

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:

KURT A. YOUNG
Nashville, 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**

JOSEPH P. TROGDON,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)
)

No. 07A05-0608-CR-450

APPEAL FROM THE BROWN CIRCUIT COURT
The Honorable Judith A. Stewart, Judge
Cause No. 07C01-9209-CF-357

February 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Joseph P. Trogdon appeals the revocation of his previously suspended eight-year sentence following a conviction for class B felony rape. Specifically, Trogdon argues that the trial court should not have ordered him to serve the entire portion of the previously suspended sentence because he had completed a sex offender treatment program, he was an active participant in Narcotics Anonymous, he had earned an associate's degree while incarcerated, and the probation officer recommended imposing only six years of the eight-year suspended sentence. Finding that the trial court did not abuse its discretion when it sentenced Trogdon, we affirm the judgment of the trial court.

FACTS

On March 12, 1993, Trogdon was convicted of class B felony rape. Trogdon was sentenced to eighteen years imprisonment with eight years suspended, for a total of ten years executed. Trogdon was placed on probation on June 27, 1999. As a condition of probation, Trogdon was ordered to have no contact with the rape victim, L.L.

In the fall of 2004, L.L. and Michael Browning had a yard sale and Trogdon drove past their home and waved at L.L. In the following days, the couple noticed that Trogdon began to frequently drive past their home, wave, and slowly drive down the street. Trogdon would drive past L.L.'s home as many as six times per day and "wave" and "smile" each time he passed. Tr. p. 89-90. L.L. estimated that Trogdon drove past her home a total of twenty-five to thirty-five times. Id. at 102. According to Browning, L.L. became "upset and she wanted to contact police on every occasion" Id. at 68. After seeing Trogdon for several days, L.L. contacted the police and eventually obtained a

thirty-month protective order against Trogdon. L.L. did not see Trogdon for approximately six months, but Trogdon soon resumed driving past L.L.'s home and waving.

On May 2, 2005, the State filed a motion to revoke the suspended sentence. On January 18, 2006, the trial court held a hearing and Trogdon admitted that he had had contact with L.L., which violated a condition of his probation. Id. at 3-5. However, when the trial court held a disposition hearing on April 18, 2006, Trogdon testified that his contact with L.L. had been unintentional. The trial court held an evidentiary hearing on May 4, 2006, and concluded that Trogdon had violated his probation by contacting L.L. On June 16, 2006, the trial court revoked the eight-year suspended sentence and released Trogdon to the Department of Correction. Trogdon now appeals.

DISCUSSION AND DECISION

Trogdon does not dispute that the trial court acted within its statutory authority when it ordered him to serve the suspended eight-year sentence. Ind. Code § 35-38-2-3(g).¹ Instead, Trogdon argues that the trial court erred when it imposed the entire portion of the suspended sentence because he had completed a sex offender treatment

¹ Indiana Code section 35-38-2-3(g) provides:

(g) If the 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.

program, he was an active participant in Narcotics Anonymous, he had earned an associate's degree while incarcerated, and the probation officer recommended imposing only six years of the eight-year suspended sentence.

We initially note that the ability to serve a sentence on probation has been described as a “matter of grace” and a “conditional liberty that is a favor, not a right.” Marsh v. State, 818 N.E.2d 143, 146 (Ind. Ct. App. 2004) (quoting Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999)). We review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion.² Sanders v. State, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. Rosa v. State, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005). If the trial court finds that the person violated a condition of probation, it may order the execution of any part of the sentence that was suspended at the time of initial sentencing. Stephens v. State, 818 N.E.2d 936, 942 (Ind. 2004).

We acknowledge that Trogdon completed a sex offender treatment program, participated in Narcotics Anonymous, and earned an associate's degree while incarcerated. However, the trial court was within its discretion when it imposed the entire portion of the previously suspended sentence because Trogdon violated a condition of his probation by repeatedly making contact with the victim of his crime. L.L. testified

² While Trogdon argues that his sentence was inappropriate under Indiana Appellate Rule 7(B), we have specifically rejected that argument because we review the reasonableness of such sentences for an abuse of discretion. See, e.g., Abernathy v. State, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006); Sanders, 825 N.E.2d at 957; Sharp v. State, 817 N.E.2d 644, 646 (Ind. Ct. App. 2004).

that Trogdon's behavior made her "very upset" and it was "like everything [came] crashing back . . . from the rape." Tr. p. 90. Trogdon's decision to taunt L.L. by repeatedly driving past her home and waving a decade after he had raped her was thoughtless and cruel. His actions demonstrate his attempt to assert power over L.L. by alerting her that he knew where she lived and would contact her even if such contact violated his probation and the protective order she had obtained.

In Trogdon's attempt to persuade us to reduce his sentence, he asserts that he was unaware where L.L. lived and that he drove past her home because she lived in close proximity to one of his friends. While Trogdon does not explicitly make a sufficiency argument, we pause to note that we only consider the evidence most favorable to the trial court's judgment and do not reweigh the evidence or judge the credibility of the witnesses. Sanders, 825 N.E.2d at 954-55. And, even if Trogdon was unaware where L.L. lived prior to her obtaining the thirty-six month protection order—an assertion that we highly doubt since he would wave and smile at L.L. when he drove past her home—such error does not explain Trogdon's decision to continue to drive past L.L.'s home and wave at her six months after she obtained the protective order. Therefore, we do not find Trogdon's intent argument to be persuasive.

While Trogdon argues that the trial court's imposition of the entire previously suspended sentence was excessive, it is ultimately within the trial court's discretion as to what sanction to impose under Indiana Code section 35-38-2-3(g). Abernathy v. State, 852 N.E.2d 1016, 1022 (Ind. Ct. App. 2006). As we held in Abernathy:

If the trial court were to exercise other sanction options more liberally, the “grace of probation” would be rendered meaningless. Probation violators would be less apt to modify their behavior and abide by the terms of probation in the absence of a need to avoid the imposition of a suspended sentence.

Id. Therefore, we conclude that the trial court did not abuse its discretion when it ordered Trogdon to serve the entire portion of his eight-year suspended sentence for violating a condition of his probation.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.