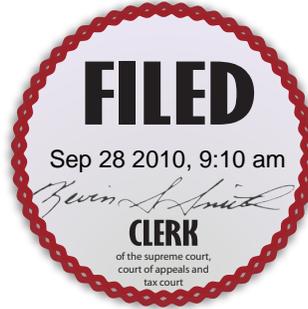


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

**ANDREW J. BORLAND**  
Borland & Gaerte  
Indianapolis, Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**RUTH JOHNSON**  
Indianapolis, Indiana

**JOBY D. JERRELLS**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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TIMOTHY L. KING, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 49A02-1002-CR-191  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Steven R. Eichholtz, Judge  
Cause No. 49G23-0802-FA-48433

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**September 28, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Timothy L. King appeals his sentence upon the revocation of his probation and community corrections placement. King raises one issue, which we restate as whether the trial court abused its discretion by ordering King to serve eight years of his previous sentence in the Department of Correction. We affirm.

The facts most favorable to the revocations follow. On February 28, 2008, the State charged King with possession of cocaine as a class A felony, dealing in cocaine as a class B felony, and neglect of a dependent as a class C felony. In March 2008, the State filed an amended information charging King with possession of cocaine as a class B felony rather than a class A felony. Pursuant to a plea agreement, on May 21, 2008, King pled guilty to possession of cocaine as a class B felony and neglect of a dependent as a class C felony. The trial court accepted King's plea, sentenced him to ten years with eight years suspended for the possession of cocaine conviction and to four years with two years suspended for the conviction for neglect of a dependent, and ordered that King's sentences be served concurrent with each other. The court placed King on probation for two years and ordered King committed to community corrections for two years.

On July 28, 2008, a notice of violation of community corrections rules was filed alleging that King was absent without leave and that he submitted to a urinalysis resulting in a diluted specimen. After a hearing on August 28, 2008, the court found that King violated one of the community corrections rules and returned King to community corrections.

A notice of community corrections violation was filed on July 6, 2009, and a notice of probation violation was filed on July 9, 2009. Each notice alleged that on or

about July 4, 2009, King had been arrested and charged under cause number 49F19-0907-CM-061544 (“Cause No. 544”) with operating a vehicle while intoxicated, operating a vehicle with BAC of .08-.15%, Sch. I, II, driving while license suspended, and operating without license, permit in possession.

An amended notice of community corrections violation was filed on December 16, 2009, and an amended notice of probation violation was filed on December 28, 2009. In addition to the allegations filed in July 2009, both amended notices alleged that King on or about December 13, 2009 was arrested under cause number 49G16-0911-FD-094556 (“Cause No. 556”) and charged with two counts of criminal confinement as class D felonies, strangulation as a class D felony, and battery as a class A misdemeanor, and the amended notice of probation violation also alleged that on or about December 13, 2009 he was arrested and charged under cause number 49G16-0912-FD-100567 (“Cause No. 567”) with battery as a class D felony, three counts of criminal confinement as class D felonies, theft, receiving stolen property as a class D felony, three counts of battery as class A misdemeanors, two counts of interfering with reporting of a crime as class A misdemeanors, and two counts of criminal mischief as class B misdemeanors.

On January 21, 2010, the court held a hearing on the amended notice of probation violation and amended notice of community corrections violation at which King admitted that he violated the terms of his probation and the rules of community corrections. Specifically, King admitted that he had pled guilty and had been convicted of operating a vehicle while intoxicated on or about July 4, 2009, and that there was probable cause for his arrest for the charges filed under Cause No. 556 and Cause No. 567. The court found

a violation of both King's community corrections and probation and ordered that he serve eight years of his sentence, part of which was previously ordered to be served with the community corrections program and part of which was previously suspended, in the Department of Correction.

The sole issue is whether the trial court abused its discretion by ordering King to serve eight years in the Department of Correction. King argues that the trial court "made no mention of [his] acceptance of responsibility in its sentencing statement" and that his "acknowledgement of the violation should have been given some weight." Appellant's Brief at 9. King argues that, while he had "received a somewhat mitigated sentence already," had the court "considered further mitigating factors, such as his taking responsibility and saving the Court's time and resources, then, arguably, the sentence should have been less than eight (8) years handed down." *Id.* King also urges us to find an abuse of discretion "[d]ue to the ambiguity of the record supporting the Trial Court's sentence in this case . . . ." *Id.* The State argues that the court properly revoked King's placement in community corrections, that King admitted that probable cause existed for his arrest on additional charges of battery, theft, and receiving stolen property, that the trial judge noted that severe sanctions were appropriate, and that "King's numerous arrests and conviction support the court's decision to revoke his probation and impose eight years of his suspended sentence." Appellee's Brief at 4.

Ind. Code § 35-38-2-3(g) sets forth a trial court's sentencing options upon a finding of probation violation:

If the court finds that the person has violated a condition at any time before termination of the 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.
- (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) (Supp. 2008) (subsequently amended by Pub. L. No. 106-2010 § 11 (eff. July 1, 2010)). Ind. Code § 35-38-2-3(g) permits judges to sentence offenders using any one of or any combination of the enumerated options. Prewitt v. State, 878 N.E.2d 184, 187 (Ind. 2007).

The Indiana Supreme Court has held that a trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. Prewitt, 878 N.E.2d at 188 (citation omitted). The Court explained that “[o]nce a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed” and that “[i]f this discretion were not afforded to trial courts and sentences were scrutinized too severely on appeal, trial judges might be less inclined to order probation to future defendants.” Id. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. Id. (citation omitted). As 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.” Goonen v. State, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999).

In addition, placement in community corrections is at the sole discretion of the trial court. Toomey v. State, 887 N.E.2d 122, 124 (Ind. Ct. App. 2008) (citing Ind. Code § 35-38-2.6-3(a) (a court “may . . . order a person to be placed in a community corrections program as an alternative to commitment to the department of correction”)).

Ind. Code § 35-38-2.6-5 provides:

If a person who is placed under this chapter violates the terms of the placement, the court may, after a hearing, do any of the following:

- (1) Change the terms of the placement.
- (2) Continue the placement.
- (3) Revoke the placement and commit the person to the department of correction for the remainder of the person’s sentence.

See also Toomey, 887 N.E.2d at 124. For purposes of appellate review, we treat a hearing on a petition to revoke a placement in a community corrections program the same as we do a hearing on a petition to revoke probation. Holmes v. State, 923 N.E.2d 479, 482 (Ind. Ct. App. 2010) (citing Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999), reh’g denied). A defendant is not entitled to serve a sentence in either probation or a community corrections program. Id. Rather, placement in either is a “matter of grace” and a “conditional liberty that is a favor, not a right.” Id. (citing Cox, 706 N.E.2d at 549 (quoting Million v. State, 646 N.E.2d 998, 1002 (Ind. Ct. App. 1995) (internal quotation omitted))). Thus our standard of review of an appeal from the revocation of a community

corrections placement mirrors that for revocation of probation. Id. at 484 (citing Cox, 706 N.E.2d at 551).

Here, the record shows that King violated one of the rules of community corrections in August 2008 and was allowed to remain in community corrections. The record also shows that King was convicted of misdemeanor operating a vehicle while intoxicated and was arrested for several additional offenses while committed to community corrections. At the January 21, 2010 hearing, the State argued that the additional offenses for which King was arrested were “not insignificant arrests,” that the “OVWI [was] inherently dangerous behavior,” that “the other two are felonies and crimes of violence,” and that “Community Corrections is having no effect on [King]” and is “not changing [King’s] behavior.” Transcript at 11-12. The State then recommended that King serve his ten-year sentence in the Department of Correction. King’s counsel argued that he was “doing pretty well until Fourth of July weekend” and then he “decided not to face the consequences at that point.” Id. at 13. King argued that he “would just ask the Court to impose something in the four to five year range.” Id.

After hearing the State’s recommendation and King’s arguments, the trial court stated:

I’m a big believer in second chances. I gave you one earlier in June. And I also am a big believer in not violating people and giving them full backup time for minor violations like failing to report to the drug lab, giving a dirty drop. I’m pretty open minded about that. I’m not open minded about three arrests and one of them being --- resulting in a conviction while you are serving a sentence. Nor am I a big fan of disappearing from an executed sentence which you were serving and not coming back until you were arrested for two new criminal charges. That behavior I think warrants the imposition of severe sanctions.

Id. at 14.

Given the circumstances, we cannot say that the trial court abused its discretion in ordering King to serve the remaining eight years of the previously suspended portion of his sentence. See Jones v. State, 838 N.E.2d 1146, 1149 (Ind. Ct. App. 2005) (holding that the trial court did not abuse its discretion in ordering the defendant to serve a portion of his previously suspended sentence as a result of probation violations); see also Toomey, 887 N.E.2d at 124-125 (noting that if the defendant violated the terms of his placement with community corrections, the court could revoke any remaining time with community corrections).

For the foregoing reasons, we affirm the trial court's order that King serve eight years of his previous sentence in the Department of Correction.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.