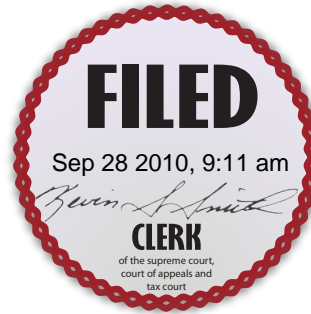


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL MYERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A01-1002-CR-82
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE VIGO SUPERIOR COURT  
The Honorable David R. Bolk, Judge  
Cause No. 84D03-0212-FB-3370

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September 28, 2010

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Michael Myers appeals the revocation of his probation. Myers raises two issues, which we revise and restate as whether the trial court abused its discretion by ordering Myers to serve the remaining four years of his previously suspended sentence.<sup>1</sup> We affirm.

The facts most favorable to the probation revocation follow. On April 14, 2003, Myers pled guilty to armed robbery as a class B felony and was sentenced to ten years in the Department of Correction with four years suspended to probation. On April 25, 2008, he was released to probation. On May 5, 2008, Myers signed the enumerated terms and conditions of his probation that contained in part the following provisions:

1. I will follow a course of good conduct and behavior, and will not violate any laws or city ordinances.

\* \* \* \* \*

7. . . . I will not possess or use any controlled substance except as prescribed by a licensed medical practitioner.

\* \* \* \* \*

9. I will report in person to the Adult Probation office by the 15<sup>th</sup> of each month, and at any other time upon a 24-hour notice.

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<sup>1</sup> Myers also asks this court to revise his sentence under Ind. Appellate Rule 7(B). However, the Indiana Supreme Court has held that “[a] trial court’s action in a post-sentence probation violation proceeding is not a criminal sentence as contemplated by [Rule 7(B)]” and that thus “[t]he review and revise remedy of [Rule 7(B)] is not available.” Jones v. State, 885 N.E.2d 1286, 1290 (Ind. 2008) (citing Prewitt v. State, 878 N.E.2d 184, 187-188 (Ind. 2007)). “[R]ather than the independent review afforded sentences under [Rule 7(B)], a trial court’s sentencing decisions for probation violations are reviewable using the abuse of discretion standard.” Milliner v. State, 890 N.E.2d 789, 793 (Ind. Ct. App. 2008) (citing Prewitt, 878 N.E.2d at 188), trans. denied. Accordingly, we decline Myers’s invitation to review his sentence under Appellate Rule 7(B).

Appellant's Appendix at 14-15. The document listing the enumerated terms and conditions and signed by Myers contained the acknowledgment: "If it shall appear that I have violated the terms of my probation or have been charged with having committed another offense, the Court may revoke the suspension of sentence and may impose the sentence which has been originally imposed." Id. at 16.

On February 10, 2009, Myers submitted to a drug test and tested positive for amphetamines and benzodiazophine. Myers submitted to another drug test on February 13, 2009 and again tested positive for amphetamines. Myers had not been prescribed either drug. Then, on February 17, 2009, Myers did not appear at a scheduled meeting with his probation officer in which he was to submit to another drug screen.<sup>2</sup> After Myers did not appear, Steven Bell, Myers's probation officer, phoned Myers and Myers's brother and wrote Myers a letter, but Myers never responded to Bell.

On June 26, 2009, Bell filed a Notice of Probation Violation citing Myers's failed drug tests and the missed appointment on February 17, 2009, and on July 7, 2009 an Amended Notice of Probation Violation was filed making the same allegations. A warrant was issued pursuant to the notices of violation, and Myers was arrested. At some point, the trial court agreed to place Myers in the Fellowship House, which was "a halfway house sponsored by Recovery Associates . . . and receive I.O.P. treatment," but

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<sup>2</sup> We note that Steven Bell, Myers's probation officer, testified that he had not yet received the results of the drug screens Myers submitted to on February 10 and February 13 of 2009 before Myers's February 17, 2009 appointment.

after about three weeks at Fellowship House Myers absconded. Probation Revocation Transcript at 16-17.

On December 29, 2009, Bell filed a Third Amended Notice of Probation Violation which alleged, in addition to the allegations contained in the previous notices of violation:

C.) Being charged in Vigo County Superior Court Division 3 on December 10, 2009 with Count 1: Possession of Marijuana, Class A Misdemeanor and Count 2: Possession of Marijuana, Class D felony . . .

**D.) Being released from Vigo County Jail on the condition of entering The Fellowship House on 9/18/09 and complying with all rules and treatment recommendations. Leaving said Fellowship House on 10/16/09 against the advice of counselors and absconding from all programs there.**

Appellant's Appendix at 19. On January 8, 2010, Bell filed a Fourth Amended Notice of Probation Violation containing the additional allegation that Myers had been charged on January 6, 2010 with theft as a class D felony and possession of a controlled substance as a class D felony.

On January 21, 2010, the trial court held a probation revocation hearing. At the hearing, Myers admitted to using methamphetamines and benzodiazophine in February of 2009. Myers also admitted failing to show for his February 17, 2009 appointment with Bell. On February 4, 2010, the trial court revoked Myers's probation and ordered that he serve "the balance of the four (4) years" that had previously been suspended. Probation Revocation Sentencing Hearing Transcript at 6. The court noted in revoking Myers's probation:

[I]t's clear and I'm not telling you anything that you don't know, that you've got a serious, serious drug addiction problem. The Court has afforded you numerous opportunities to try to help yourself, and unfortunately you've not been able to avail yourself of those opportunities. I think the Court really has very little choice in this matter . . . .

Id.

The sole issue is whether the trial court abused its discretion by ordering Myers to serve the remaining four years of his previously suspended sentence. Myers argues that “the imposition of the maximum possible penalty is excessive, in view of the facts and circumstances presented in this instance. After all, [he] had successfully completed 1 year of probation. In imposing penalty for the Probation Violation, [he] should get some consideration for having successfully completed 1 year . . . .” Appellant’s Brief at 9.

Ind. Code § 35-38-2-3(g) sets forth a trial court’s sentencing options if the trial court finds a probation violation. The provision provides:

If the court finds that the person has violated a condition at any time before termination of the period, the court may impose one (1) 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) (Supp. 2008) (subsequently amended by Pub. L. No. 106-2010 § 11 (eff. July 1, 2010)). Ind. Code § 35-38-2-3(g) permits judges to sentence offenders

using any one of or any combination of the enumerated options. Prewitt v. State, 878 N.E.2d 184, 187 (Ind. 2007).

The Indiana Supreme Court has held that a trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. Id. at 188 (citation omitted). The Court explained that "[o]nce a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed" and that "[i]f this discretion were not afforded to trial courts and sentences were scrutinized too severely on appeal, trial judges might be less inclined to order probation to future defendants." Id. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. Id. (citation omitted). As long as the proper procedures have been followed in conducting a probation revocation hearing, "the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence." Goonen v. State, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999).

Here, less than a year after being released to probation, Myers tested positive on February 10, 2009 for amphetamines and benzodiazophine and again for amphetamines three days later on February 13. On February 17, Myers failed to show up for another drug screen. The trial court granted Myers's request that he be placed at the Fellowship House to receive treatment for his drug addiction, but Myers absconded from his treatment after about three weeks. Given the circumstances, we cannot say that the trial court abused its discretion in ordering Myers to serve the remaining four years of his

previously suspended sentence. See, e.g., Wilkerson v. State, 918 N.E.2d 458, 464 (Ind. Ct. App. 2009) (holding that the trial court did not abuse its discretion when it ordered the defendant to serve his entire previously-suspended sentence).

For the foregoing reasons, we affirm the trial court's order reinstating the remaining four years of Myers's previously suspended sentence.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.