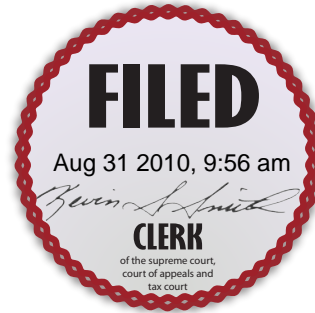


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JUSTIN SPARKS,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 48A02-0911-CR-1105

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0905-FD-76

August 31, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Justin Sparks appeals the sentence imposed on revocation of his probation. Finding no abuse of discretion, we affirm.

FACTS AND PROCEDURAL HISTORY

On May 11, 2009, the State charged Sparks with Class D felony strangulation¹ and Class A misdemeanor battery.² On June 16, 2009, Sparks entered a plea of guilty to battery, and the State dismissed the felony strangulation charge. Sparks waived the pre-sentence investigation and agreed to be sentenced that day. The court entered a one-year sentence, to be served as sixty days executed at work release and ten months on probation.

On August 17, 2009, the State filed a notice of probation violation alleging Sparks had committed new criminal offenses and tested positive for marijuana use. The court heard evidence and ordered:

Court found Defendant violated the conditions of suspended/executed sentence as follows: 1) failed to behave well in society: on/about 8-6-09, defendant committed a new criminal offense of Possession of Cocaine and Possession of Marijuana; and 2) on/about 8-5-09, Defendant submitted a urine specimen to the Community Justice Center which tested positive for the presence of marijuana.

Hearing as to sanctions had and concluded. Based upon the admissions of the Defendant and the findings of the Court, the following sanction is imposed: One (1) year of the previous sentence is revoked and ordered executed at the Indiana Department of Correction. Defendant shall be allowed to facilitate an inpatient treatment program for the last ninety (90) actual days of his executed sentence.

(Amended App. of the Appellant (hereinafter “App.”) at 14.)³

¹ Ind. Code § 35-42-2-9.

² Ind. Code § 35-42-2-1.

³ When Sparks committed battery, he was on probation for a prior offense. At the sentencing for battery on June 16, 2009, the trial court revoked the prior probation and ordered Sparks to serve the battery sentence

DISCUSSION AND DECISION

Probation is a matter of grace that may be granted at the trial court's discretion and to which a criminal defendant has no right. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). Trial courts determine the conditions of probation and may revoke probation if those conditions are violated. *Id.* Trial judges "have considerable leeway in deciding how to proceed" so they will not be hesitant to offer probation to future defendants. *Id.* We review the court's decision for an abuse of discretion and may reverse only "where the decision is clearly against the logic and effect of the facts and circumstances" that were before the trial court. *Id.*

As Sparks notes, "a probationer may challenge the reasonableness of the executed portion of the previously suspended sentence in view of the nature of the violations and the character of the offender." *Stephens v. State*, 818 N.E.2d 936, 939 (Ind. 2004). This does not mean, however, that we may usurp the trial court's discretion by revising a sentence we find "inappropriate in light of the nature of the offense and character of the offender," Ind. Appellate Rule 7(B), because that standard does not apply to "a sentence imposed for a probation violation." *Prewitt*, 878 N.E.2d at 188.

Sparks asserts the trial court abused its discretion because this was his "first probation violation," (Br. of Appellant at 6), the violations "were non-violent and consisted only of

consecutive to one-year of executed time remaining on the old sentence. Thus, when the court revoked probation in October 2009, Sparks had not yet begun serving his sentence for battery and the entire sentence for battery -- one year -- was available for revocation. At that October revocation, Sparks had two months remaining on the first sentence, but the trial court decided: "although there is time remaining that Mr. Sparks could be sanctioned for under the FB-230 Cause Number, we're going to close that case out and no additional sanction under that." (Tr. at 93.)

drug-related offenses,” (*id.*), and he admitted and requested help with his addictions and mental health issues.

Sparks is correct that this revocation resulted from the first petition the State filed under this cause number, but it was not Sparks’ “first probation violation.” (*Id.*) Sparks was serving probation for an earlier crime when he committed the battery underlying this probation, and this battery conviction resulted in revocation of that earlier probation. *See supra* fn.3. Thus, Sparks had violated probation before this petition.

Sparks is also correct that the new charges include “only . . . drug-related offenses.” (Br. of Appellant at 6.) However, these were not minor offenses. Sparks was charged with Class A felony dealing in cocaine⁴ and Class A misdemeanor possession of marijuana.⁵ He had 138 grams of marijuana in a lock-box in his car trunk, and in his backpack he had five baggies each containing .26 grams of crack cocaine packaged for individual sale, six baggies each containing two grams of marijuana, and digital scales. That amount of marijuana apparently would have permitted Sparks to be charged with a Class D felony rather than a Class A misdemeanor. *See* Ind. Code § 35-48-4-11. Sparks also violated his probation by testing positive for marijuana use.

Sparks did admit his addictions and mental illnesses and requested assistance with both, but the trial court was not required to impose a sentence of less than one year based on those facts. Sparks testified he was taking medication prescribed for his mental illnesses.

⁴ Ind. Code § 35-48-4-1.

⁵ Ind. Code § 35-48-4-11.

The trial court noted:

I know because Mr. Sparks was a part of Mental Health Court for a while that Mr. Sparks has some real serious mental health and substance abuse issues. Whether or not he is fully committed to dealing with that, I don't know, that's a decision he has to make and he did not sustain that commitment while he was in Mental Health Court as he knows.

(Tr. at 93-4.) Based on this history, the court ordered Sparks could spend the final ninety days of his sentence in an inpatient treatment facility if Sparks took the initiative to arrange it. As the court was aware Sparks had not followed through when such services were offered in the past, we cannot find an abuse of discretion in the court's refusal to again facilitate those services without knowing whether Sparks intended to take advantage of them.

In light of Sparks' history and probation violations, the trial court did not abuse its discretion when it ordered him to serve the one year that remained on his sentence for battery.

Accordingly, we affirm.

Affirmed.

BAILEY, J., and BARNES, J., concur.