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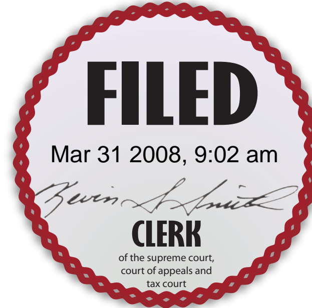

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IN THE COURT OF APPEALS OF INDIANA

SCOTT W. CHAPPELL, Appellant-Defendant, vs. STATE OF INDIANA, Appellee-Plaintiff.	)	No. 82A04-0707-CR-376

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Scott R. Bowers, Judge
Cause No. 82D02-9605-CF-430

March 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Scott W. Chappell asserts the trial court erred by revoking his probation and by ordering him to serve all ten years that originally had been suspended. We affirm.

FACTS AND PROCEDURAL HISTORY

In 1996, Chappell was charged with Class B felony criminal deviate conduct, Class B felony rape, and with being an habitual offender. A jury found him guilty of the two underlying crimes, and then he pled guilty to being an habitual offender. On August 29, 1997, the court pronounced the following sentence

> On Count I to the custody of the IDC for a period of twenty (20) years, with the first ten (10) years to be executed and the balance suspended to probation; on Count II, Defendant is sentenced to the custody of the IDC for a period of twenty (20) years, with the first ten (10) executed and the balance suspended to probation; sentence on Count II is to run concurrently with Count I; Defendant having been found to be an habitual offender, the Court imposes an additional ten (10) years to the aforesaid sentence, said enhancement to be served executed at the IDC and consecutive to sentence imposed in Counts I and II.

(App. at 11, 41-42.)

On April 13, 2007, the State petitioned the court to revoke Chappell's probation because he had committed another crime while on probation and because he was not attending the required therapy. At the hearing, Chappell admitted he pled guilty to a misdemeanor battery charge on April 11, 2007. (Tr. at 28.) April Mayberry testified she was the victim of a battery in January 2007 and Chappell pled guilty to committing that offense. Chappell also admitted he told his counselor he did not feel suited to the group he was to attend because "it was more for child molesters than it was for me." (*Id*. at 27.)

At the end of the hearing, the court stated:

> [I]n regard to the question of fees, without knowing exactly how much he's earning it's, the Court's not, really not comfortable with revoking on the basis of what is required there and by way of the fees, however; we do have the question of the cooperation with the counseling and based on the testimony and the counseling records it seems pretty clear that that was just blown off and that the defendant has failed to cooperate in regard to the sex offender counseling which he was required to comply with as a special condition of probation. Then in regard to the allegation in the . . . April petition, also, most seriously he's a rapist who's committed a violent crime against a women [sic] while on probation. It is a misdemeanor but that is, given the context of misdemeanor and the sentencing posture, an extremely egregious violation of the terms of probation.

(*Id*. at 39-40.) The court then revoked Chappell's probation and ordered him to serve the ten years that had been suspended on each of his B felony convictions.

DISCUSSION AND DECISION

1. Sufficiency of Evidence

Probation is a matter of grace, and the question at a probation revocation hearing is whether the probationer should remain conditionally free. *Gosha v. State*, 873 N.E.2d 660, 663 (Ind. Ct. App. 2007). Whether to revoke probation is left to the sound discretion of the trial court. *Kelnhofer v. State*, 857 N.E.2d 1022, 1023 (Ind. Ct. App. 2006). The State must prove any alleged violations by a preponderance of the evidence. *Id.* The violation of a single condition of probation justifies revocation of probation. *Gosha*, 873 N.E.2d at 663.

When we review a revocation, we must consider only the evidence favorable to the trial court's judgment without reweighing the evidence or reassessing the credibility of the witnesses. *Kelnhofer*, 857 N.E.2d at 1023. If substantial evidence of probative

value supports the trial court's decision, then we will affirm. *Id.*

At the revocation hearing, Chappell admitted he pled guilty to committing misdemeanor domestic battery while he was on probation. He called April Mayberry, who testified he committed battery against her, and pled guilty thereto, during his term of probation. This evidence is sufficient to sustain the revocation of Chappell's probation.[1] *See*, *e.g.*, *Gosha*, 873 N.E.2d at 664 (where defendant admitted four of seven alleged violations, evidence was sufficient to revoke).

2 Legality of Sentence

a. Indiana Code § 35-50-2-8[2]

When Chappell was sentenced in 1997, he received two concurrent twenty-year sentences for the Class B felonies. The court then stated he was to serve ten years for the habitual offender finding "consecutive" to those terms. As Chappell notes, this sentencing was erroneous, because the court should have attached the ten-year habitual offender sentence enhancement to one of the underlying sentences. *See Hazzard v. State*, 642 N.E.2d 1368, 1371 (Ind. 1994) (remanding for the trial court to attach enhancement to one underlying crime because habitual offender allegation is not a separate "conviction"). Nevertheless, we disagree with Chappell about the effect of this error.

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[1] Because that testimony was sufficient to revoke Chappell's probation, we need not address Chappell's arguments regarding the reliability and admissibility of the counseling reports and the docket sheet, or his claim the court "incorrectly considered non-payment of counseling fees in its decision to revoke." (Appellant's Br. at 12.)

[2] Ind. Code § 35-50-2-8 defines who is an habitual offender and the sentence enhancement an habitual offender may receive.

Chappell asserts the ten years of imprisonment he served prior to being released to probation, when day-for-day credit is applied, were the completion of his two concurrent twenty-year sentences for the Class B felonies. Because the habitual offender enhancement is not a separate conviction and was not attached to either of his underlying convictions, he continues, he cannot now be ordered to serve that ten-year enhancement because he was, in effect, discharged from the underlying crimes.

We find this argument illogical in light of the sentence ordered by the court. The court explicitly suspended ten years of each Class B felony sentence. Accordingly, Chappell served five years of imprisonment to satisfy the ten-year executed portions of each Class B felony conviction and then served five years of imprisonment to satisfy the ten-year habitual offender enhancement. His probation stemmed from the ten years suspended in the Class B sentences. Accordingly, the order he serve that suspended time does not violate Ind. Code § 35-50-2-8.

b. *Blakely v. Washington*

Chappell also alleges his sentence is illegal because the ten years the court ordered him to serve following revocation of probation are years of his original sentence that were ordered in violation of *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied* 542 U.S. 961 (2004). While those ten years are an enhancement over the presumptive sentence for a Class B felony, and thus might have been prohibited by *Blakely*, Chappell may not raise this argument on appeal from the revocation of probation.[3] *See Smylie v.*

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[3] Neither do we find any merit to Chappell's assertion this "sentence is much akin to a new sentence."

State, 823 N.E.2d 679, 690-91 (Ind. 2005) (*Blakely* applies "retroactively to all cases on *direct review* at the time *Blakely* was announced.") (emphasis added), *cert. denied* 546 U.S. 976 (2006).

CONCLUSION

Because all of Chappell's arguments fail, we affirm the revocation of his probation and the imposition of his ten-year suspended sentences.

Affirmed.

RILEY, J., and KIRSCH, J., concur.

(Appellant's Br. at 17.) While a trial court has discretion to determine how much of the previously suspended sentence to order executed, the court is not ordering a "new" sentence for the underlying crime. Rather, the court is removing from the defendant the privilege of conditional liberty he received at his initial sentencing. *See*, *e.g.*, *Sanders v. State*, 825 N.E.2d 952, 955 (Ind. Ct. App. 2005) ("Probation is a favor granted by the State, not a right to which a criminal defendant is entitled. . . . [P]robation revocation does not deprive a defendant of her absolute liberty, but only her conditional liberty . . . ."), *trans. denied* 841 N.E.2d 175 (Ind. 2005).