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IN THE
COURT OF APPEALS OF INDIANA

ANDREW G. HARTOIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A04-0812-CR-729
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS CIRCUIT COURT
The Honorable Leo T. Burns, Judge
Cause No. 09C01-0701-FC-1

June 5, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Andrew Hartoin appeals the trial court's revocation of his probation. Hartoin raises one issue, which we revise and restate as whether the trial court abused its discretion by ordering him to serve the remainder of his six-year sentence due to his probation violation in the Indiana Department of Correction and by ordering him to participate in the Clean Living is Freedom Forever ("CLIFF") program if he is eligible. We affirm.

In November 2007, Hartoin pled guilty to operating a vehicle as an habitual traffic violator as a class C felony. The trial court sentenced Hartoin to six years with three years to be served on in-home detention and three years suspended to supervised probation.

In August 2008, the Director of the Cass/Pulaski Community Corrections, David Wegner, filed a notice of Violation of Probation/Home Detention. The notice alleged that Hartoin submitted a urine screen which tested positive for cannabinoids on May 14, 2008. The notice also alleged that Hartoin submitted a urine screen that tested positive for alcohol on August 7, 2008.

In October 2008, Hartoin admitted to smoking marijuana. Specifically, Hartoin testified that he was cleaning out a closet, "found a half of a marijuana, a joint," and smoked it. Transcript at 76. Hartoin testified that he tested positive for alcohol because he used mouthwash. The trial court found that Hartoin violated the conditions of his probation by smoking marijuana. At the hearing, the following exchange occurred:

THE COURT: Well, I'm going to talk a little bit more about some options that I hope are available for you. Mr. Wegner,[1] the, [sic] because of the underlying offense here it occurs to me that Mr. Hartoin may be a good candidate for forensic diversion. Does that in any context make sense to you?

MR. WEGNER: Possibly. I'd have to take him up there for an evaluation to see if they would be, they would accept him there. He couldn't be sentenced though, to DOC.

THE COURT: All right. Well, . . . that's a program that I'm, that Mr. Wegner knows that I'm trying to get a feel for and determine when it applies and when it doesn't. I'm sorry I brought it up. Based on my sentence I'm not going to –

MR. WEGNER: The DOC does have a program called the CLIFF Program, and what we are trying to do, and we're nowhere close to it yet, but have, if we do have a facility in place at some point we'd be setting up an understanding with the Department of Corrections where if someone was sentenced to DOC and if they successfully complete that program that a modification might be available to bring him back through our facility as an aftercare and then to one of the Community Corrections programs, but that's the only thing that the Department of Correction would have available.

THE COURT: That in no way mitigates the appropriateness that I feel, or what I believe is appropriate about my sentence today, Mr. Hartoin. But I am going to go one step further and believe the undercurrent is an inability to avoid abusing substances, illegal substances. You have a substance abuse problem, and if, as demonstrated by your failure to just flip that marijuana cigarette down the toilet or out the window, or [where]ever else it could have gone except into your body, especially given the fact of the stakes that were accompanying that lack of judgment. I will make it part of the Court's order . . . that, I will make a notation that if eligible that Mr. Hartoin participate in the Clean Living is Freedom Forever Program through the Department of Correction.

[1] The Violation of Probation/Home Detention pleading reveals that David Wegner is the Director of the Cass/Pulaski Community Corrections.

Id. at 104-106. The trial court sentenced Hartoin to serve the remainder of his six-year sentence in the Indiana Department of Correction with credit for time served. The trial court also ordered that Hartoin participate in the CLIFF program if he is eligible.

The issue is whether the trial court abused its discretion by ordering him to serve the remainder of his six-year sentence due to his probation violation and by ordering him to participate in the CLIFF program if he is eligible. Hartoin argues that the trial court abused its discretion and requests that this court reverse the trial court's revocation order and impose "a lesser sanction of an additional six (6) months of in-home detention, and any other just and proper relief." Appellant's Brief at 10.

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 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 this discretion were not afforded 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, a trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard." Id. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. Id.

Hartoin appears to argue that the trial court should have considered certain mitigators. Specifically, Hartoin argues that the probation violation was an isolated incident that occurred in his residence, that he voluntarily reported the marijuana test results to his home detention officer, and that he is the sole financial provider and caretaker of his former wife. Ind. Code § 35-38-2-3(h) provides:

> (h) If the court finds that the person has violated a condition of home detention at any time before termination of the period, and the petition to revoke probation is filed within the probationary period, the court shall:
>
> (1) order one (1) or more sanctions as set forth in subsection (g); and
> (2) provide credit for time served as set forth under IC 35-38-2.5-5.

Ind. Code § 35-38-2-3(g) governs the revocation of probation and 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 impose one (1) or more of the following sanctions:
>
> (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.

Ind. Code § 35-38-2-3 does not require a trial court to balance aggravating and mitigating circumstances when considering sentencing upon a finding of probation violation. Mitchell v. State, 619 N.E.2d 961, 963 (Ind. Ct. App. 1993), overruled in part by Patterson v. State, 659 N.E.2d 220, 223 (Ind. Ct. App. 1995) (holding that a trial court

should consider a probationer's mental health in a probation revocation proceeding). "[S]o long as the proper procedures have been followed in conducting a probation revocation hearing pursuant to Indiana Code Section 35-38-2-3, the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence." Goonen v. State, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999).

Hartoin quotes Patterson for the proposition that "a probationer's mental state must be considered in the dispositional determination of a probation revocation proceeding." 659 N.E.2d at 222-223. In Patterson, at the probation violation fact-finding hearing, Patterson "testified that at the time he committed the theft, he did not possess the ability to differentiate between those actions which were right and wrong." 659 N.E.2d at 221. Patterson argued on appeal that he had presented "'uncontroverted' evidence proving that he was mentally ill at the time he committed the underlying theft upon which the revocation was based." Id. at 222. The court held that "[t]he probationer's mental state at the time and under the circumstances of the alleged violation is a factor to be considered," and that "at a minimum, a probationer's mental state must be considered in the dispositional determination of a probation revocation proceeding." Id. at 222-223.

Hartoin argues that his "mental state had been in a state of extreme disarray" because he was depressed due to the untimely death of his friend and the health problems of his former wife. Appellant's Brief at 9. However, the record reveals that Hartoin testified that he was "just kind of in a dumb mood" when he was cleaning out a closet,

"found a half of a marijuana, a joint," and smoked it. Transcript at 76. The following exchange occurred during the direct examination of Hartoin:

> Q So why in the world did you smoke that marijuana cigarette?
>
> A I have no – I was kind of down and out is my only excuse, which is none really, and it just, I had a down moment and I fell and I don't know what I was – it was – all it did was ruin my life and I hope, you know, I just beg that the Court would take some in consideration with that. I know you have already given me great consideration and everything, and I, you know, I just, I have no excuse why I let you down, and like you said, all the rest of – I just – but I will say that I will not let that happen again with all my power that I have in me.

Id. at 93-94. Based upon the record, we cannot say that Hartoin's state of mind constitutes a significant mitigator.

Given Hartoin's criminal history[2] and probation violation, the trial court acted well within its discretion by ordering him to serve the remainder of his sentence and by ordering him to participate in the CLIFF program if he is eligible.[3] See Crump v. State, 740 N.E.2d 564, 573 (Ind. Ct. App. 2000) (holding that the trial court did not abuse its discretion in ordering the defendant to serve his suspended sentence when he violated his probation by consuming alcohol), trans. denied.

For the foregoing reasons, we affirm the trial court's sentencing order in Hartoin's probation revocation.

Affirmed.

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[2] Hartoin pled guilty to operating a vehicle as an habitual traffic violator as a class C felony, and the record reveals that Hartoin has multiple convictions for operating a vehicle while intoxicated.

[3] We agree with the trial court's expressed concern that Hartoin receive substance abuse treatment, and we leave it for the court's consideration to determine whether Hartoin has been accepted into the CLIFF program and, if not, what alternative provisions for treatment might be made.

CRONE, J. and BRADFORD, J. concur