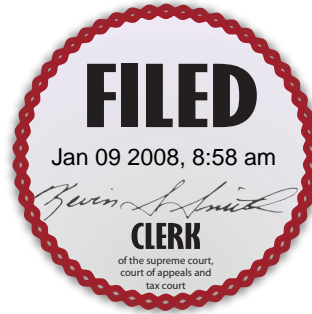


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

CHARLIE HERBST
Bunker Hill, Indiana

STEPHEN R. CARTER
Attorney General of Indiana
Indianapolis, Indiana

ARTHUR THADDEUS PERRY
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CHARLIE HERBST,)
)
 Appellant-Defendant,)
)
 vs.) No. 54A01-0706-CR-260
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Thomas Milligan, Judge
Cause No. 54C01-9402-CF-15

JANUARY 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Charlie Herbst (“Herbst”) belatedly appeals from the trial court’s order revoking the suspended portion of his sentence for Class B felony robbery.

We affirm.

ISSUE

The issue presented for our review is whether the trial court improperly revoked the suspended portion of Herbst’s sentence.

FACTS AND PROCEDURAL HISTORY

Herbst pled guilty to Class B felony attempted robbery while armed with a deadly weapon. He did not take a direct appeal of the sentencing order that was issued. Herbst filed a petition for post-conviction relief that sought to correct an erroneous sentence, and also filed a motion for clarification of the trial court’s sentencing statement. The motion for clarification was granted. Herbst was arrested on unrelated charges after his release from the Department of Correction, and the trial court revoked the suspended portion of Herbst’s sentence in this matter. Herbst filed another petition for post-conviction relief alleging that revocation of his suspended sentence was invalid due to trial court error in his original sentencing. That petition was denied, and Herbst appealed that denial. This court affirmed the denial, suggesting in a footnote that Herbst file a petition for permission to file a belated notice of appeal under Ind. Post-Conviction Rule 2 in order to seek review of that issue. The trial court granted Herbst permission to pursue the instant appeal. Herbst argues that the trial court erred by improperly revoking the suspended portion of his sentence.

DISCUSSION AND DECISION

In June of 1994, pursuant to a plea agreement, Herbst pled guilty to the Class B felony of attempted robbery while armed with a deadly weapon. Herbst's plea agreement called for a ten-year sentence, with a six-year cap on executed time. In accord with the terms of the plea agreement, Herbst was sentenced to six years executed and four years "on direct commitment to a community corrections program." Appellant's App. p. 10.

In April of 1997, Herbst, *pro se*, filed a post-conviction relief petition ("PCR"), which was subsequently amended in May of 1998, when a public defender appeared for Herbst. The trial court granted Herbst's request for a clarification of the prior sentencing statement and abstract of judgment. The trial court said in pertinent part as follows:

To the extent that there has been any confusion or misunderstanding concerning the court's use of the term direct commitment, it should be clear that it was the court's intention that successful completion of the Community Corrections program is the term of probation affecting the defendant's suspended sentence.

Appellant's App. p. 46. Herbst was released from the Department of Correction on the same day the order was issued. Herbst never reported to a community corrections program. In December of 1999, Herbst was arrested on unrelated charges committed in Benton County.

In January of 2000, the State filed a motion to revoke or modify the Community Corrections placement. In June of 2000, at a hearing on the motion to revoke or modify Community Corrections placement, Herbst admitted that he violated the terms and conditions of his community corrections placement by committing arson, burglary, forgery or attempted forgery, auto theft, obstruction of justice, and receiving stolen

property in Benton County. The trial court found that his suspended sentence should be revoked based upon the commission of crimes in Benton County.

In January of 2006, Herbst filed a second PCR, which the trial court denied. The trial court found that the second PCR was substantially the same as the first PCR. In pertinent part the trial court held:

“...it is clear that defendant was, in fact, on a suspended sentence for the four years following his executed six years. Finally, it is clear from the foregoing that defendant clearly committed and was convicted of committing several criminal offenses while he was on his suspended sentence.”

Appellant’s App. p. 11.

Herbst appealed to this court, and the trial court’s decision was affirmed. Thereafter, Herbst sought and was granted permission to belatedly file this appeal in order to address the issue.

In sum, Herbst argues that because the trial court originally characterized his sentence as a “direct commitment” to community corrections, Herbst was not on a suspended sentence. He asserts that the plea agreement capped the executed portion of his sentence at six years. Therefore, the trial court could not impose four years of community corrections after a term of six years at the Department of Correction. He claims that the four-year direct commitment was illegal, and an illegal sentence cannot be revoked. Herbst concludes his argument with the assertion that the revocation was improper.

The record reveals that the trial court, upon clarification, stated that the successful completion of the community corrections program was a condition of Herbst’s probation

affecting the suspended sentence. Appellant's App. p. 11. Herbst appeared at the initial hearing on the revocation petition and stated that he was "sentenced to ten years, four suspended." Tr. at 4. At the disposition hearing, Herbst's counsel did not object to an amendment of the revocation petition to read "in light of the court's ruling that should read he was assigned to West Central Regional Community Corrections as a term of probation rather than as a direct commitment." Rev. Tr. at 3. Therefore, the parties treated the four years as suspended or suspended subject to probation.

The trial court concluded that case law seems to allow for a situation where a person is on a suspended sentence, but not necessarily on probation. Appellant's App. 14. A convicted person free under a suspended sentence, but not on probation, is not subject to supervisory control and his suspension can be revoked only if he is found guilty of another offense. *See Gash v. State*, 258 Ind. 496-97, 283 N.E.2d 349, 356 (1972) (DeBruler, J., concurring). The trial court noted this observation in its order on the PCR petition. However, *Gash* has been overruled by *Hoffa v. State*, 267 Ind. 133, 135 368 N.E.2d 250, 252 (1977) to the extent it requires that the revocation be supported by a *conviction* of a new offense. The trial court can hear evidence of the commission of a new offense and determine if it rises to the level required for a revocation. *Id.* If a conviction does precede the revocation hearing, then the conviction is *prima facie* evidence of unlawful conduct and will alone support the revocation. *Id.* Here, Herbst was convicted of the subsequent offenses prior to the revocation hearing.

We agree with the trial court's reasoning that not committing further crimes is a condition of any suspended sentence or probation whether the defendant is specifically

informed of such or not. *See Boyd v. State*, 481 N.E.2d 1124, 1127 (Ind. Ct. App. 1985). Good behavior attaches as a matter of law to all suspensions. *Gash*, 283 N.E.2d at 354. Good behavior by necessity means lawful conduct, including abstaining from criminal acts. *Id.* Revocation of a suspended sentence solely by reason of the commission of another crime is proper. *See Hoffa*, 368 N.E.2d at 252. The State had evidence of Herbst's convictions in Benton County, and Herbst admitted he committed the offenses used to revoke his suspended sentence.

Therefore, we conclude that revocation of Herbst's suspended sentence was proper. The State was specific in its pursuit of revocation on the grounds of the new convictions, as opposed to a failure to report to community corrections or to abide by the terms of that placement. Herbst admitted to committing the new offenses.

CONCLUSION

The trial court did not err by revoking the suspended portion of Herbst's sentence.

Affirmed.

MAY, J., and MATHIAS, J., concur.