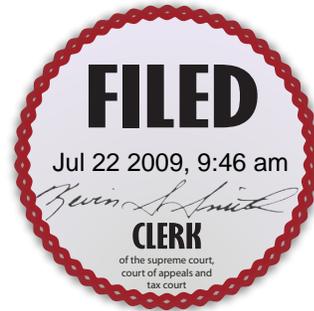


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM DOUGLAS BELL,)

Appellant-Defendant,)

vs.)

No. 79A05-0812-CR-756)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE TIPPECANOE SUPERIOR COURT

The Honorable Thomas H. Busch, Judge

Cause No. 79D02-0801-FD-1 and

79D02-0301-FB-7

July 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

William Bell appeals his seven-year aggregate sentence for Class D felony possession of a schedule I controlled substance, Class D felony theft, and probation a violation. We affirm.

Issues

Bell raises two issues on appeal, which we restate as:

- I. whether the trial court abused its discretion in ordering Bell to serve the entire five years of his suspended sentence for the probation violation; and
- II. whether his two-year concurrent sentence for the Class D felonies is appropriate.

Facts

This case involves two cases that were consolidated for sentencing purposes.¹ On January 16, 2008, Bell was charged with eight Class D felonies under FD-1 while on probation for a prior burglary conviction under FB-7. As a result, on March 4, 2008, the probation office filed a petition to revoke his probation under FB-7. On September 25, 2008, Bell pled guilty to Class D felony possession of a schedule I controlled substance and Class D felony theft. The State dismissed the remaining six charges. Bell also admitted violating his probation under FB-7 by committing the offenses in FD-1. Pursuant to a plea agreement, sentencing was left to the trial court's discretion; however,

¹ The first case involves the offenses in Cause No. 79D02-0801-FD-1 ("FD-1"), i.e. Class D felony possession of a schedule I controlled substance and Class D felony theft. FD-1 triggered the second underlying case, i.e. probation revocation under Cause No. 79D02-0301-FB-7 ("FB-7").

the parties agreed that any executed sentence imposed would be no less than five years and no more than seven years for both cases.

At the November 7, 2008 sentencing hearing, the trial court heard evidence on Bell's mental health and substance abuse. Among the evidence considered was Dr. Jeffery Wendt's examination report. Dr. Wendt opined that Bell suffered from Bipolar I Disorder, Posttraumatic Stress Disorder ("PTSD"), and Polysubstance Dependence. He recommended psychiatric, psychological, and substance abuse treatment as well as intensive inpatient substance treatment in the context of any sentence imposed. After hearing the evidence, the trial court expressed concern that Bell had not been considered for a forensic diversion program ("diversion program").² As a result, the trial court continued the sentencing hearing and ordered the State to consider Bell's eligibility for the diversion program.

At the November 12, 2008 sentencing hearing, it was the State's position that Bell was not eligible for the diversion program. As a result, the trial court determined that Bell was not eligible and accepted his guilty plea. The trial court sentenced Bell to serve all of his previously suspended five-year sentence for his probation violation under FB-7, and two years on each count in FD-1 to run concurrently. The sentences in each case are to run consecutively for a total of seven years executed. The trial court recommended

² A forensic diversion program is a program designed to provide adults who have mental illnesses and/or addictive disorders that have been charged with a non-violent offense an opportunity to receive community treatment for the mental illness and/or addiction instead of, or in addition to, incarceration. See Ind. Code § 11-12-3.7-4.

substance abuse treatment as well as mental health treatment while Bell was incarcerated. Bell now appeals.³

Analysis

I. Probation Revocation

Bell contends the trial court erred when it ordered him to serve the entire five years of his suspended sentence under FB-7. We review “a trial court’s sentencing decision in a probation revocation proceeding for an abuse of discretion.” Sanders v. State, 825 N.E.2d 952, 957 (Ind. Ct. App. 2005), trans. denied. “An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances.” Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). “If the trial court finds the person violated a condition of probation, it may order execution of any part of the sentence that was suspended. . . .” Rosa v. State, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005); Ind. Code § 35-38-2-3(g)(3). “The violation of a single condition of probation is sufficient to permit a trial court to revoke probation.” Id.

Bell asserts that the trial court abused its discretion in revoking all five years of his suspended sentence. He contends that “the record is devoid of any ‘facts and circumstances’ to justify refusing to include [community corrections] within [his] sentence.” Appellant’s Reply Br. p. 6. To buttress his argument, Bell contends that both

³ Bell’s Notice of Appeal lists only Cause No. 79D02-0801-FD-1. The State indicates that Bell did not file a separate Notice of Appeal for Cause No. 79D02-0301-FB-7. Because the trial court consolidated both FD-1 and FB-7 for purposes of the guilty plea and sentencing, and because Bell challenges his seven-year aggregate sentence, we presume that Bell’s appeal is a proper challenge to FB-7 as well, in spite of the fact that FB-7 was not named in his Notice of Appeal.

the State and Dr. Wendt recommended transition services. The record, however, reveals that despite past participation in a community transition program, work release, community corrections, and house arrest, Bell has continued to reoffend. In fact, the current probation revocation proceeding is the second time Bell has had probation revoked. Moreover, the State did not recommend such services in its sentence recommendation in FB-7.

Bell further argues that the trial court abused its discretion because it imposed a sentence harsher than that recommended by the State. However, the record reflects that the five-year sentence imposed was precisely what the State recommended. It was within the trial court's discretion to order execution of the entire suspended sentence. See I.C. § 35-38-2-3(g)(3). Because Bell failed to comply with the terms of his probation, and because the record contains facts and circumstances supporting the trial court's decision, we cannot say the trial court abused its discretion in ordering Bell to serve all five years of his suspended sentence.

II. Appropriateness

Bell next challenges the appropriateness of his sentence under Indiana Appellate Rule 7(B). Bell's five-year sentence under FB-7 is not subject to review under Rule 7(B). See Prewitt, 878 N.E.2d at 187-88. Therefore, the only sentence subject to revision under Rule 7(B) is his two-year concurrent sentence under FD-1.

“Under Indiana Appellate Rule 7(B), this court may revise a sentence that we conclude is inappropriate in light of the nature of the offense and the character of the

offender. . . .” Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). When reviewing a sentence under Rule 7(B), we need not be “extremely” deferential to a trial court’s sentencing decision. Id. Rule 7(B), however, requires that we give “due consideration” to the trial court’s decision because of the unique perspective the trial court brings to its sentencing decisions. Id. “Additionally, [the] defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate.” Id.

Bell argues that the nature of his offenses do not warrant the two-year executed sentence. Bell refers to the impact of his offenses, contending that he “was ordered to pay just \$73.23 in restitution, . . . which strongly undercuts the State’s speculation” regarding the magnitude of the offenses. Appellant’s Reply Br. p. 7. Bell, however, acknowledges that our General Assembly, after considering the crimes’ deplorability, classified both theft and possession of a schedule I controlled substance as Class D felonies. See I.C. § 35-43-4-2; I.C. § 35-48-4-7. A Class D felony carries with it a sentence range of one-half year to three years with an advisory sentence of one and one-half years. Bell pled guilty to two counts of Class D felonies. Here, the trial court sentenced Bell to two years on each count, well below the maximum, and ordered that the sentences run concurrently, resulting in a two-year executed sentence for both offenses. Considering that Bell committed the two felonies after being released from prison and while on probation, we cannot say the two-year executed sentence is inappropriate.

Bell also argues that his sentence is inappropriate in light of his character. He contends the trial court’s decision not to include transition services or community

corrections in lieu of executed time was inappropriate given his mental illnesses. Dr. Wendt diagnosed Bell with Bipolar Disorder I, PTSD, and Polysubstance Abuse. In Weeks v. State, our supreme court laid out four factors to consider when weighing the mitigating force of a defendant's mental illness. 697 N.E.2d 28, 30 (Ind. 1998). Those factors include the extent of inability to control behavior, the overall limitation on function, the duration of the illness, and the nexus between the illness and the crime. Id. Although the record reflects that Bell is limited because of his illness and that his illness stems from childhood trauma, nothing in the record indicates that Bell was unable to control his behavior at the time he committed the offenses. Moreover, no evidence indicates a nexus between Bell's illnesses and his offenses. In his report, Dr. Wendt commented that "the alleged offenses do not appear to be the product of symptoms of PTSD or Bipolar Disorder. . . ." Appellant's App. p. 151. He further reported that Bell "did not report severe symptoms during the time in question." Id.

Bell further argues that his sentence is inappropriate because the trial court's decision to impose an all-executed sentence stemmed from an erroneous concern over whether any less-restrictive options were available. The trial court's sentencing decision, however, was based on Bell's risk of reoffending. The record reflects that despite past participation in a community transition program, work release, community corrections, and house arrest, Bell has continued to reoffend. Before accepting Bell's guilty plea, the trial court stated, "[Y]our repeated violations of . . . both the laws and institutional rules suggest that there is just too strong a risk for your committing a new crime to permit your

participation in the program.” Tr. 3. Although mental illness is an appropriate mitigating factor, given the present evidence, we cannot say that Bell’s two-year executed sentence is inappropriate.⁴

Conclusion

The trial court did not abuse its discretion in ordering Bell to serve all five years of his suspended sentence under FB-7, nor has Bell established that his two-year sentence under FD-1 is inappropriate. We affirm.

Affirmed.

BAKER, C.J., and MAY, J., concur.

⁴ Although Bell does not elicit an argument regarding his sentences in FB-7 and FD-1 running consecutively, we note that, pursuant to I.C. § 35-50-1-2(d), his sentences in FB-7 and FD-1 are required to run consecutively.