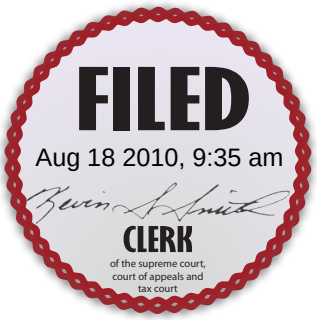

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IN THE COURT OF APPEALS OF INDIANA

WILLIAM SEBASTIAN, JR.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 14A01-1001-CR-20
	)	
STATE OF INDIANA,	)	
	)	
Appellee,	)	

APPEAL FROM THE DAVIESS SUPERIOR COURT
The Honorable Mark R. McConnell, Special Judge
Cause No. 14D01-9812-CF-857

August 18, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

William Sebastian, Jr. ("Sebastian") appeals from Daviess Superior Court following the revocation of his probation. Sebastian argues that the trial court abused its discretion when it revoked his probation because of alleged probation violations that occurred after Sebastian believed that his probation term had ended.

We affirm but remand for clarification consistent with this opinion.

Facts and Procedural History

On November 2, 2000, Sebastian pleaded guilty to three counts of Class C felony burglary. That same day, the trial court accepted the guilty plea and sentenced Sebastian to six years on each count, to be served consecutively to each other, with ten years executed and eight years suspended. After Sebastian served his executed sentence, he was released and began probation on August 14, 2003. Restitution was paid in full on March 19, 2004.

On March 3, 2008, a petition to revoke suspended probation was filed alleging that Sebastian committed various crimes in violation of his probation and that he had tested positive for amphetamines. Sebastian moved to dismiss the petition on the grounds that his probation period had ended prior to the alleged violations. The trial court denied the motion after determining that the trial court's intent, at the time of sentencing, was to put Sebastian on probation for eight years or until restitution was paid in full, whichever came later. Following a number of continuances, a probation revocation hearing was held on November 12, 2009. The trial court determined that Sebastian had violated his probation and ordered that Sebastian serve the entire previously suspended eight-year sentence to be served in the Department of Correction. Sebastian now appeals.

Discussion and Decision

Sebastian argues that the trial court abused its discretion when it revoked his probation based on probation violations that occurred after his probationary term expired.[1] When reviewing an appeal from the revocation of probation, we consider only the evidence most favorable to the judgment, and we will not reweigh the evidence or judge the credibility of the witnesses. Piper v. State, 770 N.E.2d 880, 882 (Ind. Ct. App. 2002), trans. denied. We review the trial court's revocation of probation for an abuse of discretion. Sanders v. State, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. Rosa v. State, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005).

Sebastian and the State agreed to the following guilty plea:

> The Defendant will withdraw his former plea of not guilty to Count I, II, and III Burglary, Class C Felonies, in Cause No. 14D01-9812-CF-857 and enter his plea of guilty and the State of Indiana will recommend that he receive a sentence of six years on each Count to be served consecutive to each other and concurrent to his sentence received in Vigo County. . . . Eighteen years total, ten (10) to be executed and eight (8) to be suspended. Defendant to pay restitution, the amount to be determined by the Daviess County Probation Department. . . .

Appellant's App. pp. 81-82. Sebastian, the deputy prosecutor, and Sebastian's counsel signed the agreement. Appellant's App. p. 83.

At the sentencing hearing the trial court stated, "Defendant is to be placed on supervised probation for a period of eight years or until his restitution is paid in full

[1] Sebastian does not challenge the trial court's finding that he had violated his probation for having burglary charges filed against him because the evidence showed that he committed burglary and Sebastian admitted to pleading guilty to the charge. He only challenges the trial court's determination that he was on probation at the time of his violations and therefore subject to probation revocation.

whichever is later." Tr. p. 12 (emphasis added.) The written sentencing statement states that Sebastian "is to be placed on supervised probation for a period of eight years under the following terms and conditions. Court enters Order of Probation. (Here copy)" Appellant's App. p. 85. The written order of probation states, "The Court . . . placed the defendant on supervised for a period of 8 YEARS OR UNTIL RESTITUTION IS PAID IN FULL. . . ." Appellant's App. p. 86 (emphasis in original). Obviously, the trial court made three different statements concerning the details of Sebastian's probation.

It is important to note at the outset that when Sebastian walked out of the courtroom after his sentencing, he had agreed to a probation term of eight years and had actual notice of the length of that term, both from the agreement he personally signed and by his sentencing in open court, albeit the latter in less than clear language (*". . . whichever is later*).

The general rule in Indiana when addressing the issue of conflicting statements by trial courts is:

> Rather than presuming the superior accuracy of the oral statement, we examine it alongside the written sentencing statement to assess the conclusions of the trial court. This Court has the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing. This is different from pronouncing a bright line rule that an oral sentencing trumps a written one.

McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007) (citation omitted). In its oral sentencing statement, the trial court specifically stated that the probation term was "eight years or until his restitution is paid in full whichever is later." Tr. p. 12. The written sentencing statement does not mention restitution but specifically incorporates the order

of probation which mentions restitution payment in its recitation of the sentence and imposes restitution as a condition of probation. Appellant's App. pp. 85-88.

In the case before us, it is the recitation of Sebastian's sentence in the order of probation that has been cited as the grounds for Sebastian's claim that his probation ended March 4, 2004, when he had paid restitution in full, and not August 14, 2011, eight years after he was released to probation. Neither the oral sentencing statement nor the written sentencing statement can be read to support Sebastian's claim that his probation would end upon payment of restitution. Even where the order of probation makes restitution a condition of probation, that specific condition does not mention termination of probation upon payment of restitution. Appellant's App. p. 88.

In addition, it is well settled law that a judge cannot impose a sentence that does not conform to the mandate of the relevant statutes. Mitchell v. State, 659 N.E.2d 112, 115 (Ind. 1995). "A sentence that is contrary to or violative of a penalty mandated by statute is illegal in the sense that it is without statutory authorization." Lane v. State, 727 N.E.2d 454, 456 (Ind. Ct. App. 2000) (citing Rhodes v. State, 698 N.E.2d 304, 307 (Ind. 1998)). Further, "[a] sentence that exceeds statutory authority constitutes fundamental error" and is "subject to correction at any time." Id. (citations omitted); see also Weaver v. State, 725 N.E.2d 945, 948 (Ind. Ct. App. 2000) ("[A] sentence that violates express statutory authority is facially defective.).

The statute generally governing probation terms at the time of Sebastian's sentencing was Indiana Code section 35-50-2-2(c). That section states that "whenever the court suspends a sentence for a felony, it shall place the person on probation under IC 35-

38-2 *for a fixed period* to end not later than the date that the maximum sentence that may be imposed for the felony will expire." (Emphasis added). The State argues that the trial court's written sentencing statement in the case before us does not conform to Indiana Code section 35-50-2-2, and we agree.

If a period of probation is dependent upon the date that the restitution is paid, then it is not a fixed period of probation but rather, an indeterminate period of probation that is not authorized by statute. The trial court's oral statement and written order of probation violate the statutory prohibition on indeterminate sentences; because, as sentenced, Sebastian could have remained on probation indefinitely under either the statement or the order if he did not pay restitution as required. The fact that Sebastian paid the restitution early in his probation term does not rehabilitate the illegal portion of the trial court's original sentence. As such, the language connecting the payment of restitution to probation in any way is void because it creates an illegal indeterminate sentence which is forbidden in Indiana Code section 35-50-2-2(c).

Trial courts have the power and duty to correct an erroneously imposed sentence. Lockhart v. State, 671 N.E.2d 893, 904 (Ind. Ct. App. 1996). However, the power to correct extends only to the illegal portion of the sentence. State ex rel. Pub. Serv. Comm'n v. Johnson Circuit Court, 232 Ind. 501, 509, 112 N.E.2d 429, 432 n.3 (1953) (the rule in criminal cases is that, if judgment is in part beyond the power of the court to render, it is void as to the excess). Upon remand, the trial court is compelled to follow the mandate of the remand order. Jordan v. State, 631 N.E.2d 537, 538 (Ind. Ct. App. 1994).

Under the unique facts and circumstances before us, the trial court did not abuse its discretion when it revoked Sebastian's probation. However, we remand to the trial court with instructions to correct the illegal portion of the erroneously imposed sentence in all relevant orders.

Affirmed.

RILEY, J., and BRADFORD, J., concur.