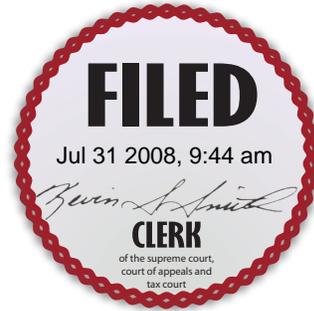


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MARCUS BRABSON,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 49A02-0801-CR-25

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Steven R.Eichholtz, Judge  
Cause No.49G23-0510-FA-168040

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**July 31, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issue

Marcus Brabson appeals the trial court's imposition of the entirety of the previously suspended nine-year portion of his sentence upon finding him in violation of his probation. Brabson argues that the trial court's decision was an abuse of discretion as his plea agreement had called for a maximum executed sentence of six years. Concluding the trial court acted within its discretion, we affirm.

### Facts and Procedural History

On October 5, 2005, the State charged Brabson with conspiracy to commit dealing in cocaine, a Class A felony; dealing in cocaine, a Class A felony; and possession of cocaine, a Class B felony. On March 14, 2007, Brabson entered into a plea agreement, under which he pled guilty to conspiracy to commit dealing cocaine, a Class B felony. Under this plea agreement, the State agreed to recommend that the executed portion of Brabson's sentence would be capped at six years. On March 22, 2007, the trial court sentenced Brabson to ten years, with one year executed and nine years suspended, with two of those years on probation.

On July 26, 2007, an administrative hearing was held to discuss "Brabson's non-compliance with his conditions of Probation, to include: G.E.D., non-payment of fees, unemployment, positive urine drug screen, and Substance Abuse Treatment." Appellant's Appendix at 35. On September 4, 2007, the State filed a notice of probation violation, alleging that Brabson failed two drug screens, failed to attend his court-ordered G.E.D. classes, failed to comply with substance abuse treatment, failed to comply with his payment agreement, and failed to obtain employment. On October 11, 2007, the trial

court held a violation hearing at which Brabson admitted violating his probation conditions. At this hearing, the State indicated that it “had offered four-and-a-half years or [Brabson] can accept strict compliance with the understanding that if he returns on another violation, he’ll be facing all nine years.” Transcript at 11-12. Brabson agreed that “he will strictly comply with the terms and conditions of his probation and if he fails to comply, there will not be any other deals offered by Probation. He’ll do nine years back-up.” Id. at 12. The court explained what strict compliance with probation entailed, and, after Brabson agreed to strictly comply with probation terms, stated, “The Court finds that if [Brabson] fails to strictly comply and a violation is filed, . . . and a violation is found to have occurred, his probation will be revoked and he will be sentenced to his back-up time of nine years.” Id. at 14.

On November 15, 2007, the State filed a notice of probation violation, alleging that Brabson had tested positive for marijuana. That same day, the trial court held a hearing and found that the State had not proved a violation and continued Brabson on probation. On November 29, 2007, the State filed a notice of probation violation, alleging that Brabson had failed to submit to a drug screen, as ordered by his probation officer on November 15. The trial court found that Brabson had violated his terms of probation and ordered that he execute the balance of his previously suspended sentence. Brabson now appeals.

#### Discussion and Decision

A trial court’s authority to sentence a defendant following a probation violation is governed by statute.

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.

Ind. Code § 35-38-2-3(g).<sup>1</sup> “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.” Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). We review a trial court's sentencing decision following a probation revocation for an abuse of discretion. Sanders v. State, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), trans. denied. We will find an abuse of discretion “where the decision is clearly against the logic and effect of the facts and circumstances.” Prewitt, 878 N.E.2d at 188. We will consider the evidence most favorable to the trial court's decision and will not reweigh the evidence or judge witnesses' credibility. Sanders, 825 N.E.2d at 954-55.

Brabson argues that because his plea agreement capped the executed portion of his sentence at six years, the trial court abused its discretion in ordering him to execute all nine years of his previously suspended sentence. This court has repeatedly held that, where a defendant pleads guilty pursuant to an agreement that caps the executed portion of his sentence, if that defendant violates his probation, the trial court may order the defendant to execute all of a previously suspended sentence, even if the net result is that the defendant executes time in excess of the cap identified in the plea agreement.

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<sup>1</sup> Our legislature has amended subsection (g) of this statute, effective July 1, 2008, to indicate that a trial court “may impose one (1) or more of the following sanctions.” P.L. 156-2007, § 5.

Abernathy v. State, 852 N.E.2d 1016, 1021 (Ind. Ct. App. 2006) (“The mere fact that [the defendant] had a plea agreement which controlled at the time of initial sentencing in no way modified the trial court’s statutory authority under Ind. Code § 35-38-2-3(g)(3) to order execution of a suspended sentence following a probation violation.”); see also Cox v. State, 850 N.E.2d 485, 491 (Ind. Ct. App. 2006); Crump v. State, 740 N.E.2d 564, 573 (Ind. Ct. App. 2000), trans. denied.

Brabson also argues that the trial court abused its discretion in ordering that he execute the entirety of his previously suspended sentence because Brabson did not commit any new crimes, and his violations consisted of missing G.E.D. classes, failing and missing drug tests, and failing to pay court-ordered fees. As we have previously stated, “so 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). Although Brabson has not been convicted of any crimes, his positive drug tests indicate that he has not been leading a completely law-abiding life. Moreover, in addition to the leniency Brabson was given in his initial sentence, Brabson received leniency when he received no prison time as a result of the State’s first petition to revoke. See Johnson v. State, 692 N.E.2d 485, 489 (Ind. Ct. App. 1998) (holding the trial court did not abuse its discretion by ordering execution of a previously suspended sentence where the trial court had declined to revoke the defendant’s probation based on a previous violation). The trial court specifically warned Brabson that any future violations would result in full execution

of the suspended sentence. Brabson was given the choice of executing half of his previously suspended sentence or going on “strict compliance.” Brabson chose strict compliance and then failed to strictly comply. Under these circumstances, we conclude the trial court acted within its discretion in ordering that Brabson serve the entire suspended portion of his sentence. Cf. Crump, 740 N.E.2d at 573 (holding that trial court did not abuse its discretion in ordering defendant to execute his previously suspended sentence after finding that defendant had violated terms of probation by consuming alcohol).

#### Conclusion

We conclude the trial court acted within its discretion in ordering Brabson to execute the entirety of his previously suspended sentence.

Affirmed.

BAKER, C.J., and RILEY, J., concur.