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.

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IN THE
COURT OF APPEALS OF INDIANA

JOHN R. CRUMP,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 29A02-0611-PC-1001
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable J. Richard Campbell, Judge
Cause No. 29D04-0302-CM-1041

August 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

John R. Crump, pro se, appeals from the denial of his petition for post-conviction relief.

We affirm.

ISSUES

1. Whether Crump's sentence exceeded the maximum authorized by law.

2. Whether the trial court extended Crump's probation.

3. Whether Crump served his suspended sentence prior to the revocation of his probation.

FACTS

On February 18, 2003, the State charged Crump with driving while intoxicated, as a class A misdemeanor.[1] After Crump failed to appear for his bench trial on May 15, 2003, the trial court issued an arrest warrant on May 20, 2003. On May 27, 2003, Crump informed the trial court that he had been arrested for a parole violation on April 15, 2003.

Crump pleaded guilty as charged on July 18, 2003. Pursuant to a plea agreement, the trial court sentenced Crump to 365 days in the Hamilton County Jail, with all but 180 days suspended, and placed Crump on probation for 365 days. The trial court also credited Crump with thirty days of credit time. Finally, the trial court ordered Crump to pay court costs and probation user's fees.

On June 4, 2004, Crump filed a motion for credit time, requesting credit for time served from May 15, 2003 to June 20, 2003. On June 21, 2004, Crump filed a motion to

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[1] Ind. Code § 9-30-5-2(b).

correct erroneous sentence, alleging that his sentence was illegal because his executed sentence and his probation exceeded one year. Furthermore, Crump filed a supplemental motion for credit time, seeking credit for time served from July 18, 2003 through August 8, 2003, the time he spent in the Hamilton County Jail after being sentenced for the driving while intoxicated conviction and before his return to the Department of Correction for his parole conviction. On June 25, 2004, the trial court denied Crump's motions. Subsequently, Crump filed a notice of appeal.

On August 12, 2004, the trial court issued an order requiring Crump to report to the Hamilton County Jail on August 18, 2004. On August 18, 2004, Crump filed a motion to amend the jail order, requesting credit for time served from July 21, 2004, through August 9, 2004, the time between the date the parole board allowed him to start serving his sentence for driving while intoxicated and the date of his release from the Department of Correction. The trial court declined to rule on Crump's motion due to the pending appeal.

On appeal, Crump raised three issues: 1) whether the trial court erred by denying Crump's supplemental motion for credit time; 2) whether the trial court abused its discretion by denying Crump's motion to correct erroneous sentence; and 3) whether the trial court abused its discretion by declining to rule on Crump's motion to amend the jail order.

In a memorandum opinion handed down on August 5, 2005, this court found that Crump "failed to meet his burden of demonstrating that the trial court erred by denying his request for credit time." *Crump v. State*, No. 29A05-0407-PC-389, slip op. at 5 (Ind.

Ct. App. Aug. 5, 2005). Thus, this court affirmed the trial court's denial of Crump's supplemental motion for credit time. Regarding Crump's motion to correct erroneous sentence, this court found no abuse of discretion in sentencing Crump to a combined term of imprisonment and probation exceeding one year. *Id.* at 6-7. As to the motion to amend the jail order, this court "express[ed] no opinion on Crump's claim and remand[ed] to the trial court for a determination of the matter" since the trial court had not ruled on it. *Id.* at 7.

On October 6, 2005, the State filed a notice of probation violation for Crump's failure to pay court costs and fees and for failure to complete community service. The State filed a second notice of probation violation on October 13, 2005, for Crump's failure to advise his probation officer of charges filed against him on September 10, 2005[2] and September 19, 2005.[3]

The trial court held a revocation hearing on December 14, 2005. The parties presented an agreed disposition, which the trial court accepted. Pursuant to the agreement, the trial court revoked Crump's probation and ordered Crump to serve 84 days in the Hamilton County Jail and credited Crump with 42 days of credit time. The trial court also entered a civil judgment against Crump for court costs, probation user's fees and drug testing.

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[2] The State charged Crump with operating while intoxicated, as a class A misdemeanor; operating while intoxicated with a previous conviction, a class D felony; and public intoxication, a class B misdemeanor.

[3] The State charged Crump with operating while intoxicated, as a class A misdemeanor; operating while intoxicated with a previous conviction, a class D felony; and operating a motor vehicle with a blood-alcohol content of .15% or greater, a class A misdemeanor.

On June 1, 2006, Crump filed a petition for post-conviction relief, arguing that the trial court erred in revoking his probation and that the 2003 plea agreement was illegal and unenforceable. On August 31, 2006, Crump filed an amended petition for post-conviction relief.[4]

The post-conviction court held a hearing on September 19, 2006. On October 9, 2006, the post-conviction court entered its findings of fact and conclusions of law, denying Crump post-conviction relief.

Additional facts will be provided as necessary.

DECISION

A post-conviction petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Thompson v. State*, 796 N.E.2d 834, 838 (Ind. Ct. App. 2003), *trans. denied*; Ind. Post-Conviction Rule 1(5). When reviewing the denial of a petition for post-conviction relief, we will neither reweigh the evidence nor judge the credibility of the witness. *Id.* Thus, to prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. *Id.* We will disturb the post-conviction court's decision only if the evidence is without conflict and leads to but one conclusion and the post-conviction court has reached the opposite conclusion. *Id.*

1. Sentence

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[4] Crump does not appeal the disposition of the claims asserted in his amended petition for post-conviction relief.

Crump asserts that the 2003 plea agreement and resulting sentence constituted fundamental error because the sentence imposed exceeded the statutory maximum. Crump contends that he is entitled re-litigate this claim because the previous judgment is not barred by the defense of res judicata. We disagree.

Crump appealed the legality of his sentence, which this court affirmed in *Crump v. State*, No.29A05-0407-PC-389 (Ind. Ct. App. Aug. 5, 2005). Specifically, this court determined that the sentence limitation under Indiana Code section 35-50-3-1(b)[5] did not apply as Crump's sentence fell within the exception to the one-year rule, as set forth in subsection (c) of Indiana Code section 35-50-3-1.[6] *See Crump*, No. 29A05-0407-PC-389, slip op. at 6-7.

"[T]he 'doctrine of res judicata bars later suit when earlier suit resulted in final judgment on merits, was based on proper jurisdiction, and involved the same cause of action and same parties or privies as the later suit.'" Annes v. State, 789 N.E.2d 953, 954 (Ind. 2003) (quoting *Indiana Dep't of Envtl. Mgmt. v. Conard*, 614 N.E.2d 916, 923 (Ind.1993)). However, "[t]he bar of res judicata may sometimes give way when the initial decision was 'clearly erroneous and would work manifest injustice.'" *Id.* (quoting

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[5] Indiana Code section 35-50-3-1(b) provides, in pertinent part, that

> [e]xcept as provided in subsection (c), whenever the court suspends in whole or in part a sentence for a Class A . . . misdemeanor, it may place the person on probation . . . for a fixed period of not more than one (1) . . . . However, the combined term of imprisonment and probation for a misdemeanor may not exceed one (1) year.

[6] Indiana Code section 35-50-3-1(c) provides, in pertinent part, as follows:

> Whenever the court suspends a sentence for a misdemeanor, if the court finds that the use or abuse of alcohol, drugs, or harmful substances is a contributing factor or a material element of the offense, the court may place the person on probation . . . for a fixed period of not more than two (2) years.

State v. Lewis, 543 N.E.2d 1116, 1118 (Ind. 1989)). Here, Crump argues that his sentence should be reconsidered given the holding in *Collins v. State*, 835 N.E.2d 1010 (Ind. Ct. App. 2005), *trans. denied*.

In *Collins*, Collins was convicted of driving while intoxicated, as a class A misdemeanor. The trial court sentenced Collins to 365 days in the county jail, with all but 10 days suspended, and ordered Collins to serve 365 days of probation. Collins appealed his sentence, arguing that it exceeded the statutory maximum prescribed by Indiana Code section 35-50-3-1. Finding Collins's sentence constituted fundamental error, the *Collins* court vacated his sentence. *Collins*, 835 N.E.2d at 1017-18. The *Collins* court, however, did not address subsection (c) of Indiana Code section 35-50-3-1.

In *Datzek v. State*, 838 N.E.2d 1149 (Ind. Ct. App. 2005), *trans. denied*, a panel of this court addressed the same issue. In that case, the trial court found Datzek guilty of operating a vehicle while intoxicated, as a class D felony. Pursuant to the alternate misdemeanor-sentencing scheme, the trial court entered Datzek's sentence as a class A misdemeanor; sentenced Datzek to 365 days, with 275 days suspended; and ordered Datzek to serve 365 days on probation. Datzek appealed, arguing that his sentence exceeded the one-year limit under Indiana Code section 35-50-3-1(b).

The *Datzek* court affirmed Datzek's sentence. As in Crump's case, the *Datzek* court found that Indiana Code section 35-50-3-1(c) applied, and therefore, "the trial court did not abuse its discretion when it sentenced Datzek, whose offense involved the use of alcohol, to a term of imprisonment of one year with ninety days executed and one year of probation." *Datzek*, 838 N.E.2d 1163-64.

Given the holding in *Datzek*, we find no fundamental error.[7] Thus, Crump's claim is barred by the doctrine of res judicata.[8]

2. Probation Period

Crump also asserts that "his probation was extended without statutory authority" beyond the original 365 days ordered by the trial court. Crump's Br. 16. Specifically, Crump argues "that his probation period should have ended on or about August 9, 2005," but the trial court instead extended it to October 7, 2005, "in [the] absence of a petition to revoke probation." Crump's Br. 17. We disagree.[9]

Here, the Department of Correction released Crump on August 9, 2004, triggering the probationary phase of Crump's sentence. On August 12, 2004, however, the trial court issued an order requiring Crump to report to the Hamilton County Jail on August 18, 2004, to serve the remaining executed sentence for his driving while intoxicated conviction. Crump remained in the Hamilton County Jail until his release on October 16, 2004, upon which he was returned to probation to serve the remaining 356 days left on

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[7] Given our finding that the trial court did not abuse its discretion in imposing Crump's sentence, we need not address Crump's contention that the civil judgment entered pursuant to the agreed disposition in 2005 is void because the plea agreement and probation order on which it was based were illegal. Crump's Br. 20.

[8] Crump also argues that his sentence was improper because "it did not rest upon a suspended sentence"; "the material element of driving while intoxicated," namely, alcohol, was "the same material element . . . used to enhance his sentence"; and the trial court failed "to make a judicial fact-finding as to whether alcohol was a material element of the offense." Crump's Br. 13, 14. Crump, however, did not raise these issues on appeal. Therefore, he has waived them for post-conviction review. *See Reed v. State*, 856 N.E.2d 1189, 1193-94 (Ind. 2006) ("The law in this jurisdiction is settled that sentencing issues which are known or available at the time of direct appeal but are not raised are waived for post-conviction review.").

[9] We note that Crump later acknowledges that his probation was to end on October 7, 2007. *See* Crump's Br. 18 ("On October 6, 2005, the 1st Information of Violation Probation was filed, the day before his probation period was to end.").

his term of probation. Thus, Crump's term of probation expired on October 7, 2005. We therefore do not agree that the trial court extended Crump's probation period or that Crump's "probation period should have ended on or about August 9, 2005 . . . ." Crump's Br. 17.

Furthermore, because Crump's probationary period did not expire until October 7, 2005, the State timely filed its first notice of probation violation on October 6, 2005, because the State filed it "during the probationary period . . . ." *See* I.C. § 35-38-2-3(a)(2). The State also timely filed the second notice of probation violation on October 13, 2005, pursuant to Indiana Code section 25-38-2-3(a)(2), which provides that a petition to revoke probation shall be filed either during the probationary period <u>or</u> before the termination of probation or 45 days after the State receives notice of the violation, whichever is earlier.

3. <u>Suspended Sentence</u>

Crump next asserts that "his probation was revoked without statutory authority" because he had already served the suspended portion of his sentence when the trial court revoked his probation. Crump's Br. 18. Crump contends that his "suspended sentence had ended 183-days [sic] into []his 365-day probation period." Crump's Br. 19.

A suspended sentence is in part defined as a "'sentence that is formally given, but not actually served.'" *Shaffer v. State*, 755 N.E.2d 1193, 1196 (Ind. Ct. App. 2001) (quoting BLACK'S LAW DICTIONARY 1446 (6th ed. 1990)). "No matter how long a person has been on probation, that person can be required to serve the full sentence if probation has been revoked." *Shaffer*, 755 N.E.2d at 1196.

We find no support for Crump's assertion that this suspended sentence ended 183 days into his probationary period. Furthermore, Crump provides no authority or citation to the record in support of his claim that his suspended sentence ended during his probationary period. Thus, he has waived this issue. *See* Ind. Appellate Rule 46 (A)(8) ("Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . ."); *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), *trans. denied* (holding that a party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record).

Judgment affirmed.

KIRSCH, J., and MATHIAS, J., concur.