



## STATEMENT OF THE CASE

Appellant-Defendant, Joseph McClimans (McClimans), appeals his sentence for burglary, a Class C felony, Ind. Code § 35-43-2-1, and the trial court's execution of his entire suspended sentence following a probation violation.

We affirm.

## ISSUES

McClimans raises three issues on appeal, which we consolidate and restate as following two issues:

- (1) Whether the trial court properly sentenced McClimans; and
- (2) Whether the trial court abused its discretion by executing McClimans' entire five year suspended sentence.

## FACTS AND PROCEDURAL HISTORY

On May 20, 2002, McClimans, Christopher Timmons (Timmons), and Christopher Vernon (Vernon) drove by a residence in Tippecanoe County, Indiana, to determine whether it was a likely house to burglarize. McClimans was dropped off at a pub in the neighborhood to act as a lookout. Timmons, Vernon, and a third man then burglarized the home, returned to pick up McClimans, and drove to Illinois where they pawned what they had stolen.

On January 17, 2003, the State filed an Information charging McClimans with burglary, a Class B felony, I.C. § 35-43-2-1. On August 1, 2003, after the State agreed and amended the Information charging McClimans with burglary, a Class C felony, McClimans pled guilty. The trial court sentenced McClimans that same day to an eight

year sentence suspending five years to probation, finding his criminal history and the need of correctional or rehabilitative treatment that could best be provided by commitment to a penal facility as aggravating factors.

On December 22, 2004, the State filed a Petition to Revoke Probation. On February 25, 2005, McClimans admitted to the violation. On March 3, 2005, the trial court ordered McClimans released on his own recognizance to Harvest Chapel. On June 6, 2005, the trial court was advised McClimans left Harvest Chapel. As a result, the trial court issued an arrest warrant. The warrant was served, and on July 1, 2005, the trial court again ordered McClimans release to Harvest Chapel. On July 8, 2005, the trial court held a hearing and McClimans was remanded to the custody of the sheriff, but was to be released to Home With Hope as soon as a bed was available and to complete their program. On October 31, 2005, the trial court received a letter from Home With Hope advising that McClimans had been discharged for non-compliance and drug use. The next day, the State filed a Motion for Arrest Warrant, which was granted and on March 1, 2006, an arrest warrant was issued. On July 13, 2006, a hearing on the petition to revoke probation was held. At the hearing's conclusion the trial court revoked probation and ordered McClimans to serve all five years of his suspended sentence. On November 14, 2006, McClimans filed a Motion for Belated Appeal, which stated in pertinent part:

#### MOTION FOR BELATED APPEAL

1. That on July 13, 2006[, McClimans] was sentenced to five years in the Department of Correction[.]

\* \* \*

3. That there has not been a timely notice of appeal and the failure to file a timely notice of appeal was not due to the fault of [McClimans].
4. That [McClimans] has been diligent in requesting permission to file a notice of appeal under [Indiana Post Conviction Rule 2].

(Appellant's App. p. 71). The trial court granted the motion.

McClimans now appeals. Additional facts will be provided as necessary.

### DISCUSSION AND DECISION

McClimans argues (1) the trial court relied on improper aggravators pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), when imposing his original sentence; (2) his original sentence is inappropriate; and (3) the trial court abused its discretion by imposing his entire suspended sentence. Conversely, the State argues McClimans may not collaterally attack his sentence on appeal from a probation revocation, and the trial court did not abuse its discretion when it imposed his entire suspended sentence.

The State is correct that a defendant may not collaterally attack a sentence on appeal from a probation revocation. *Stephens v. State*, 818 N.E.2d 936, 939 (Ind. 2004) (citing *Schlichter v. State*, 779 N.E.2d 1155, 1157 (Ind. 2002)). However, as the *Stephens*' court held that a "defendant is entitled to dispute on appeal the terms of a sentence ordered to be served in a probation revocation proceeding that differ from those terms originally imposed," we will review the imposition of his entire suspended sentence. *Stephens*, 818 N.E.2d at 939.

McClimans claims the trial court abused its discretion by imposing his entire suspended sentence, rather than just a portion of it, due to the time he spent in jail awaiting adjudication of his probation violations and because his violation stemmed from

failing to follow through with his court ordered treatment programs. We review a trial court's decision to revoke probation and a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion. *Sanders v. State*, 825 N.E.2d 952, 956-57 (Ind. Ct. App. 2005). Probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment. *Jones v. State*, 838 N.E.2d 1146, 1148 (Ind. Ct. App 2005). These restrictions are designed to ensure that the probation serves as a period of genuine rehabilitation and that a probationer living within the community does not harm the public. *Id.* Moreover, as we have noted on numerous occasions, a defendant is not entitled to serve a sentence in a probation program; rather, such placement is a "matter of grace" and a "conditional liberty that is a favor, not a right." *Id.*

Here, McClimans admitted to violating his probation, but nonetheless argues the trial court abused its discretion in ordering he serve his entire suspended sentence. McClimans submits ordering a portion of his suspended sentence would be more appropriate. With respect to the underlying charge, McClimans pled guilty after the State amended the charging Information from a Class B burglary to a Class C burglary. He was then sentenced to eight years with five years suspended on probation. Thereafter, he violated his probation by failing to maintain contact with his probation officer, and failing to appear for scheduled appointments. He was released into a treatment facility that he left prematurely, resulting in his arrest. He was then released to a second treatment facility from which he was subsequently discharged for failing to adhere to the midnight curfew without calling within a 24-hour period, as well as testing positive for

methamphetamine. In our view, McClimans violations indicate he had no regard for probation as a privilege. Therefore, we find the trial court's order that McClimans serve his entire suspended sentence is not an abuse of discretion.

#### CONCLUSION

Based on the foregoing, we conclude McClimans cannot collaterally attack his sentence on appeal from a probation revocation, and the imposition of his entire suspended sentence was not an abuse of discretion.

Affirmed.

NAJAM, J., and BARNES, J., concur in result.