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IN THE COURT OF APPEALS OF INDIANA

KARI A. FULTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 01A04-0611-CR-645
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ADAMS CIRCUIT COURT
The Honorable Frederick A. Schurger, Judge
Cause No. 01C01-0204-FD-006

July 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Kari A. Fulton appeals the trial court's revocation of her probation and the sentence imposed based upon that revocation. We conclude that the evidence is sufficient to support the revocation of Fulton's probation and that the trial court did not abuse its discretion in sentencing Fulton to a year in jail. Furthermore, while Fulton's original sentence of two years probation is contrary to statute in that it exceeds the maximum one-year sentence for a Class A misdemeanor, Fulton cannot now challenge that sentence because a defendant cannot enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence. We affirm the judgment of the trial court.

Facts and Procedural History

Fulton has a history of not paying child support. In 2001, Fulton was behind $4,255.25 in her child support payments. By March 22, 2002, Fulton had fallen behind $5,409.25 in her child support payments. As a result, on April 1, 2002, Fulton was charged with Nonsupport of a Dependent Child as a Class D felony.[1] On January 21, 2003, Fulton pled guilty as charged in exchange for the State's recommendation that she get alternative misdemeanor sentencing as a Class A misdemeanor, one year in the Adams County Law Enforcement Center with all time suspended, and "Informal probation for a period of two years." Appellant's App. p. 35. The State additionally recommended that Fulton be ordered not to "fall more than two weeks behind in her

[1] Ind. Code § 35-46-1-5(a).

support payments of $96.00 plus $10.00 toward the arrearage per week ($106.00 per week)." *Id*. at 36.

On March 4, 2003, pursuant to Fulton's plea agreement, the trial court entered a judgment of conviction and sentenced her under the alternative misdemeanor statute. Thereafter, Fulton was sentenced in accordance with the terms of her plea agreement. In its sentencing order the trial court stated, in pertinent part:

> The Court sentences the Defendant to one year in the Adams County Law Enforcement Center but suspends said sentence in its entirety.
>
> *The Defendant shall be on INFORMAL probation for a period of two (2) years from this date.*
>
> As a condition of the Defendant's informal probation, the defendant shall not fall more than two weeks behind in her support payments of $96.00 plus $10.00 towards the arrearage per week.

Id. at 40 (emphasis added).

Less than a month later, the State filed a Violation of Informal Probation Petition alleging that Fulton had fallen more than two weeks behind in her child support payments. On December 16, 2003, in a fact-finding hearing, Fulton admitted that she was more than two weeks behind in her child support payments and explained that this was due to injuries she had sustained in a 2002 incident with the police, which left her unable to work. Fulton further explained the extent of her injuries was unknown until June 25, 2003, when Fulton first sought treatment for her injuries from a chiropractor who determined that she had a serious neck injury leaving her unable to work. At the conclusion of this hearing, the trial court determined that Fulton was in violation of her probation and set up a sentencing hearing to take place on February 19, 2004. Between

the December 16, 2003, fact-finding hearing and the February 19, 2004, sentencing hearing, Fulton paid $1883.00 in child support payments. At the February 19, 2004, sentencing hearing, in reference to Fulton's ability to pay the remaining arrearage, Fulton's attorney stated that Fulton believed she could pay the balance within two weeks because she had made arrangements to receive a loan. At the conclusion of this hearing, the trial court sentenced Fulton to "one year at the Adams County Law Enforcement Center but stays issuance of said order on the condition the defendant pays the arrearage in full on or before March 24, 2004." *Id*. at 70.

On June 15, 2004, the State filed an Affidavit of Noncompliance alleging that Fulton was noncompliant with the court's February 19, 2004, order. Thereafter, the court issued a bench warrant for Fulton's arrest. In July 2006, Fulton was arrested.[2] At the time of her arrest she was working and had not made all of her payments toward her child support. At a hearing held on August 31, 2006, the trial court lifted the stay of its February 19, 2004, order, due to Fulton's failure to pay child support in accordance with that order, and imposed her previously suspended one-year sentence. Fulton now appeals.

Discussion and Decision

Fulton raises three issues on appeal. First, she contends that the evidence is insufficient to support the revocation of her probation. Second, she argues that the trial court abused its discretion by imposing a fully executed sentence. Third, Fulton asserts

[2] After ordering a bench warrant for Fulton's arrest and setting bond in the amount of $4,976.75 on June 16, 2004, the record is unclear as to why Fulton was not arrested until 2006.

that her original sentence of two years probation exceeds the maximum sentence for a Class A misdemeanor and therefore constitutes fundamental error.

I. Sufficiency of Evidence

Fulton contends that the State did not present sufficient evidence to support the trial court's revocation of her probation. A probation revocation hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999), *reh'g denied*. When we review the determination that a probation violation has occurred, we will consider all the evidence most favorable to the judgment without reweighing the evidence or judging the credibility of witnesses. *Id*. If there is substantial evidence of probative value to support the trial court's conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation. *Id*. However, "Probation may not be revoked for failure to comply with conditions of a sentence that imposes financial obligations on the person unless the person recklessly, knowingly, or intentionally fails to pay." Ind. Code § 35-38-2-3(f).

While Fulton admits that she was more than two weeks behind in her child support payments, she argues her "failure to do so was the product of a health condition which prevented her from working." Appellant's Br. p. 11. Hence, Fulton argues that she did not violate her probation knowingly, recklessly or intentionally, as is statutorily required, and, as a result, the evidence is insufficient to support the revocation of her probation. *See* I.C. § 35-38-2-3(f). We disagree.

Fulton claims that she was unable to work because of injuries sustained in an accident in December 2002. In support of her contention, she submitted two letters from a chiropractor dated June and July of 2005 as evidence that she had a serious neck injury and therefore could not work. But we note that after the date of her alleged neck injury, in December 2002, she continued to work as a dancer. Furthermore, at the time of her arrest in July of 2006, she admitted that she was working as a waitress and a dancer in Kokomo. A reasonable inference from this evidence is that she was able to work despite her alleged neck injury. Thus, Fulton's argument on this issue amounts to a request for us to reweigh conflicting evidence, which we will not do. Sufficient evidence exists to support that Fulton knowingly, recklessly, or intentionally failed to pay her child support payments in violation of her probation.

II. Challenge to Jail Term

Fulton next contends that the trial court abused its discretion when it sentenced her to serve the entire one-year suspended sentence. We review a trial court's decision to revoke probation and 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).

Under the statutory authority of Indiana Code § 35-38-2-3(g), a trial court has the authority to order execution of all or part of the sentence that was suspended at the time of initial sentencing. *Abernathy*, 852 N.E.2d at 1021. Nonetheless, Fulton argues that the trial court's imposition of the entire one-year suspended sentence was overly harsh and unwarranted and, therefore, an abuse of discretion. However, her only argument in this

regard is that her failure to pay child support was a byproduct of her physical injury and resulting lack of employment. This is the same argument we earlier rejected with regard to the sufficiency of the State's evidence. Because Fulton's intentional disregard of the condition of her probation requiring her to timely pay child support, we cannot say the trial court abused its discretion in imposing the one-year suspended sentence.

III. Challenge to Probation Term

Fulton also argues that the trial court committed fundamental error by originally sentencing her "to a total term of prison plus probation which exceeded the maximum sentence for a Class A misdemeanor[.]" Appellant's Br. p. 16. Fulton maintains that when ordering her to serve her previously suspended one-year jail term, the trial court was not clear as to whether she would be subject to probation after serving her sentence. Fulton's concern arises from the fact that such a sentence violates Indiana Code § 35-50-3-2, which limits the maximum statutory sentence for a Class A misdemeanor to one year. *See Smith v. State*, 621 N.E.2d 325, 326 (Ind. 1993) (holding that a trial court has the option, in sentencing a Class A misdemeanant, to suspend the sentence in whole or in part and to place the defendant on probation, so long as the combination of the executed sentence and the probationary period do not exceed the maximum statutory sentence for that offense).

However, it is clear at the final sentencing hearing that the trial court sentenced Fulton to a one-year executed sentence. The trial court did not require Fulton to serve an additional year of informal probation. Even if the trial court had ordered an additional year of probation, it is well established that a defendant may not enter a plea agreement

calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence. *Stites v. State*, 829 N.E.2d 527, 529 (Ind. 2005); *Lee v. State*, 816 N.E.2d 35, 40 (Ind. 2004). Here, Fulton benefited from her illegal sentence in that she was sentenced, pursuant to her plea agreement, for a Class A misdemeanor instead of a Class D felony and she was not initially ordered to spend any time in prison. Therefore, she cannot now complain that her original sentence was illegal.

Affirmed.

SULLIVAN, J., and ROBB, J., concur.