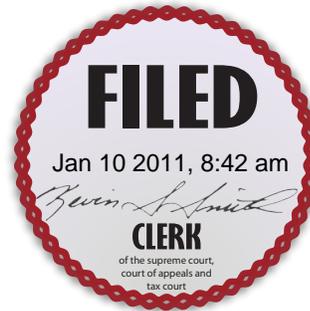


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

KEVIN WILD
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MARSHALL SIMS,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-1005-CR-555
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jose D. Salinas, Judge
Cause No. 49G14-0508-FB-146459

January 10, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Marshall Sims appeals the revocation of his probation, raising the following restated issue: whether the trial court abused its discretion when it ordered Sims to serve 1,095 days of his previously-suspended sentence executed in the Department of Correction.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 2007, Sims pleaded guilty to two counts of Class B felony robbery and one count of Class B felony criminal confinement pursuant to a written plea agreement. The trial court sentenced him to an aggregate sentence of fifteen years with six years suspended to probation. Sims was released to probation after serving his executed time. After approximately six months on probation, a probation violation was filed against Sims, and he admitted that he had failed to report to the drug lab as directed on six occasions. The trial court found that Sims had violated his probation, but continued him on probation with the condition that he maintain strict compliance, and if he violated his probation again, he would serve his “full back-up time.” *Appellant’s App.* at 28.

In March, 2010, the probation department filed a probation violation against Sims, alleging that he had attempted to submit a false sample to the drug lab, had tested positive for cocaine on one occasion, failed to report to the drug lab as directed, and had been arrested and charged with Class D felony possession of cocaine in cause number 49G14-1003-FD-21413 (“Cause 21413”). Sims pleaded guilty in open court to Class D felony possession of cocaine in Cause 21413. The trial court then found Sims had violated his probation due to his admission of guilt in Cause 21413.

Before the trial court determined how to proceed after its finding of a probation violation, Sims presented evidence that he was a Gulf War veteran, was receiving mental health and substance abuse treatment through the VA, and had completed the first step in a three-step substance abuse program. *Tr.* at 8. He also informed the court that he enrolled in Martin University and in the Governor’s program Access to Recovery. *Id.* at 9, 11. Further, Sims had been accepted into Section 8 housing and several rehabilitation programs. *Id.* at 11. He admitted he had relapsed into addiction but requested that the trial court allow him to continue his rehabilitation outside of incarceration. *Id.* at 10-11. The trial court sentenced Sims to 1,095 days of his previously-suspended sentence for his violation of probation with no credit. It also sentenced him to six months in jail for Cause 21413 and ordered that sentence to be served consecutively to that of his probation revocation. Sims now appeals.

DISCUSSION AND DECISION

Sims challenges the reasonableness of the sentence imposed for his probation violation. He argues that in reviewing his sentence, we should apply the standard set forth in Indiana Appellate Rule 7(B). This rule provides that a court “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” However, this is not the correct standard to apply when reviewing a sentence imposed for a probation violation.

Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). The

trial court determines the conditions of probation and may revoke probation if the conditions are violated. *Id.* (citing Ind. Code § 35-38-2-3). “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.” *Id.* If we did not afford such discretion to trial courts and sentences were scrutinized too severely on appeal, trial judges might be less inclined to order probation to future defendants. *Id.* Accordingly, we review a trial court’s sentencing decision in probation revocation proceedings for an abuse of discretion. *Id.* An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Id.* ““When reviewing a trial court’s decision to order a defendant’s previously suspended sentence to be executed after revoking probation, we will not review the propriety of an original sentence.”” *Cox v. State*, 850 N.E.2d 485, 489 (Ind. Ct. App. 2006).

Sims argues that the trial court abused its discretion when it ordered 1,095 days of his previously-suspended sentence to be served in the Department of Correction for his probation violation. He specifically contests his placement in the Department of Correction for the duration of his sentence rather than an alternative placement such as work release or home detention. Sims contends that such an alternative placement would have allowed him to continue the progress he had made while out of custody to get his life back on track and conquer his addiction.

Here, Sims had been given several chances by the trial court to address his addiction problems and has failed. After his previous probation violation, the trial court continued Sims on probation but warned him that if he violated in the future, he would be

ordered to serve all of his suspended time. Less than two months later, Sims again violated his probation by committing the offense of Class D felony possession of cocaine. Sims was well aware of the punishment he faced if he violated his probation again -- serving his entire six-year suspended sentence. Although the trial court stated that it would order the whole sentence to be served, it only ordered 1,095 days to be served in the Department of Correction, which is half of the previously-suspended sentence. While we join the trial court in acknowledging Sims's military service and in commending him for the positive steps he has taken, we do not believe that the trial court abused its discretion when it revoked Sims's probation and ordered him to serve 1,095 days executed in the Department of Correction.

Affirmed.

CRONE, J., and BRADFORD, J., concur.