

Case Summary

Kurt O. Elder appeals the trial court's order revoking six years of his probation and requiring him to remain on probation "through the date that [he was] previously scheduled to be released." Tr. at 52. We affirm.

Issue

We address only one issue: whether the trial court abused its discretion when it revoked six years of Elder's probation.

Facts and Procedural History

On March 15, 2007, the State charged Elder with class A misdemeanor operating while intoxicated, class C misdemeanor operating while intoxicated, class A misdemeanor possession of paraphernalia, class D felony resisting law enforcement, class D felony maintaining a common nuisance, class A misdemeanor resisting law enforcement, and class B felony possession of cocaine within 1000 feet of school property. On January 14, 2008, Elder pled guilty to class B felony possession of cocaine within 1000 feet of school property, and the other six charges were dismissed. Judge David Holt sentenced Elder to twelve years' imprisonment, with all but thirty days suspended, and eight years' probation. The probation order required Elder to remain on probation until January 14, 2016, and it listed the conditions of his probation, which included not committing another criminal offense and not consuming or possessing any alcoholic beverage.

Elder's probation officer filed a petition to revoke suspended sentence on June 17, 2009. The petition alleged that Elder violated the terms of his probation by consuming

alcohol and by committing four offenses in Adams County: (1) class D felony theft, which occurred on June 3, 2009, when Elder left Wal-Mart without paying for merchandise; (2) class A misdemeanor domestic battery resulting in bodily injury, which occurred on June 7, 2009, against his wife; (3) class A misdemeanor resisting law enforcement, which occurred on June 7, 2009; and (4) class B misdemeanor battery, which occurred on June 7, 2009, against his stepson. Elder pled guilty to the four counts in Adams County and was incarcerated for those offenses.

At the probation revocation hearing conducted by Judge Dena A. Martin on December 2, 2009, Elder admitted that he violated the terms of his probation. Judge Martin revoked six years of Elder's probation and ordered Elder to serve six years in prison and to return to probation "through the date that [he was] previously scheduled to be released." *Id.* at 52. The trial court's written order states that "probation is **CONTINUED** on the same terms and conditions set forth in the Order of Probation entered January 14, 2008." Appellant's App. at 7.

Discussion and Decision

"Probation is a matter of grace and a conditional liberty which is a favor, not a right." *Noethlich v. State*, 676 N.E.2d 1078, 1081 (Ind. Ct. App. 1997). The decision whether to revoke probation is a matter addressed to the sole discretion of the trial judge. *Hubbard v. State*, 683 N.E.2d 618, 620 (Ind. Ct. App. 1997). A probation revocation hearing is in the nature of a civil proceeding, and an alleged violation need be proven only by a preponderance of the evidence. *Baxter v. State*, 774 N.E.2d 1037, 1044 (Ind. Ct. App. 2002), *trans. denied*.

If the trial court finds that a person has violated a condition of probation, the court may impose one 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.

Ind. Code § 35-38-2-3(g).

We review a trial court's decision to revoke probation and its 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*. We will only find an abuse of discretion if the trial court's decision is clearly against the logic and effect of the facts and circumstances. *Guillen v. State*, 829 N.E.2d 142, 145 (Ind. Ct. App. 2005), *trans. denied*.

Elder argues that the trial court abused its discretion by "imposing an overly harsh sanction" in response to his probation violations. Appellant's Br. at 11. Elder argues that Indiana Code Section 35-38-2-3(g) authorizes trial courts to order the execution of "all or part" of a suspended sentence. Therefore, Elder believes that the evidence introduced at the probation revocation hearing justifies a minimum period of incarceration. Elder argues that after his probation violations, he turned his life around by switching to non-narcotic pain medication, ending his relationship with his wife, and seeking a new life with the support of his parents and church. Elder would like a lesser sanction imposed of time served followed by a period of probation.

We find that the trial court's decision was not against the logic and effect of the facts and circumstances given Elder's probation violations and his past criminal conduct. His past criminal conduct includes convictions for misdemeanor possession of marijuana in 1978, misdemeanor operating while intoxicated in Texas in 1985, misdemeanor operating while intoxicated in Marion County, Indiana around 1990, misdemeanor operating while intoxicated in Florida in 1995, class D felony operating while intoxicated in Indiana in 1996, misdemeanor battery resulting in bodily injury in 1999, and class B felony possession of cocaine within 1000 feet of school property. Elder now adds four new convictions to his previous record. He admitted that he violated the terms of his probation by consuming alcohol¹ and by committing class D felony theft, class A misdemeanor domestic battery resulting in bodily injury, class A misdemeanor resisting law enforcement, and class B misdemeanor battery. These are not minor offenses, and the trial court could have required Elder to serve the entire previously-suspended sentence under Indiana Code Section 35-38-2-3(g).

Elder's explanations for his behavior are repetitive; his excuse to Judge Martin that he has turned his life around was also given to Judge Holt back in January 2008. Given Elder's criminal conduct during his probationary period, the trial court did not abuse its discretion by denying Elder another of many second chances.² It was well within the trial court's authority

¹ Elder initially admitted that he consumed alcohol on or about June 7, 2009, but he later contested the consumption allegation and admitted that he possessed alcohol. Tr. at 17, 29.

² The State notes that Elder received an illegal sentence for his 2008 conviction when the court sentenced him to twelve years, all suspended but thirty days, and eight years of probation. Appellee's Br. at 7 n.2. By law, Elder was required to serve a minimum six-year sentence for his 2008 conviction. See Ind. Code § 35-50-2-2(b)(1). However, Elder notes that the State agreed to that sentence. Appellant's Reply Br. at 2.

and discretion to revoke six years of Elder's probation.

Furthermore, Elder argues that the sentencing order is ambiguous and defective regarding the amount of time he will be on probation after he serves his six-year sentence. Elder argues that even if the previous order provides for his probation to end January 14, 2016, "no one can predict at this point when Elder will be released from prison and will start probation, given his ability to earn good time credit in a variety of ways." Appellant's Br. at 6.

The State argues that the "mere fact that it is unknown at this point on what date Defendant will begin or resume that period of probation does not render the term indefinite or ambiguous." Appellee's Br. at 10. We agree with the State that there is no ambiguity regarding Elder's probation after he executes the six years. Even though Elder may receive good time credit, therefore shortening his executed time, the end of his probation date still remains January 14, 2016. After the trial court ascertained from the probation officer that Elder was scheduled to finish his probation on January 14, 2016, the trial court stated that Elder would "remain on probation through the date that [he was] previously scheduled to be released" after executing his six years. Tr. at 52. In addition, the court's written order states that "probation is **CONTINUED** on the same terms and conditions set forth in the Order of Probation entered January 14, 2008." Appellant's App. at 7. This is a fixed ending point as required by Indiana Code Section 35-50-2-2(c); therefore, it is not necessary to remand the sentencing order for clarification. Consequently, we affirm.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.