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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES MILES,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 49A05-0702-CR-110

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Rubick, Commissioner
Cause No. 49G04-9412-CF-109040

September 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant James Miles appeals the trial court's order requiring that he serve the remainder of his previously-suspended sentence in the Department of Correction after he violated the terms of his probation. In particular, Miles argues that his mild mental handicap and the hardships he has faced in his life and while incarcerated militate against an order that he serve the entirety of his remaining sentence. Finding no error, we affirm the judgment of the trial court.

FACTS

On June 30, 1994, Miles attempted to rape ten-year-old J.B. and on July 26, 1994, Miles raped twelve-year-old M.D. On September 1, 1994, the State charged Miles with attempted rape, attempted child molesting, rape, and three counts of child molesting against the two victims. Miles agreed to plead guilty to attempted rape and rape, both class B felonies, in exchange for the State's agreement to dismiss the remaining charges. Sentencing was left to the trial court's discretion. On August 14, 1996, the trial court sentenced Miles to fifteen years imprisonment for attempted rape with five years suspended to probation and fifteen years for rape with five years suspended to probation, with the sentences to be served concurrently.¹

On June 29, 2005, Miles was placed on probation. Among other things, the conditions of his probation required him to complete a three-year sex offender treatment program and register as a convicted sex offender and prevented him from having contact with any minor child.

¹ Miles's probation was to run consecutively to a sentence he was serving in a separate cause.

In September 2005, an administrative hearing was held because Miles had not been attending his sex offender treatment program. Miles's probation officer reminded him to start treatment immediately and cautioned him that he was not to miss any classes without permission. Miles complied with the conditions of his probation until November 2006 when, on November 8 and November 22, he missed two group meetings. His probation officer went to Miles's residence to determine the cause of the absences, and the officer learned that Miles had been staying with a woman for three or four days without informing anyone. The woman had minor children, though it appears that they were not present while Miles was staying there.

On December 5, 2006, the State filed a notice of probation violation alleging that Miles had failed to comply with the sex offender treatment program. On January 17, 2007, the trial court found that Miles had violated the terms of his probation but reserved disposition for another time because it was a "difficult decision" and the court needed to "think about what I'm going to do." Tr. p. 23. On January 26, 2007, the trial court held a dispositional hearing and ordered that Miles serve the remainder of his sentence:

Try as I might, I couldn't get past the fact that . . . Miles's family had at least one period of four days when Mr. Miles was out of sight and out of mind. Given that, . . . I have to consider the interest of the community, and I find that there is no alternative for Mr. Miles other than revocation with remand to the Department of Correction. Accordingly, Mr. Miles's term of probation . . . is revoked. I am going to order him remanded to the Department of Correction to serve his full 5 year back-up time.

Id. at 28. Miles now appeals.

DISCUSSION AND DECISION

The sole issue is whether the trial court abused its discretion when it sentenced Miles to serve the balance of his previously-suspended sentence in the Department of Correction. We review a trial court's sentencing decision in probation revocation proceedings for an abuse of discretion, which occurs where the decision is clearly against the logic and effect of the facts and circumstances before the court. Prewitt v. State, 865 N.E.2d 669, 671 (Ind. Ct. App. 2007).

Indiana Code section 35-38-2-3(g) describes a trial court's sentencing options after the trial court determines that the defendant has violated the terms of probation:

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:

- (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; or
- (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing.

The trial court may order execution of a suspended sentence upon a finding of a violation of probation by a preponderance of the evidence. Goonen v. State, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999). The “[c]onsideration and imposition of any alternatives to incarceration is a ‘matter of grace’ left to the discretion of the trial court.” Monday v. State, 671 N.E.2d 467, 469 (Ind. Ct. App. 1996).

Here, Miles emphasizes that he is functionally illiterate, has an I.Q. of 71, and functions, at best, at a sixth to ninth grade level with a lower reading level. He was allegedly molested as a child and, while in prison, was allegedly repeatedly raped and badly beaten.

Miles concedes that he violated the terms of his probation by missing group meetings and leaving home for three or four days without reporting to anyone. Miles's probation officer concluded that

[f]rom a correctional point of view the defendant would appear to be a poor candidate for a term of Court-ordered supervision at this time. . . . [H]is intellectual capacity is significantly impaired enough as to bring into question his ability to profit from a sex offender program or successfully complete any other terms of probation.

PSI p. 9. The trial court properly factored the safety of the community into its decisionmaking process. See Jones v. State, 838 N.E.2d 1146, 1148 (observing that conditions of probation are partially designed to ensure “that the public is not harmed by a probationer living within the community”). Although we are sympathetic to the reality of Miles's life in prison, given the evidence in the record that he missed meetings and disappeared for several days, staying with a woman who had minor children, we cannot conclude that the trial court abused its discretion by ordering Miles to serve the remainder of his previously-suspended sentence in the Department of Correction.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.