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.

FILED
Sep 24 2009, 9:32 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

WILLIAM BYER, JR.
Byer & Byer
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

AMANDA MAY DULWORTH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A05-0905-CR-267
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON COUNTY COURT, DIVISION I
The Honorable David W. Hopper, Judge
Cause No. 48E01-0507-FD-336

September 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Amanda May Dulworth appeals the trial court's decision to order her to serve a previously stayed eighteen-month sentence after she failed to complete a drug court program. Specifically, Dulworth claims that the trial court abused its discretion in imposing an executed sentence in the Indiana Department of Correction (DOC) because she was eligible to complete her sentence in a work release center. Dulworth also maintains that her rights under the Equal Protection provision of the Fourteenth Amendment to the United States Constitution were violated because there is a work release center in Madison County for men but no such facility exists for women. Concluding that Dulworth was properly sentenced, we affirm the judgment of the trial court.

FACTS

In January 2006, Dulworth pleaded guilty to class D felony theft. Thereafter, the trial court imposed an eighteen-month suspended sentence and placed Dulworth on probation.

In July 2006, a notice of violation of probation was filed, which alleged that Dulworth had committed class C felony forgery. At the revocation hearing that commenced on October 24, 2006, Dulworth admitted the violation, and the trial court revoked the suspended sentence. However, the State and Dulworth entered into a written "Agreement for Entry into Madison County Drug Court" (Agreement), which provided that the trial court would stay execution of that sentence "pending [Dulworth's] admission and successful completion of the Madison County Drug Court Program." Appellant's App. p. 33, 35-40. The terms of the Agreement stated that if Dulworth was removed, failed to graduate, or voluntarily withdrew from the drug court program, she would be returned to her custodial status and remanded to

the trial court.

On March 11, 2009, Dulworth voluntarily withdrew from drug court after submitting five "dirty screens" and missing six treatment meetings. Appellant's App. p. 53-54. Thereafter, Dulworth filed several motions seeking modification of her original sentence, claiming that

> This is the type of offense for which judges traditionally consider work release. Madison County has no Women's Work Release Center. The defendant herein is a woman. The defendant respectfully submits that it is a denial of equal protection to fund a Work Release Center for men, but not a Work Release Center for women.

Id. at 46.

At a hearing that commenced on March 24, 2009, the trial court stated that it was bound by the Agreement to impose the eighteen-month executed sentence. Although the trial court granted Dulworth a final opportunity to be re-admitted to the drug court program, the drug court refused to accept Dulworth. As a result, the trial court denied Dulworth's request for a modification of sentence and ordered her to serve the previously-stayed eighteen-month sentence in the DOC. Dulworth now appeals.

DISCUSSION AND DECISION

I. Abuse of Discretion

In addressing Dulworth's claim that the trial court abused its discretion when it revoked her probation and ordered her to serve the eighteen-month sentence, we initially observe that probation is a conditional liberty, and the "granting of a conditional liberty is a favor and not a right." Gardner v. State, 678 N.E.2d 398, 401 (Ind. Ct. App. 1997). A

probation revocation hearing is in the nature of a civil proceeding and, therefore, a violation need only be proven by a preponderance of the evidence. Washington v. State, 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001). A trial court may revoke a person's probation upon evidence of the violation of any single term of probation. Id. Once a defendant has been sentenced, "the court may revoke or modify probation, upon a proper showing of a violation, at any time before the completion of the probationary period." Gardner, 678 N.E.2d at 401. The sole question at a probation revocation hearing is whether the probationer should be permitted to remain conditionally free or should be required to serve the previously imposed sentence in prison. Morgan v. State, 691 N.E.2d 466, 468 (Ind. Ct. App. 1998).

Indiana Code section 35-38-2-3(g) provides:

> 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.

In construing this statute, this court has determined that so long as the proper procedures have been followed in conducting a probation revocation hearing, the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence. McKnight v. State, 787 N.E.2d 888, 892 (Ind. Ct. App. 2003). We review the trial court's decision regarding what punishment to impose following a probation violation only

for an abuse of discretion. Sanders v. State, 825 N.E.2d 952, 957-58 (Ind. Ct. App. 2005). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances before the trial court. Guillen v. State, 829 N.E.2d 142, 145 (Ind. Ct. App. 2005).

As noted above, although Dulworth was originally placed on probation following the suspension of the eighteen-month sentence, she subsequently committed forgery and admitted the probation violation. Appellant's App. p. 21-25, 33. The State and Dulworth then agreed that she could—in lieu of serving an executed sentence—enroll in, and successfully complete, a program through the Madison County Drug Court Program. Id. at 33, 35-40. The Agreement made it clear that if Dulworth failed to complete the program, was removed, or voluntarily withdrew from the Drug Court program, she would be taken into custody and remanded to the original trial court. Id. at 35-40.

When Dulworth withdrew from the drug court after submitting five "dirty screens" and missing several treatment meetings, she immediately sought a sentence modification. Although the trial court stated that it was bound by the Agreement to impose an executed sentence, it permitted Dulworth a final chance to be re-admitted to the drug treatment program. Tr. p. 14. When the drug court refused to accept Dulworth, the trial court declined to consider any lesser sanction than the eighteen-month executed sentence that had been agreed upon.

In our view, the Agreement that Dulworth entered into with the State was tantamount to a plea agreement. And plea agreements "are in the nature of contracts entered into

between the defendant and the [S]tate." Clay v. State, 882 N.E.2d 773, 775 (Ind. Ct. App. 2008). More particularly:

> A plea agreement is contractual in nature, binding the defendant, the [S]tate and the trial court. The prosecutor and the defendant are the contracting parties, and the trial court's role with respect to their agreement is described by statute: If the court accepts a plea agreement, it shall be bound by its terms.

Id. at 775.

Here, the trial court specifically—and correctly—found that it was bound by the Agreement to impose the eighteen-month sentence and was without authority to modify the agreed-to sanction. Tr. p. 10-12, 14, 16. See Pannarale v. State, 638 N.E.2d 1247, 1248 (Ind. 1994) (holding that when a plea agreement calls for the court to impose a specific sentence, the court may not subsequently alter the sentence pursuant to a defendant's motion unless the agreement contained a specific reservation of such authority for the trial judge); see also Robinett v. State, 798 N.E.2d 537, 540 (Ind. Ct. App. 2003) (stating that because the defendant agreed to a specific term of years in the agreement, the court lacked the authority to modify the sentence). As a result, the trial court did not abuse its discretion when it ordered Dulworth to serve the previously stayed eighteen-month sentence in the DOC.

II. Equal Protection Claim

In a related issue, Dulworth contends that her equal protection rights under the Fourteenth Amendment to the United States Constitution were violated. In essence, Dulworth argues that the executed sentence must be set aside because the evidence established that women—unlike men—are not permitted to serve a sentence in a work release

facility in Madison County.

Notwithstanding Dulworth's claim, we have concluded above that the trial court lacked the authority to impose any sanction other than the eighteen-month executed sentence pursuant to the terms of the Agreement. Even assuming that the trial court had the authority to impose a lesser sentence, trial courts—as a practical matter—know the feasibility of alternative placements in particular counties or communities. Fonner v. State, 876 N.E.2d 340, 343 (Ind. Ct. App. 2007). Consideration of alternatives to incarceration is a "matter of grace" left to the trial court's discretion. Wolf v. State, 793 N.E.2d 328, 330 (Ind. Ct. App. 2003). As a result, Dulworth's equal protection challenge fails.[1]

The judgment of the trial court is affirmed.

FRIEDLANDER, J. and RILEY, J., concur.

---

[1] As an aside, we note that the trial court made no findings about the existence of a work release center or comparable facility in Madison County for women. The only evidence presented on this issue was at the March 24, 2009, hearing when Dulworth answered "no" to defense counsel's question on direct examination as to whether there was a county work release center for women. Tr. p. 22. The trial court could have determined that Dulworth's response was insufficient to establish whether there was a work release center or comparable facility in the county.