



In this consolidated appeal, Brian Biddle (“Biddle”) appeals his conviction for Class A misdemeanor resisting law enforcement and the revocation of his probation.

Biddle raises two issues, which we restate as:

- I. Whether the State presented sufficient evidence to sustain Biddle’s conviction for Class A misdemeanor resisting law enforcement; and
- II. Whether the trial court’s imposition of Biddle’s previously suspended sentence was an abuse of discretion.

We affirm.

### **Facts and Procedural History**

On September 5, 2008, Biddle pleaded guilty to Class D felony possession of a controlled substance. On October 3, 2008, Biddle was sentenced to three years with two years suspended to probation. As conditions of his probation, Biddle was ordered not to commit a criminal offense or consume alcohol or illegal substances.

At approximately 1:00 a.m. on November 20, 2009, Andrew Wirtz and Rochelle Shumsky were using their SUV to tow a disabled car out of a driveway when Biddle rounded a corner at a high rate of speed and crashed his pickup truck into the car’s driver’s side door, injuring Mr. Wirtz. After stopping briefly to ask if everyone was alright, Biddle left the scene of the accident. However, Biddle’s truck was so severely damaged that it left gouge marks on the road as he drove away.

Dearborn County Sheriff’s Deputy Wallace Lewis (“Deputy Lewis”) followed the gouge marks Biddle’s truck left on the roadway, which led him to discover Biddle in his front yard attempting to cover the truck with a tarp. Because Biddle appeared to be

intoxicated, Deputy Lewis administered field sobriety tests, which Biddle failed. Deputy Lewis subsequently sought and obtained a warrant to collect blood and urine samples from Biddle, and Biddle was transported to Dearborn Community Hospital.

While Biddle was being transported to the hospital, he told Dearborn County Sheriff's Deputy Steven Jackson ("Deputy Jackson") that he had a phobia of needles and that the officers "weren't going to get his blood." Tr. p. 270. Once at the hospital, Biddle refused to submit to a blood draw, but agreed to give a urine sample. When Biddle was taken to the restroom to give the urine sample, he said he was thirsty and claimed that he could not urinate, so the officers gave him water. Biddle then spit the water into the specimen cup and said "there's your drug test." Tr. p. 449.

Deputies Lewis and Jackson then decided to obtain a blood sample, but Biddle continued to say that the officers "were not going to get his blood[.]" Tr. p. 273. When the phlebotomist attempted to take the blood sample, Biddle pulled his arm away. Deputy Lewis then grabbed Biddle's wrist and attempted to hold his arm steady, but Biddle again jerked his arm away before the phlebotomist could insert the needle. Deputy Jackson then held Biddle's upper arm steady while Deputy Lewis held Biddle's wrist. The officers "both had to squeeze down, clamp down harder and just hold him" in order for the phlebotomist to finally obtain the sample. Tr. pp. 419-20.

On November 20, 2009, the State charged Biddle with failure to return to the scene of an accident resulting in injury, operating a vehicle while intoxicated, and

resisting law enforcement, all Class A misdemeanors.<sup>1</sup> The State also filed an information alleging that Biddle was an habitual substance offender and a request for a probation revocation hearing alleging that Biddle had violated his probation by committing the newly-charged offenses.

A probation revocation fact-finding hearing was held on December 29, 2009, and the court took the matter under advisement. On January 11, 2010, the trial court issued a written order concluding that Biddle had violated his probation by committing a criminal offense while on probation. Biddle's two-day jury trial on the new charges commenced on April 20, 2010, and Biddle was found guilty as charged. The jury concluded that Biddle was not an habitual substance offender.

On April 28, 2010, Biddle was sentenced on both the probation violation and the new convictions. The trial court sentenced Biddle to serve concurrent, executed one-year terms for failure to return to the scene of an accident resulting in injury and operating a vehicle while intoxicated. For resisting law enforcement, Biddle was sentenced to a consecutive term of 180 days, all suspended. On the probation violation, Biddle was ordered to serve 610 days, the remainder of his previously suspended sentence, consecutive to his executed sentence on the new charges. Thus, Biddle received a total sentence of 975 days executed and 180 days suspended. In this consolidated appeal, Biddle appeals both his conviction for resisting law enforcement and the revocation of his probation.

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<sup>1</sup> The State also charged Biddle with Class A misdemeanor criminal mischief, but later dismissed the charge.

## I. Sufficiency of Evidence

Biddle first argues that the State presented insufficient evidence to support his conviction for Class A misdemeanor resisting law enforcement. In reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Atteberry v. State, 911 N.E.2d 601, 609 (Ind. Ct. App. 2009). Instead, we consider only the evidence supporting the conviction and the reasonable inferences to be drawn therefrom. Id. If there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt, then the verdict will not be disturbed. Baumgartner v. State, 891 N.E.2d 1131, 1137 (Ind. Ct. App. 2008).

To establish that Biddle committed Class A misdemeanor resisting law enforcement, the State was required to prove that Biddle knowingly or intentionally forcibly resisted, obstructed, or interfered with Deputy Lewis and Deputy Jackson while the officers were lawfully engaged in the execution of their duties. See Ind. Code 35-44-3-3 (2004). A person forcibly resists law enforcement by using strong, powerful, violent means to evade a law enforcement officer's rightful exercise of his or her duties. Spangler v. State, 607 N.E.2d 720, 723 (Ind. 1993).

Biddle first argues that his conduct did not rise to the level of forcible resistance. In support of this argument, Biddle cites several cases in which resisting law enforcement convictions were reversed because there was no showing that the defendant's resistance was forcible. However, these cases are easily distinguishable from the case before us.

Biddle's cases involve flight from officers or mere passive resistance or refusal to comply with an officer's commands. See Graham v. State, 903 N.E.2d 963, 965-66 (Ind. 2009) (defendant refused to present his arms to be handcuffed, but did not stiffen his arms or pull away from the officers who handcuffed him); Atkinson v. State, 810 N.E.2d 1190, 1194 (Ind. Ct. App. 2004) (defendant ran into the woods and hid in the trunk of a vehicle); O'Connor v. State, 590 N.E.2d 145, 148 (Ind. Ct. App. 1992) (defendant fled from officers); White v. State, 545 N.E.2d 1124, 1125-26 (Ind. Ct. App. 1989) (defendant stood in a driveway to prevent a tow truck from passing).<sup>2</sup>

In this case, however, Biddle did not flee from the officers, and he did more than just passively resist or refuse to comply with the officers' commands. Rather, he jerked his arm out of Deputy Lewis's grasp, and he continued to struggle as both officers held his arm down. Biddle used such force in his resistance that the officers "both had to squeeze down, clamp down harder and just hold him" in order for the phlebotomist to obtain the blood sample. Tr. pp. 419-20. Under these facts and circumstances, it was reasonable for the jury to conclude that Biddle forcibly resisted Deputies Lewis and Jackson. See J.S. v. State, 843 N.E.2d 1013, 1017 (Ind. Ct. App. 2006) (affirming a juvenile adjudication for resisting law enforcement where the juvenile "flailed her arms, pulled, jerked, and yanked away" from a law enforcement officer), trans. denied; Johnson

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<sup>2</sup> Biddle also cites Sapen v. State, in which this court reversed a resisting law enforcement conviction where the defendant "pushed back" and "pulled away" when an officer attempted to handcuff him. 869 N.E.2d 1273, 1280 (Ind. Ct. App. 2007), trans. denied. However, in that case, Sapen's acts of resistance took place during a police officer's unlawful entry into Sapen's home. Id. at 1279-80. As we noted in Sapen, although the common law rule allowing a person to use reasonable force to resist an unlawful arrest has been largely abrogated, this court has recognized that "a greater privilege exists to resist an unlawful entry into private premises than to resist an unlawful arrest in a public place." Id. at 1280. Here, Biddle's acts of resistance took place in a public place and, in any event, he does not argue that his arrest was unlawful. Thus, Biddle's reliance on Sapen is misplaced.

v. State, 833 N.E.2d 516, 518-19 (Ind. Ct. App. 2005) (affirming a resisting law enforcement conviction where the defendant turned and pushed away from arresting officers and “stiffened up” when they attempted to put him into a police car, causing the police to “exert force” in order to put him inside).

Biddle also argues that the evidence was insufficient to support his conviction for resisting law enforcement because his resistance was not directed toward the officers. Rather, Biddle claims that he has a fear of needles and that he was “attempting to keep the phlebotomist from sticking the needle in his arm.” Appellant’s Br. at 8. However, as we explained above, Biddle jerked his arm away from Deputy Lewis and struggled against both officers, requiring the officers to exert force to counteract Biddle’s acts of resistance. While Biddle’s underlying motivation may have been a desire to avoid a needle prick, his acts of resistance were clearly directed toward the officers. Consequently, we conclude that the State presented sufficient evidence to support Biddle’s conviction for Class A misdemeanor resisting law enforcement.

## **II. Probation Revocation**

Biddle also argues that the trial court abused its discretion by ordering him to serve the remainder of his previously suspended sentence. We review a trial court’s sentencing decision in a probation revocation proceeding for an abuse of discretion. Jones v. State, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005). An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). Moreover, “[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.” Id. Were trial judges not afforded this discretion, they might be less inclined to order probation for future defendants. Id.

Pursuant to Indiana Code section 35-38-2-3(g) (2004), after finding that a person has violated a condition of his or her probation, the trial 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.
- (3) Order execution of all or part of the sentence that was suspended at the time of initial sentencing.

Here, Biddle does not dispute that he violated the terms of his probation, but he nonetheless argues that the trial court abused its discretion when it ordered him to serve the remainder of his previously suspended sentence. Specifically, Biddle argues that only six months of his previously suspended sentence should have been revoked because (1) he received the maximum sentences on his new convictions, (2) he financially supports his family, (3) the expense involved in incarcerating him, and (4) his criminal history is limited and consists only of convictions related to substance abuse.

Biddle’s arguments are substantially weakened by his previous responses to lesser punishments. The record reveals that Biddle has not fared well when offered alternatives to incarceration. After his conviction for Class D felony possession of a controlled substance, Biddle was sentenced to three years with two years suspended to probation. The trial court ordered 180 days of the executed time to be served on work release and

the remaining 185 executed days to be served on home detention. Biddle violated the terms of both work release and home detention, resulting in the conversion of both of those sentences to straight jail time. And, very importantly, this is not the first time Biddle has violated his probation. As a result of an earlier violation, Biddle was ordered to serve 120 days of his previously suspended two-year sentence and his probation was extended by one year.

The manner in which Biddle violated his probation in the case before us demonstrates that he poses a serious and continuing risk of harm to the public. As a result of Biddle's decision to drive while intoxicated, Mr. Wirtz sustained a concussion, a displaced rib, and a neck injury. Mr. Wirtz has experienced continuing pain as a result of these injuries, requiring him to undergo physical therapy.

Finally, we note that while Biddle received the maximum sentences for operating a vehicle while intoxicated and failure to return to the scene of an accident causing injury, these sentences were ordered to be served concurrently. Moreover, Biddle received less than the maximum sentence for resisting law enforcement, and the entirety of that sentence was suspended. See Ind. Code § 35-50-3-2 (2004). Under these facts and circumstances, we conclude that the trial court acted well within its discretion when it ordered Biddle to serve the remainder of his previously suspended sentence.

## **Conclusion**

The State presented sufficient evidence to support Biddle's conviction for Class A misdemeanor resisting law enforcement. The trial court did not abuse its discretion by ordering Biddle to serve the remainder of his previously suspended sentence.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.