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ATTORNEY FOR APPELLANT:

T. MICHAEL CARTER
Scottsburg, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

LINDA ROTH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 36A01-0902-CR-91
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JACKSON CIRCUIT COURT
The Honorable William E. Vance, Judge
Cause No. 36C01-0609-FD-304

September 24, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Linda Roth's ("Roth") probation was revoked and the Jackson Circuit Court ordered Roth to serve her previously suspended eighteen-month sentence in the Department of Correction. Roth appeals and argues that the trial court's order was an abuse of its discretion. We affirm.

Facts and Procedural History

Roth was convicted in Jackson Circuit Court of Class D felony operating a vehicle while intoxicated on June 12, 2007. At that time, all but five days of Roth's eighteen-month sentence was suspended to probation.

On October 7, 2008, the State filed a Petition to Revoke Roth's probation alleging that she had committed the offense of Class D felony operating a vehicle while intoxicated. Appellant's App. p. 7. The State alleged that by committing that offense and possessing and using alcohol, Roth violated conditions two and twelve of her probation.

On January 12, 2009, hearing was held on the State's petition to revoke. At the hearing, a Jackson County Sheriff's Deputy testified that he initiated a traffic stop of Roth's vehicle after he observed that Roth failed to come to a complete stop at a stop sign. Roth's condition observed during the stop led the deputy to believe that she was intoxicated, and therefore, he administered several field sobriety tests that Roth failed. A portable breath test given to Roth was ".181% positive for alcohol." Tr. p. 19. Roth admitted to the deputy that she had four or five beers that evening. Tr. p. 20.

On February 2, 2009, the trial court revoked Roth's probation and ordered her to serve her previously suspended eighteen-month sentence in the Department of Correction. Roth now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Roth argues that the trial court abused its discretion when it ordered her to serve her previously suspended eighteen-month sentence. We review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion. Abernathy v. State, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006). "A defendant may not collaterally attack a sentence on appeal from a probation revocation." Jones v. State, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005). Moreover, serving a sentence in a probation program is not a right, but rather a "matter of grace" and a "conditional liberty that is a favor." Id.

Indiana Code Section 35-38-2-3(g) (2004 & Supp. 2009) provides three alternatives upon the finding of a probation violation by a preponderance of the evidence:

> 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; or
> (3) Order execution of all or part of the sentence that was suspended at the time of initial sentencing.

Here, the trial court ordered execution of the entire eighteen-month suspended sentence, as permitted by Indiana Code section 35-38-2-3(g)(3).

Yet, Roth argues that the trial court abused its discretion because the court made the decision due to its "personal desire to send a message to the community and other

probationers." Appellant's Br. at 4. At the probation revocation hearing, the trial court stated in part:

> We're not to use alcohol and the Defendant did that. It wasn't a use of alcohol at home where nobody was in danger. It was not a use of alcohol without prior alcohol abuse counseling and treatment. The alcohol content was .18 which is more than twice over the amount necessary to test for a blood alcohol content charge which justifies an arrest. . . . [D]rove a vehicle with that alcohol content. Obviously the driving was impaired because the stop was a result of a vehicular violation blowing a stop sign.

Tr. p. 55. The trial court then observed that Roth was drinking at a public place in a small community, that individuals in that place and community likely knew Roth, and likely knew that she was on probation. The court stated, "I think about what kind of message does the court sent [sic] in that circumstance . . . [I]f probation is going to mean something in this county we have to, we have to follow the rules and the rules are very clear. You don't commit another violation of probation." Id.

Roth cites cases holding that a trial court's desire to send a personal, philosophical, or political message is not a proper reason to aggravate a sentence. See e.g. Nybo v. State, 799 N.E.2d 1146, 1152 (Ind. Ct. App. 2003). However, the facts of this case are clearly distinguishable.

Here, Roth's probation was revoked because she committed precisely the same offense she had been convicted of and was on probation for: operating a vehicle while intoxicated. While it may not be appropriate to order Roth to serve her previously suspended sentence just to send a message to the community at-large, the trial court expressed other, valid reasons for ordering Roth to serve her entire eighteen-month sentence in the Department of Correction. Most importantly, pursuant to Indiana Code

section 35-38-2-3(g)(3), it was within the trial court's discretion to order execution of the entire eighteen-month sentence, and we affirm that decision.

Affirmed.

DARDEN, J., and ROBB, J., concur.