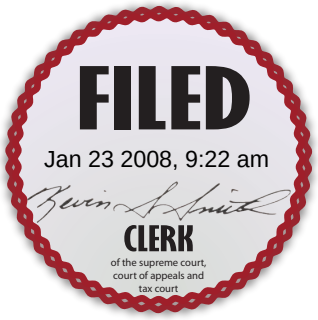

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IN THE COURT OF APPEALS OF INDIANA

BROCK TAMSETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A04-0705-CR-273
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Vorhees, Judge
Cause No. 18C01-0411-FC-46

January 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Brock Tamsett appeals the trial court's revocation of his probation. Tamsett raises one issue, which we revise and restate as whether the trial court abused its discretion by ordering him to serve the remainder of his six-year sentence due to his probation violations. We affirm in part, reverse in part, and remand.[1]

In December 2005, Tamsett pleaded guilty to sexual misconduct with a minor as a class C felony[2] and three counts of conversion as class A misdemeanors[3] for offenses under three different cause numbers. In a consolidated sentencing, the trial court sentenced Tamsett to serve an aggregate sentence of six years in the Indiana Department of Correction with four years suspended to supervised probation. Tamsett was also ordered to pay restitution, court costs, and probation user fees.

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[1] Tamsett included a copy of the presentence investigation report on white paper in his appendix. See Appellant's Appendix at 39. We remind Tamsett that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
>
> (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

[2] Ind. Code § 35-42-4-9 (2004).

[3] Ind. Code § 35-43-4-3 (Supp. 2005).

In December 2006, the Delaware County Probation Department filed a petition to revoke Tamsett's supervised probation. The Probation Department alleged that Tamsett had been arrested for battery by means of a deadly weapon as a class C felony[4] and had failed to pay court costs, restitution, and probation user fees. Tamsett admitted to the violations alleged in the petition to revoke his probation. The trial court sentenced Tamsett to serve the entire six-year sentence with credit for time served.

The issue is whether the trial court abused its discretion by ordering him to serve the remainder of his six-year sentence due to his probation violations. First, we note that Tamsett argues that his sentence is "manifestly unreasonable." Before January 1, 2003, Ind. Appellate Rule 7(B) provided: "The Court shall not revise a sentence authorized by statute unless the sentence is *manifestly unreasonable* in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B) (emphasis added). Today, the same rule provides: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is *inappropriate* in light of the nature of the offense and the character of the offender." (emphasis added). We no longer apply the "manifestly unreasonable" standard.[5] Thus, we take Tamsett's argument to mean that his sentence is inappropriate.

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[4] Ind. Code § 35-42-2-1 (Supp. 2005).

[5] The change in language is not simply a matter of semantics. Patterson v. State, 846 N.E.2d 723, 730 n.7 (Ind. Ct. App. 2006). The Indiana Supreme Court's revision to the rule "changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005).

Second, we note that his argument is not appropriate in probation revocation proceedings. We held in Sanders v. State, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), trans. denied, that "the standard of review used when reviewing whether a defendant's probation revocation sentence is unreasonable is an abuse of discretion" not whether the sentence is inappropriate under Ind. Appellate Rule 7(B). The Indiana Supreme Court recently agreed with Sanders in Prewitt v. State, __ N.E.2d __, __ 2007 WL 4395044 (Ind. 2007), and held that the proper standard of review of a trial court's probation revocation sentencing decision is abuse of discretion. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. Prewitt, __ N.E.2d at __.

Tamsett seems to argue that the trial court should have considered certain mitigators, including the fact that he was molested as a child, his young age, and the fact that he has a young child to support. Ind. Code § 35-38-2-3(g) governs the revocation of probation and provides:

> If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may:
> (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; or
> (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 does not require a trial court to balance aggravating and mitigating circumstances when considering sentencing upon a finding of probation violation. Mitchell v. State, 619 N.E.2d 961, 963 (Ind. Ct. App. 1993), overruled in part by Patterson v. State, 659 N.E.2d 220, 223 (Ind. Ct. App. 1995) (holding that a trial court should consider a probationer's mental health in a probation revocation proceeding). "[S]o long as the proper procedures have been followed in conducting a probation revocation hearing pursuant to Indiana Code Section 35-38-2-3, 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).

The trial court here emphasized that Tamsett was given the opportunity on probation to do the mental health counseling, drug and alcohol abuse counseling, and anger management classes that he was now asking to do. Rather than take advantage of the opportunities given to him, Tamsett committed another crime[6] and failed to pay court costs, restitution, and probation user fees as directed. Given Tamsett's probation violations, the trial court acted well within its discretion by ordering him to serve the remainder of his sentence. See, e.g., Prewitt, __ N.E.2d at __ (holding that the trial court did not abuse its discretion by ordering the probationer to serve two years of his previously suspended sentence and to receive treatment at Richmond State Hospital).

Although the trial court did not abuse its discretion in ordering Tamsett to serve the remainder of his sentence, the State correctly notes that the trial court's sentence does

not technically comply with the probation revocation statute. Ind. Code § 35-38-2-3 provides that the trial court may "order execution of all or part of *the sentence that was suspended* at the time of initial sentencing." (emphasis added). Tamsett was initially sentenced to six years in the Indiana Department of Correction with four years suspended to probation. Upon revoking Tamsett's probation, the trial court ordered him to serve "the entire six (6) year sentence" minus credit for time served rather than ordering him to serve only his sentence that had been suspended. Transcript at 21; Appellant's Appendix at 88. While it amounts to the same time of imprisonment, the trial court should have sentenced Tamsett to the four years that had been suspended minus any appropriate credit time. Accordingly, we reverse and remand for entry of an appropriate sentencing order.

For the foregoing reasons, we affirm in part, reverse in part, and remand the trial court's sentencing order in Tamsett's probation revocation.

Affirmed in part, reversed in part, and remanded.

BARNES, J. and VAIDIK, J. concur

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[6] Tamsett pleaded guilty and was scheduled for sentencing at the time of the probation revocation sentencing hearing.