

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:

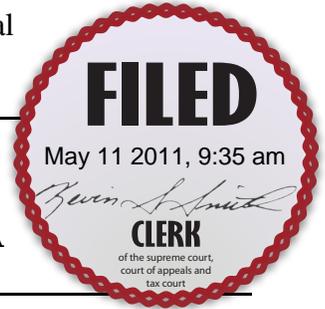
MARK EVERETT WATSON
Terre Haute, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



RIKKI L. VESTAL,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

)
)
)
)
)
)
)
)
)
)

No. 84A01-1010-CR-526

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D03-0901-FD-3147

May 11, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

Rikki Vestal was serving a three-year suspended sentence on supervised probation when the trial court revoked her probation and ordered her to serve the entirety of her suspended sentence in the Indiana Department of Correction (“DOC”). Vestal appeals the sanction, contending the trial court abused its discretion in ordering her to serve her entire suspended sentence. Concluding the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

Vestal pleaded guilty to possession of a controlled substance, a Class D felony, and operating a vehicle with a schedule I or II controlled substance or its metabolite in the body, a Class C misdemeanor. On June 14, 2010, she was sentenced pursuant to the terms of the plea agreement to an aggregate sentence of three years, all suspended but for time served, and placed on formal probation. In addition to standard terms and conditions of probation, Vestal was ordered to continue in therapy and intensive outpatient treatment, attend and successfully complete an alcohol and drug program, and submit to random breath tests and drug screens. On July 7, 2010, a notice of probation violation was filed alleging Vestal had failed drug screens on two occasions and had failed to submit to screens on four occasions.

At a probation violation hearing on September 30, 2010, Vestal admitted to the violation of her probation. The trial court heard evidence from Vestal’s probation officer, who testified that in addition to the failed or missed drug screens, Vestal did not continue in intensive outpatient treatment as ordered and had committed the crimes of conversion and false informing since being sentenced in this case. The probation officer

recommended that Vestal be sentenced to the DOC for the balance of her sentence because she “doesn’t appear to want help She doesn’t do well on the streets [and] she just gets in more trouble when she’s out.” Transcript at 19. Vestal also testified, stating she first tried marijuana when she was thirteen years old and has used drugs daily throughout her twenties, and acknowledging she needs help. She further testified she had difficulty getting to treatment meetings because she had a suspended license and then the program she was attending closed. She testified that soon after being placed on probation, she moved in with her sister and her infant nephew, and that her nephew died soon after, which was very difficult for her. She also admitted her children were removed from her two years prior to this incident and she was ordered to participate in drug services as part of that case but “wasn’t doing everything I was supposed to.” Id. at 38. Finally, she testified that she failed to report for the four drug screens because she knew she would test positive for drug use. The trial court ordered Vestal to serve the balance of her suspended sentence at the DOC because “she hasn’t wanted to take the initiative herself to help herself.” Id. at 42. Vestal now appeals.

Discussion and Decision

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. Once the trial court has exercised its grace by imposing probation rather than incarceration, the trial court has considerable leeway in how to proceed when probation is violated. Id. The decision to revoke probation is within the sound discretion of the trial court, and the trial court’s decision is reviewed on appeal

only for abuse of that discretion. Woods v. State, 892 N.E.2d 637, 639 (Ind. 2008). Indiana Code section 35-38-2-3(g) provides that upon finding a violation of probation, a trial court may, among other things, “[o]rder execution of all or part of the sentence that was suspended at the time of initial sentencing.”

Vestal contends the trial court abused its discretion in ordering her to serve the entirety of her suspended sentence in the DOC because, since a trial court is required to consider a probationer’s mental state, the trial court should also be required to consider her history of addiction, the treatment offered to address her addiction, and how her addiction affected her ability to comply with the terms of her probation. See Patterson v. State, 659 N.E.2d 220, 222-23 (Ind. Ct. App. 1995) (holding “at a minimum, a probationer’s mental state must be considered in the dispositional determination of a probation revocation proceeding”). The probationer in Patterson alleged he was mentally ill and therefore could not form the requisite intent to commit the crime that was the basis for alleging he violated his probation. The facts here are easily distinguishable from Patterson, which was decided in the context of an alleged psychiatric condition that would have negated the culpability for the underlying violation, and we do not necessarily agree with Vestal’s position that consideration of a probationer’s “mental state” should be extended to include issues related to an addiction. Indiana Code section 35-38-2-3 does not require a trial court to balance aggravating and mitigating circumstances when considering sentencing upon finding a violation of probation.

Nonetheless, the trial court heard and considered evidence of Vestal’s history of addiction and her failure to conquer said addiction even in the face of losing her children. The trial court further heard evidence from Vestal that within a month of going on

probation, her sister's infant son died, which was difficult for her, especially as she had been living with her sister and nephew at the time. Her counsel argued to the trial court that she should be given another chance to get into a drug and alcohol program and that although she agreed to a three-year sentence as part of her plea agreement, it was "a bit harsh" for a first offense. Tr. at 41. The trial court acknowledged counsel's points, but stated "[s]he just doesn't get it at this point. And again, I can't force her to do anything [but] I can sentence her to the D.O.C. . . . I just don't see any other option." Id. at 42-43. Although sentencing her to serve the full three years, the trial court did state that if Vestal successfully completed a certified drug program while at the DOC, even if relatively soon, it would consider modification of her sentence.

By originally ordering Vestal to serve a suspended sentence rather than even a partially-executed sentence in the DOC and by ordering her to attend and complete a county drug and alcohol program, the trial court offered Vestal the opportunity to address her addiction issues on her own. Instead of taking advantage of the opportunity given to her, Vestal immediately and repeatedly abused it. Under these circumstances, we do not consider the imposition of the entire executed sentence to be an abuse of discretion.

Conclusion

Based on the foregoing, we conclude the trial court did not abuse its discretion by ordering Vestal to serve the remainder of her suspended sentence after revoking her probation.

Affirmed.

NAJAM, J., and CRONE, J., concur.