

Conclusion

There is sufficient evidence to support the revocation of Brown's probation, and the trial court did not abuse its discretion by ordering Brown to serve his entire four-year suspended sentence. We affirm.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.