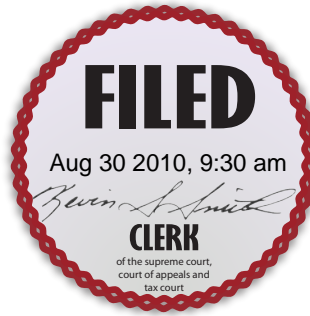


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CARL LEE GARY,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 20A03-1004-CR-176
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Evan S. Roberts, Judge
Cause No. 20D01-0601-FC-20

August 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

This case involves a plea agreement pertaining to charges originally filed against Carl Lee Gary under three separate cause numbers. Under 20D01-0601-FC-20 (FC-20), Gary was charged with three counts of Forgery,¹ all as class C felonies; under 20D01-0605-FC-84 (FC-84), he was charged with, among other things, dealing in a sawed-off shotgun as a class D felony and domestic battery as a class A misdemeanor; and under 20D01-0601-FD-7 (FD-7), he was charged with two counts of intimidation, one as a class D felony and one as a class C felony, carrying a handgun without a license as a class A misdemeanor, pointing a loaded firearm as a class D felony, and possession of a firearm after a previous felony conviction, as a class C felony. Ultimately, Gary pleaded guilty, pursuant to a plea agreement, of three counts of forgery under FC-20, and dealing in a sawed-off shotgun and domestic battery as a class A misdemeanor under FC-84. Following his guilty plea, the trial court sentenced Gary to aggregate terms of sixteen years in prison, with five years suspended for FC-20 and four years for FC-84. Gary appeals his sentence,² presenting the following restated issue for review: Did the trial court contravene the sentence cap agreed to in the plea agreement when it ordered Gary to serve sixteen years in the Department of Correction after revoking his community corrections placement?

We affirm.

As set out above, Gary was charged with multiple offenses in three separate proceedings under three separate cause numbers. He entered into a plea agreement with the

¹ Ind. Code Ann. § 35-43-5-2(b)(1) (West, Westlaw through 2010 2nd Regular Sess.).

² This appeal arises from FC-20.

State whereby he agreed to plead guilty to three counts of forgery under FC-20, and dealing in a sawed-off shotgun as a class D felony and domestic battery as a class A misdemeanor under FC-84. In exchange, the State agreed to dismiss all remaining charges. With respect to sentencing, the agreement provided as follows: “1. Total executed cap of twenty (20) years for the sentences in both 20D01-0601-FC-20 and 20D01-0605-FC-84; and 2. All other terms are left to the discretion of the Court.” *Appellant’s Appendix* at 81.

On November 8, 2006, at the combined sentencing hearing for cause numbers FC-20 and FC-84, both of which were resolved by the plea agreement, the trial court sentenced Gary to eight years for each of the three forgery convictions, with Counts I and II to be served concurrently to each other, but consecutively to Count III. The court suspended five years of the sentence for Count III to probation. With respect to Gary’s convictions under FC-84, the court sentenced him to three years for the shotgun conviction and one year for the domestic battery conviction, with those sentences to run consecutively to each other and to the sentences imposed in FC-20. The trial court summarized the sentence as follows:

Pursuant to the terms of the plea agreement, I’m going to sentence you to twenty years’ incarceration. Of that twenty years, I’m going to suspend five years of that executed sentence, which means your total sentence will be fifteen years. The five years that are suspended, you will be put on reporting probation[.]

Transcript at 44.

On December 27, 2007, Gary filed a petition for sentence modification, asking the court to “place him in a home detention program for the remainder of the executed portions of his sentence.” *Appellant’s Appendix* at 140. The trial court granted the petition on January 28, 2008 and sentenced Gary to the East Race Community Corrections Center. On

August 18, 2008, the trial court entered an order clarifying its January 28 ruling, *viz.*, “On 1/28/2008, Court modified the EXECUTED portion of the sentence to Home Detention through East Race. Upon defendant’s release from Home Detention, he is placed on reporting probation for 5 years to satisfy the SUSPENDED portion of the sentence.” *Id.* at 156.

Beginning on January 26, 2009, East Race filed several notices against Gary of violations of community corrections rules. Gary admitted those violations at an October 12, 2009 hearing, after which the trial court entered an order providing, in part, as follows: “Court revokes the original suspended sentence, orders defendant to serve 16 years in Department of Corrections.” *Id.* at 186. The court ordered the probation department to submit a report indicating the appropriate credit time. That report was submitted on October 16, 2009 and indicated that Gary had completed serving his sentence in FC-84 on April 29, 2008 and began serving his sentence for FC-20 the next day. On November 9, Gary submitted the following handwritten letter to the trial court:

I would like to inform the courts that I would like to appeal the sentence I received on October 12. Im [sic] in the process of [hiring] a different lawyer, I just would like for this to be filed in court before my 30 day deadline.

Id. at 193.³ In response to the letter, the court held a status hearing on November 30, 2009 and appointed an attorney to represent Gary in this matter. On December 28, 2009, Gary filed a formal notice of appeal.

Gary contends that the trial court abused its discretion in ordering him to serve sixteen

years in the Department of Correction after it revoked his community corrections placement. He contends this contravened the provision of his plea agreement calling for a cap of twenty years executed time.

For purposes of appellate review, we treat a hearing on a petition to revoke a placement in a community corrections program the same as we do a hearing on a petition to revoke probation. *Monroe v. State*, 899 N.E.2d 688 (Ind. Ct. App. 2009) (citing *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999)). The similarities between the two dictate this approach. *Id.* Both probation and community corrections programs serve as alternatives to commitment to the DOC and both are made at the sole discretion of the trial court. *Id.* A defendant is not entitled to serve a sentence in either probation or a community corrections program. *Id.* Rather, placement in either is a “matter of grace” and a “conditional liberty that is a favor, not a right.” *Id.* at 549 (quoting *Million v. State*, 646 N.E.2d 998, 1002 (Ind. Ct. App. 1995) (internal quotation omitted)). Thus, our standard of review of an appeal from the revocation of a community corrections placement mirrors that for revocation of probation. *Monroe v. State*, 899 N.E.2d 688.

We review a trial court’s sentencing decision in a probation revocation proceeding for an abuse of discretion. *Abernathy v. State*, 852 N.E.2d 1016 (Ind. Ct. App. 2006). An abuse of discretion occurs if the trial court’s decision is against the logic and effect of the facts and circumstances before it. *Id.* Generally, as long as the trial court follows the procedures outlined in Ind. Code Ann. § 35-38-2-3 (West, Westlaw through 2010 2nd

³ We note that on cross-appeal, the State contends this case is not properly before us because Gary did not timely file his notice of appeal. This court ruled on April 30, 2010, that Gary timely filed a notice of appeal

Regular Sess.), it may properly order execution of a suspended sentence. *Abernathy v. State*, 852 N.E.2d 1016. Gary does not challenge the finding that he violated the conditions of his community corrections placement or indeed even the fact that such placement was revoked. Rather, he challenges the decision to execute all sixteen years of the sentence under FC-20.

We pause here to address what might arguably be a challenge to the trial court's award of credit time. Gary received a twenty-year sentence, an aggregate of sixteen years for the convictions in FC-20 and an aggregate four years for his convictions in cause number FC-84. Five years of the former sentence was suspended to probation. At the time of revocation, according to the memorandum submitted by the probation department, Gary had completed serving his sentence for FC-84. Thus, we are concerned primarily with the sentence for FC-20. According to the memorandum, Gary began serving his sentence in FC-20 on April 30, 2008. On July 25, 2008, he was released from the Department of Correction and on July 30, 2008, he began serving the remainder of his executed sentence through East Race on home detention. He was terminated from East Race on August 11, 2009. Between April 30 and July 25, 2008, Gary served 87 days toward his sentence in FC-20. Prior to that, Gary had served one day toward his sentence in FC-20 when he was sentenced on November 8, 2006. He next served his sentence at East Race from July 30, 2008 to August 11, 2009 – a total of 377 days. He was thereafter arrested on September 8, 2009 and incarcerated until he appeared in court on October 12, 2009. The latter period of incarceration spanned 34 days. Thus, at the time of revocation on October 12, 2009, Gary had served 122 (1 plus 87 plus 34) days in confinement, for which he was entitled to receive 122 days of good-time credit, and

with the trial court on November 9, 2009. We decline to revisit that ruling.

377 days at East Race (for which he was not entitled to receive good-time credit, *see Purcell v. State*, 721 N.E.2d 220 (Ind. 1999)). The foregoing is all of the credit time to which Gary was entitled as of October 12, 2009, and is precisely what the trial court awarded to him. There is no error in the award of credit time.

We now continue to Gary's primary argument, which is that the sentence imposed by the trial court violated the plea agreement provision calling for a cap of twenty years executed time. The trial court accepted the plea agreement and in conformity with its terms, ordered Gary to serve a twenty-year executed sentence with five years of that suspended to supervised probation. Accordingly, the trial court's initial sentence complied with the terms of the plea agreement. Pursuant to the plea agreement, it was within the trial court's discretion to order alternative placement such as community corrections or probation. Thus, Gary implicitly agreed to comply with the terms of any such placement or probation and to the imposition of sanctions or consequences for the violation thereof. *See Abernathy v. State*, 852 N.E.2d 1016. On January 28, 2008, the trial court modified Gary's sentence and placed him on home detention.

After more than a year, however, Gary admitted that he had violated those conditions. Thus, upon Gary's violation of East Race's conditions, the trial court was required to look to the terms of the probation revocation statute for the potential consequences to be imposed therefore. Pursuant to I.C. § 35-38-2-3(g), three sanctions are available to the trial court for such violations: 1) continue the alternative placement with no modifications to the conditions; 2) extend the probationary period; or 3) order execution of all or part of the sentence that was suspended at the time of initial sentencing. Accordingly, when the trial

court ordered Gary to serve out his alternative sentence, including the five years originally suspended to probation, it was acting within the statutory authority of available sanctions for violations of community corrections placement. *See Abernathy v. State*, 852 N.E.2d 1016. “The mere fact that [Gary] had a plea agreement which controlled at the time of initial sentencing in no way modified the trial court’s statutory authority under Ind.Code § 35-38-2-3(g)(3) to order execution of a suspended sentence following a probation violation.” *Id.* at 1021.

In summary, the initial sentence the trial court imposed was in conformity to the terms of the plea agreement in all respects. The imposition of the previously suspended sentence was a consequence of Gary’s violation of the terms of his initial sentence, which included alternative placement. Viewed thus, it was Gary’s violation of East Race’s terms that resulted in the statutorily authorized sanctions against him. *Cf. Chism v. State*, 807 N.E.2d 798 (Ind. Ct. App. 2004) (if probation is ordered pursuant to a guilty plea, the defendant is bound by the plea agreement and must submit to the terms of probation; otherwise, the defendant has breached the plea agreement).

Judgment affirmed.

BARNES, J., and CRONE, J., concur.