



Donald King appeals the trial court's revocation of his probation. King raises one issue which we revise and restate as whether the court abused its discretion in ordering him to serve the previously-suspended portion of his sentence in the Indiana Department of Correction. We affirm.

The relevant facts follow. On August 28, 2008, King pled guilty to possession of marijuana as a class D felony. The plea agreement provided that King would be sentenced to 1,095 days with 915 days suspended. Under the terms of probation, King was ordered not to commit another criminal offense. That same day, the court accepted the plea agreement and sentenced King in accordance with the plea agreement. On September 11, 2008, the court entered a corrected judgment of conviction which clarified that King should be on probation for thirty-six months.

On May 21, 2010, King committed the offenses of two counts of abusing a police officer, criminal damaging, resisting arrest, and petty theft in Middletown, Ohio. On June 2, 2010, King was convicted of these offenses in the Middletown Municipal Court. On June 3, 2010, the State filed a Request for Probation Violation Hearing<sup>1</sup> alleging that King committed the criminal offenses of abusing a police officer, petty theft, resisting arrest, criminal damaging, and disorderly conduct on May 21, 2010 in Ohio.

At a hearing on June 23, 2010, King indicated that he understood the allegations, waived his right to counsel, and admitted the allegations. The court found that King

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<sup>1</sup> The table of contents of the Appellant's Appendix indicates that the August 28, 2008 judgment of conviction, the September 11, 2008 corrected judgment of conviction, and the State's Request for Probation Violation Hearing are found on pages 40 through 48, but the appendix does not contain those pages.

made a knowing and voluntary admission and that there was a factual basis for his admission and proceeded to disposition. King then stated: “I’m sorry for what I did. I made a mistake.” Transcript at 16. When the court asked King if he had anything that he wished to say on the matter of his disposition, King stated:

Okay, if I could, I run my own company and businesses. There are other families that depend on me for paychecks.<sup>[2]</sup> If they reinstate my parole back in Ohio, I guarantee I will not get in trouble again until this is over and even after that. I’m not going to get in any more trouble. That would be retarded.

Id. at 16. The court observed that King had “some significant criminal history, including some probation violations,” and that “[t]he underlying offense was particularly aggregious, [sic] especially the threats made to a police officer and to the police officer’s wife and family.” Id. at 21. The court revoked King’s probation and ordered him to serve the previously-suspended portion of his sentence in the Indiana Department of Correction.

The issue is whether the court abused its discretion in ordering King to serve the previously-suspended portion of his sentence in the Indiana Department of Correction. King argues that his sentence should be reversed because the court failed to consider any mitigating factors and “inappropriately sentenced him to the maximum punishment the trial court could impose for the probation revocation.” Appellant’s Brief at 4-5. King

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<sup>2</sup> After the court had revoked King’s probation and sentenced him to serve the remainder of his previously-suspended sentence, King testified that he just started his business in March, that he had made about \$3,000, and that the business provided “different types of charities, for veterans, shop with a police officer programs, grant a wish, things like grant a wish, hospital children funds, etcetera, etcetera.” Transcript at 24.

argues that “[a]lthough criminal history of the defendant is certainly one factor to consider in imposing an appropriate sentence, the trial court failed to consider or weigh other mitigating evidence.” Id. at 4. King argues that he admitted to the probation violation, showed remorse, “had his own business that employed other people who depended on him for income through their employment,” and points out that “this was the first allegation of any probation violation during the term of probation under the original sentence.” Id. The State argues that the trial court was not required to balance aggravating and mitigating circumstances and that “even if the trial court was obliged to weigh mitigating factors, the purported mitigators would not support a reduction to [King’s] executed term.” Appellee’s Brief at 4.

Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled. Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). The trial court determines the conditions of probation and may revoke probation if the conditions are violated. Id. “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.” Id. “If 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. “Accordingly, a trial court’s sentencing decisions for probation violations are reviewable using the abuse of discretion standard.” Id. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. Id.

Ind. Code § 35-38-2-3(g) governs the revocation of probation and 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 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.

To the extent that King argues that the court should have considered his admission of the violation, remorse, or the fact that he had his own business as mitigators, Ind. Code § 35-38-2-3 does not require a trial court to balance aggravating and mitigating circumstances when considering sentencing upon a finding of probation violation. Mitchell v. State, 619 N.E.2d 961, 963 (Ind. Ct. App. 1993), overruled in part by Patterson v. State, 659 N.E.2d 220, 223 (Ind. Ct. App. 1995) (holding that a trial court should consider a probationer's mental health in a probation revocation proceeding).<sup>3</sup> “[S]o 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).

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<sup>3</sup> King does not argue on appeal that his mental health should have been considered in imposing a sentence.

The record reveals that the trial court sentenced King to the Indiana Department of Correction for 1,095 days with 915 days suspended on August 28, 2008. In 2010, King committed and was convicted of abusing a police officer, criminal damaging, resisting arrest, and petty theft in Middletown, Ohio. King's criminal history consists of convictions for resisting law enforcement as a class A misdemeanor in 1997, an OWI in 1998, battery as a class A misdemeanor in 2002, and possession of marijuana in 2003. King has also violated a previous probation on at least one occasion.

Given King's criminal history and probation violation, we cannot say that the court abused its discretion in ordering King to serve the entire portion or balance of his previously-suspended sentence. See Wilkerson v. State, 918 N.E.2d 458, 464 (Ind. Ct. App. 2009) (holding that the court did not abuse its discretion in ordering probationer to serve the balance of his previously-suspended sentence in the Department of Correction); Milliner v. State, 890 N.E.2d 789, 793 (Ind. Ct. App. 2008) (holding that the trial court did not abuse its discretion in reinstating the probationer's entire previously-suspended sentence), trans. denied.

For the foregoing reasons, we affirm the trial court's order that King serve his previously-suspended sentence in the Department of Correction.

Affirmed.

ROBB, C.J., and RILEY, J., concur.