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IN THE
COURT OF APPEALS OF INDIANA

BRIEN E. FRANKLIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-1010-CR-732
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable R. W. Chamblee, Jr., Judge
Cause No. 71D03-0904-FD-368

June 17, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Brien E. Franklin appeals the revocation of his probation. Because a preponderance of the evidence supports the trial court's determination Franklin committed the new offense of receiving stolen property,[1] we affirm the revocation of his probation.

FACTS AND PROCEDURAL HISTORY

In November 2009, Franklin pled guilty to Class D felony residential entry.[2] The trial court ordered a sentence of thirty months, with twenty-four months suspended and one year of probation.

Around 2:30 am on April 2, 2010, police received a phone call from a man concerned about suspicious activity at a neighboring abandoned house. He reported a person was in the back yard with a moped. Dispatch sent two officers to the scene.

Upon arrival, the officers noticed a man, later identified as Franklin, pushing a moped along a nearby sidewalk. When one of the officers asked Franklin if the moped was his, Franklin dropped the moped and ran. He was ordered to stop, but did not, so the officers chased him on foot. They caught Franklin when he attempted to hide on a nearby porch and arrested him.

After Franklin was arrested, the officers went back to inspect the moped. It had a broken ignition, which allowed it to start without a key and indicated the moped might

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[1] Ind. Code § 35-43-4-2(b) provides: "A person who knowingly or intentionally receives, retains, or disposes of the property of another person that has been the subject of theft commits receiving stolen property, a Class D felony . . . ."
[2] Ind. Code § 35-43-2-1.5.

have been stolen. Police ran information regarding the moped through dispatch, but found no indication its owner had reported it stolen.

Three days later a detective received the report about Franklin's arrest and the moped. He decided to check the hand-written reports of stolen mopeds to see if any were similar to the moped Franklin had. He found a report indicating that a moped of the same make, model, year, and color had been stolen four days prior to Franklin's arrest. The detective took pictures of the recovered moped to the owner, who identified the moped as his and reported the ignition was intact before the moped was stolen between sunset on March 28th and noon on March 29th.

The detective then met with Franklin, who claimed he bought the moped on the street for $40 or $50 from someone named "Fresh" on March 20th or 22nd. (State's Ex. 9.) Franklin did not have paperwork confirming the purchase, but offered to help the detective find the seller. The detective gave his business card to Franklin, but Franklin did not call with additional information about the identity of "Fresh."

The State charged Franklin with receiving stolen property and filed a petition to revoke his probation. At a combined evidentiary hearing, a jury found Franklin was not guilty beyond a reasonable doubt of receiving stolen property, but the trial court found the preponderance of the evidence demonstrated Franklin knowingly received stolen property and it revoked Franklin's probation.

DISCUSSION AND DECISION

Probation is a conditional liberty that trial courts have discretion to provide. *Lightcap v. State*, 863 N.E.2d 907, 911 (Ind. Ct. App. 2007). Trial courts set the conditions of probation and may revoke probation if a probationer violates a condition. *Cooper v. State*, 917 N.E.2d 667, 671 (Ind. 2009). Thus, whether to revoke probation in any particular case resides within the discretion of the trial court, and we review its decision for an abuse of that discretion. *Id*.

A revocation hearing is a civil proceeding, which means the State's burden is to prove the violation by only a preponderance of the evidence. *Id*. If substantial evidence of probative value supports the finding of a violation, then we affirm. *Id*.

Franklin challenges the sufficiency of the evidence supporting the court's decision, noting a jury acquitted him of the same crime that the trial court found to support revocation of probation.

> Indeed even in instances where a defendant has been acquitted of the charges providing the basis for a probation revocation, a defendant may still be subject to having his probation revoked. The law is well settled that an arrest standing alone will not support the revocation of probation. However, proof that the defendant engaged in the alleged criminal conduct is sufficient to support revocation of probation. In addition, if the trial court after a hearing finds that the arrest was reasonable and there is probable cause to believe the defendant violated a criminal law, revocation will be sustained.

Cooper, 917 N.E.2d at 674.

Franklin claims the State did not prove he knew the moped was stolen. "Knowledge that the property is stolen may be established by circumstantial evidence;

however, knowledge of the stolen character of the property may not be inferred solely from the unexplained possession of recently stolen property." *Fortson v. State*, 919 N.E.2d 1136, 1143 (Ind. 2010) (discussing charge of receiving stolen property) (quoting *Barnett v. State*, 834 N.E.2d 169, 172 (Ind. Ct. App. 2005)). Rather, possession must be considered along with other circumstances, such as how much time has passed since the property was stolen, how close the defendant is to the place from which the item was stolen, and whether the defendant attempted to conceal the property, fled from the police, or provided evasive answers. *Id*. at 1143-44.

When a police officer asked Franklin if the moped was his, Franklin dropped the moped and ran from the police. Later, when questioned by a detective, Franklin claimed he purchased the moped before March 22nd from a man on the street. However, the moped was not stolen until March 28th. These facts permit a finding by a preponderance of the evidence that Franklin knew the moped was stolen. *Cf. id*. at 1144 (holding evidence insufficient to prove knowledge of truck's stolen character when defendant did not conceal the truck, flee from police, or provide evasive answers). We therefore affirm the revocation of Franklin's probation.

Affirmed.

BAKER, J., and BRADFORD, J., concur.