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IN THE
COURT OF APPEALS OF INDIANA

DERRY L. VAUGHN,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 71A04-0701-CR-53

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-9804-DF-207

July 18, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Derry L. Vaughn (Vaughn), appeals the trial court's imposition of his suspended sentence upon revocation of his probation.

We affirm.

ISSUE

Vaughn raises one issue on appeal, which we restate as: Whether the trial court appropriately sentenced Vaughn.

FACTS AND PROCEDURAL HISTORY

On April 1, 1998, under Cause Number 71D03-9804-DF-207 (Cause No. 207), the State filed an Information charging Vaughn with theft, a Class D felony, I.C. § 35-43-4-2. On April 20, 1998, under Cause Number 71D01-9804-DF-238 (Cause No. 238), the State filed an Information charging Vaughn with Count I, theft, a Class D felony, I.C. § 35-43-4-2(a); Count II, battery, a Class D felony, I.C. §35-42-2-1; Count III, battery, a Class A misdemeanor, I.C. § 35-42-2-1; Count IV, resisting law enforcement, a Class A misdemeanor, I.C. § 35-44-3-3; Count V, possession of marijuana, a Class A misdemeanor, I.C. 35-48-4-11(a); and Count VI, habitual offender. Also, in April of 1998, under Cause Number 9804-CM-3151 (Cause No. 3151), the State filed an Information charging Vaughn with battery, as a Class A misdemeanor, I.C. § 35-42-2-1.

In March of 1999, under Cause Number 71D01-9903-DF-191 (Cause No. 191), the State filed an Information charging Vaughn with Count I, theft, a Class D felony, I.C. § 35-43-4-2, and Count II, habitual offender. Then, in May of 1999, under Cause Number 71D04-9905-DF-600 (Cause No. 600), the State filed an Information charging

Vaughn with theft, a Class D felony, I.C. § 35-43-4-2, and another habitual offender offense. During the same general time period, the State filed Informations under three additional Cause Numbers charging Vaughn with numerous Counts of misdemeanor conversion, I.C. § 35-43-4-3. Finally, also between 1997 and 1999, Vaughn accumulated charges under ten additional Cause Numbers.

On October 15, 1999, Vaughn entered into a plea agreement with the State to resolve all of the pending cases against him. Pursuant to the plea agreement, Vaughn pled guilty to two Counts of theft, Class D felonies; battery, as a Class D felony; possession of marijuana, a Class A misdemeanor; battery, as a Class A misdemeanor; multiple misdemeanor conversion charges; and to being an habitual offender. In exchange for his guilty plea, the State dismissed all other charges in all Causes pending against Vaughn. On January 11, 2000, the trial court accepted the plea agreement and sentenced Vaughn to an aggregate sentence of five years executed, to be followed by eight years of probation.[1]

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[1] Specifically, the trial court's Sentencing Order, filed January 12, 2000, provided for the following sentences:

> In Cause No. 191: The trial court sentenced Vaughn to three years imprisonment for conviction of theft, as a Class D felony, enhanced by four and a half years for the habitual offender adjudication; executed sentence of three years, to be served consecutive to 180-day sentence in Cause No. 3151, with remaining four and a half years suspended, with four years on probation.
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> In Cause No. 238: The trial court sentenced Vaughn to three years imprisonment for Count II, battery, as a Class D felony, with one year executed to be served consecutive to executed sentence in Cause No. 191, and two years suspended. In addition, Vaughn was ordered to probation for one year with probation period to begin upon termination of probationary period of his suspended sentences in Cause No. 191. In addition, Vaughn was sentenced to one year imprisonment for Count V, possession of marijuana, to be served concurrent to executed sentence for Count II in this case.
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> In Cause No. 207: The trial court sentenced Vaughn to three years, with two and a half years suspended, for his conviction of theft, as a Class D felony. With respect to the probationary period of this sentence, "[Vaughn] is placed on reporting probation for three years, which is to

On January 10, 2001, the trial court held a hearing on modifying Vaughn's sentence. On January 12, 2001, the trial court issued an Order to reflect that Vaughn had served the mandatory minimum sentence in each case, and ordered all remaining executed time of his sentences be suspended and served on probation. As a condition of probation, the trial court ordered Vaughn to serve two years in a Community Corrections work-release program.

On February 24, 2005, the State filed a Petition to Revoke Probation, alleging that Vaughn had failed to report to probation and had committed new offenses in nine separate causes. On November 2 and 10, 2005, the trial court held hearings wherein Vaughn admitted to violating the terms of his probation. On January 18, 2006, the trial court issued an Order finding that Vaughn had remaining: two and a half years of a suspended sentence in Cause No. 238, and a consecutive two and a half years of a suspended sentence in Cause No. 207, with 346 days of real time credit. As a result, the trial court ordered Vaughn to a two-year probationary period beginning February 5, 2006 for Cause No. 238, and a two-year probationary period beginning February 5, 2008 for his conviction in Cause No. 207.

On May 3, 2006, the State filed a second Petition to Revoke Probation. On October 3, 2006, the trial court held a hearing and found that Vaughn had violated his

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begin upon termination of the probationary period of [his] suspended sentence in [Cause No. 238]." (Appellant's App. p. 28).

In Cause No. 600: The trial court sentenced Vaughn to one year for his conviction of theft, as a Class A misdemeanor; however, "[e]xecution of this sentence is suspended, and [Vaughn] is placed on reporting probation for one year, which is to begin upon termination of the probationary period of [his] suspended sentence in [Cause No. 207]." (Appellant's App. p. 28).

probation. On October 18, 2006, the trial court entered its Findings and Order on the second Petition to Revoke Probation, stating in pertinent part:

> Findings
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> 1. When the State filed its second [Petition to Revoke Probation (PTR)] on May 3, 2006, [Vaughn's] probationary period had not run in [Cause No. 238]; it had not even begun in [Cause No. 207] (a consecutive sentence to [Cause No. 298]).
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> 2. The State can file to revoke probation even if the probationary period has not yet begun. *Gardner v. State*, [678 N.E.2d 398 (Ind. Ct. App. 1997)].
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> 3. The evidence produced at the hearing on October 3, 2006, clearly and convincingly established that [Vaughn] committed a new criminal offense after he was sentenced in each of the above cases, and before he had completed his probationary sentences in either case.
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> 4. [Vaughn] urges that when he was released from prison in these cases, he was told at his exit interview that "these sentences were done," and he did not realize that he had any probationary sentences or obligations remaining. First, . . . [Vaughn] had been told that he had probationary sentences in each of these cases. Second, the basis for the State's Petition to Revoke Probation included [Vaughn's] commission of new criminal [offenses] while on probation. It is this fact – the commission of new offenses before the completion of his probation – that this [c]ourt finds to be violative of [Vaughn's] probation. His mistake as to whether he was on probation is immaterial to the fact that he violated that probation by committing new criminal offenses.
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> Order
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> Wherefore, based on its Findings herein, the [c]ourt requests the Probation Department to (1) determine whether [Vaughn's] credits and remaining probation periods found by this [c]ourt on January 18, 2006, are accurate, or should be amended; (2) inform the [c]ourt and parties of any other pending cases [Vaughn] has, and any other sentences [he] has yet to serve – giving their completion dates and whether executed and/or suspended; and (3) recommend the disposition in these cases.

(Appellant's App. pp. 94-96).

Thereafter, on January 8, 2007, the trial court entered an Order revoking Vaughn's suspended sentence in Cause No. 207 and ordering him to serve the two and a half year sentence consecutive to his sentence in Cause. No. 191.[2]

Vaughn now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Vaughn argues that the trial court erred in reinstating his previously suspended sentence in Cause No. 207. Specifically, Vaughn contends that this sentence violates the prohibition against sentences that begin *in futuro*.

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. *Sanders v. State*, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), *trans. denied*. I.C. § 35-38-2-3(g) gives the trial court options upon finding that a defendant has committed a violation of his probation. *Id*. at 957. The provision of these options by the statute implies that the trial court has discretion in deciding which option is appropriate under the circumstances of each case. *Id*. With respect to ordering the execution of a sentence that was suspended at the time of initial sentencing, "so long as the proper procedures have been followed in conducting a probation revocation hearing pursuant to I.C. § 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." *Johnson v. State*, 692 N.E.2d 485, 488

[2] We note that the trial court's Order of January 8, 2007, actually states that Vaughn's sentence in Cause No. 207 shall be served consecutive to that in Cause No. "06FD391." (Appellant's App. p. 111). However, in our review of the record, we do not find Cause No. 06FD391; nor do the parties ever refer to such a Cause Number. Consequently, we determine that the trial court must have intended to refer to Cause No. 191.

(Ind. Ct. App. 1998). However, a trial court may not withhold judgment, indefinitely postpone sentencing, or impose sentences that begin *in futuro*. *Reaves v. State*, 586 N.E.2d 847, 852 (Ind. 1992).

Vaughn asserts that the trial court's imposition of his two-year executed sentence in Cause No. 207, as a result of his probation violation, is contrary to Indiana's rule prohibiting sentences *in futuro*. Instead, Vaughn contends that the trial court was required to order his sentence under Cause No. 207 to be served before his sentence in Cause No. 191. Further, Vaughn claims that had the trial court properly credited him for days already served in Cause No. 207, it would have concluded that he has already served that sentence in its entirety.

However, we find multiple flaws and confusion in Vaughn's arguments and logic. First, we note that the State suggests, and we find plausible, that Vaughn is attempting to collaterally attack his modified sentence, which had his probationary period in Cause No. 207 beginning after such period in Cause No. 238 -- although, we recognize that this is not congruent with his current argument relating to the ordering of the sentences in Cause Nos. 207 and 191. Nevertheless, we find it worthwhile to recite that 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). Thus, any allegation by Vaughn that the trial court incorrectly ordered his probationary periods or incorrectly calculated his credit time when it modified his sentence fails completely. Rather, he is only "entitled to dispute on appeal the terms of [his] sentence ordered to be served in a probation revocation proceeding that differ from those terms originally imposed." *Id*. (citing *Stephens v.*

State, 818 N.E.2d 936, 939 (Ind. 2004)). Here, we do not find the trial court imposed any different sentence upon revoking Vaughn's probation than that imposed previously.

Second, as for Vaughn's argument that serving his sentence in Cause No. 207 after his sentence in Cause No. 191 violates the prohibition against *in futuro* sentences, this court has previously held that consecutive sentences are not an automatic violation of sentences *in futuro*. *See Burnett v. State*, 439 N.E.2d 174, 177 (Ind. Ct. App. 1982). Rather, consecutive sentences for separate offenses are proper and there is no constitutional right to serve concurrent sentences for separate crimes in Indiana. I.C. § 35-50-1-2; *Burnett*, 439 N.E.2d at 177. "To so hold would minimize the penalty for the commission of additional crimes, since the sentences could all be served more or less concurrently." *Burnett*, 439 N.E.2d at 177 (quoting *Bewley v. State*, 220 N.E.2d 612 (Ind. 1966)). Moreover, in the present case, we do not find the trial court's sentencing of Vaughn to be of an indeterminate nature. *See Reaves*, 586 N.E.2d at 852. The record indicates that the trial court clearly ordered Vaughn to serve his suspended sentences in Cause Nos. 191 and 207 consecutively, leaving no sentence to be determined in the future. Thus, we conclude that the trial court's consecutive sentencing order was sufficiently specific and does not violate any rule against sentences in *futuro*. *See id*. Pertaining to all other arguments by Vaughn that his sentences should be served in a particular chronological order, we find no legal support or merit thereto.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion in sentencing Vaughn following revocation of his probation.

Affirmed.

NAJAM, J., and CRONE, J., concur.