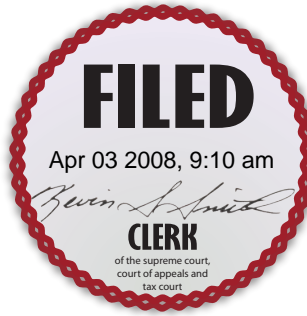


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JILL A. HAYDEN,)
)
Appellant-Defendant,)
)
vs.) No. 59A01-0709-CR-442
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ORANGE CIRCUIT COURT
The Honorable Kenneth L. Lopp, Special Judge
Cause Nos. 59C01-0408-FD-096, 59C01-0408-FD-087
59C01-0408-CM-086, and 59C01-0408-FB-084

April 3, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Jill A. Hayden (“Hayden”) appeals her reinstated sentences due to the revocation of her probation. We affirm.¹

Issues

Hayden raises two issues for review:

- I. Whether the trial court abused its discretion in reinstating her entire suspended sentences; and
- II. Whether the trial court erred in calculating her credit time.

Facts and Procedural History²

Pursuant to a plea agreement, Hayden was sentenced on December 20, 2005,³ to the following:

Plea of Guilty to Count 1 in FD-096 [Possession of Marijuana]
1 ½ years IDOC, all suspended but time served, concurrently with Count 2 but consecutively to all other causes

Plea of Guilty to Count 2 in FD-096 [Public Intoxication]
180 days OCJ, all suspended but time served, concurrently with Count 1 but

¹ A copy of the pre-sentence investigation report on white paper is included within the appellant’s appendix. We remind the parties that Ind. Appellate Rule 9(J) requires that “[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G).” Ind. Administrative Rule (G)(1)(b)(viii) requires 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 report on white paper in the appellant’s appendix is contrary to Trial Rule 5(G) that 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 We also remind Appellant’s counsel that Indiana Appellate Rule 50(A)(2) states that “[t]he appellant’s Appendix shall contain a table of contents.” (emphasis added).

³ We list the sentences imposed by referring to the language of the plea agreement because Hayden did not include the order for CM-086. The trial court accepted the plea agreement and thus, the agreement reflects the sentences imposed by the trial court.

consecutively to all other causes

Plea of Guilty to Residential Entry, a Class D Felony (lesser included offense) in FB-084

1 ½ years IDOC, all suspended but time served, consecutively to all other causes

Plea of Guilty to FD-087 [Residential Entry, as a Class D felony]

1 ½ years IDOC, all suspended but time served, concurrently with all other causes

Plea of Guilty to CM-086 [Trespass, a Class A misdemeanor]

1 year IDOC, all suspended but time served, consecutively to all other causes

Appellant's Appendix at 51-52. The aggregate of the sentences was four years imprisonment. On September 21, 2006, the State filed a petition to revoke Hayden's probation based on charges of theft, possession of marijuana, and public intoxication filed in Lawrence Superior Court. On April 13, 2007, Hayden admitted to the violation of her probation. The trial court revoked Hayden's probation in the four cause numbers, and the entirety of the original sentences was ordered executed and credit time was awarded.

Hayden now appeals.

Discussion and Decision

I. Reinstatement of Sentence

Hayden argues on appeal that the trial court's sentence was inappropriate because it failed to acknowledge some proposed mitigators. In making this argument, Hayden uses the standard of review from Indiana Appellate Rule 7(B). This is not the correct standard to apply when reviewing a sentence reinstated for a probation violation. Our Supreme Court recently explained:

Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled. Sanders v. State, 825 N.E.2d 952 (Ind. Ct. App. 2005). The trial court determines the conditions of probation and may revoke probation if the conditions are violated. Ind.Code Ann. § 35-38-2-3 (West 2007); Goonen v. State, 705 N.E.2d 209 (Ind. Ct. App. 1999). Once a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed. If 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. Accordingly, a trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. See Sanders, 825 N.E.2d at 956. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. Guillen v. State, 829 N.E.2d 142 (Ind. Ct. App. 2005).

Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). Under Indiana Code Section 35-38-2-3(g), if a court finds that a defendant has violated probation, the court may (1) continue probation, with or without modifying or enlarging conditions; (2) extend the probationary period for not more than one year beyond the original probationary period; or (3) order execution of all or part of the sentence that was suspended at the time of the initial sentencing.

Hayden does not dispute that the trial court acted within its statutory authority when it ordered her to serve the entire suspended sentences of the original four cause numbers. Rather, Hayden argues that the trial court's imposition of the entire previously suspended sentences was excessive because the trial court failed to recognize certain proffered mitigators. If the trial court finds that a probationer has violated his or her probation, it then must determine whether the violation warrants revocation. Parker v. State, 676 N.E.2d 1083, 1086, n.4 (Ind. Ct. App. 1997). Before making this determination, the probationer must be provided with the opportunity to present evidence that explains and mitigates his violation. Id. However, Indiana Code Section 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. See Mitchell v. State, 619 N.E.2d 961, 963 (Ind. Ct. App. 1993). Thus, a review of possible aggravators and mitigators is not available on appeal. In that Hayden violated her probation by committing similar crimes for which she had been previously convicted, we find no abuse of discretion in the trial court ordering Hayden to execute her entire suspended sentences.

II. Credit Time

First, Hayden argues and the State concedes that the State misspoke during sentencing after the revocation of probation when it stated that Hayden's original aggregate sentence was five and one-half years. Both parties agree that Hayden's aggregate sentence is four years. However, the trial court's orders match the original sentences.⁴ Therefore, there is no resulting error.

Second, Hayden contends that the trial court did not properly calculate her credit time, requesting the relief of being immediately released from the Indiana Department of Correction. Hayden argues that the trial court calculated 601 days actually served, which should yield 1202 days of credit with good time. Thus, Hayden does not challenge the actual calculation of the days served, but complains that the trial court did not credit her with a day of good time credit for each day served. It appears that Hayden obtains the 601-day calculation from the sentencing hearing rather than the trial court's orders. The State responds that it acknowledges confusion about the credit time that Hayden was granted.

However, the State contends that this claim is moot because no relief in this regard can be granted as Hayden was to be released on February 14, 2008, according to the website of the Indiana Department of Correction.

The initial sentences imposed under the four cause numbers were one and one-half years imprisonment for FD-084, suspended to probation; one year for CM-086, suspended to probation; one and one-half years for FD-087, suspended to probation; and one and one-half years for Count 1 and 180 days for Count 2 for FD-096 to be served concurrently as to each other but consecutively as to the other cause numbers, suspended to probation except for 286 days of credit. All of these sentences under each cause number were to be served consecutively to one another except for FD-087. On the petition to revoke Hayden's probation, the trial court, as noted above, chose to reinstate the original sentences imposed in their entirety. The trial court issued a separate order to reinstate the original sentence for each cause number.

Courts speak only by their records. In re M.S., 551 N.E.2d 881, 884 (Ind. Ct. App. 1990), trans. denied. In reviewing sentences, Indiana appellate courts are to examine both the written and oral sentencing statements to discern the findings of the trial court. McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007). Although credit time is not a part of a defendant's sentence,⁵ this principle of comparing the written and oral statements of the trial court to

⁴ The discrepancy appears to involve whether the sentence from cause number FD-087 is run concurrent with or consecutive to the other sentences. The trial court's order reinstating this sentence correctly notes that it is to run concurrent with the other sentences.

⁵ Indiana Code Section 35-38-3-2 requires a trial court's sentencing judgment to include "the amount of credit, including credit time earned, for time spent in confinement before sentencing." "The time spent in confinement before sentencing applies toward a prisoner's fixed term of imprisonment." Robinson v. State, 805 N.E.2d 783, 789 (Ind. 2004). Thus, credit towards one's criminal sentence for time in confinement prior

determine the intention of a trial court is equally applicable when reviewing a challenge to the amount of credit time awarded.

Hayden's contention that the trial court credited Hayden with 601 actual days and that doubling this is her correct total credit time is not well taken. First, it is apparent that Hayden simply gleaned this number from the sentencing statement and makes her argument using this number "[c]onsidering this calculation to be correct." Appellant's Brief at 13. Hayden apparently uses this number without investigating the rest of the sentencing transcript to understand the component of the 601 actual days calculation or whether trial court's statements were intended to be conclusive as to her credit time.

It is apparent from the sentencing transcript that verification of the credit time was needed to ensure that Hayden received the appropriate credit. The following exchange took place:

The Court: . . . Now the calculations I've got before me are that you had 286 actual days originally, 158 days now since November 6th or, excuse me 160 days. It's 446 days that you have served plus the time in the halfway house that you should and I think I am required to give you credit for. I don't have that count, we will have to get that.

Defense Attorney: She indicates five months. I, I don't, do you know specific days you were in the halfway house?

The Court: You will be given credit for each one of those days that you, uh, have served. The remainder will be sentenced to the Indiana Department of Corrections. . . . We need to get an actual count on the halfway house and give

to sentencing is not part of the actual sentence. Rather, it is a statute-driven calculation of the days the defendant has already served while waiting for his or her trial and sentencing. In fact, the trial court's determination of credit time is subject to modification thereafter by the Department of Correction pursuant to statutory procedures. *Id.* at 792.

you credit for that.

....

State: She shouldn't get day for day [for time spent in the halfway house] because she shouldn't get two days credit.

The Court: Well, I don't know because on home incarceration you do if it's a term and condition of probation. I don't know for a halfway house you do or not.

State: I don't see in the plea that was a condition of probation.

The Court: Well it's actual days. You spend five actual months in? Okay, I'm just giving actual days here anyway.

State: Okay.

The Court: So she would have right at 600 actual days, 601 if we take that 555. So she would have right around that much time in. If there is additional time, Ms. Hayden, I will be sure it is credited to you.

Sentencing transcript at 30, 32. This exchange reveals that the trial court did not have all of the information before it to make a final calculation of credit time because it did not know Hayden's time spent in the halfway house and was unsure whether her time in the halfway house entitled her to good time credit in addition to time served.

In comparing the transcript of the sentencing hearing and the trial court's final orders, it is clear that the trial court intended to award credit time as stated in its final orders because it indicated in the hearing that it needed further information to make the proper calculation. As Hayden does not challenge the actual calculation as reflected in the trial court's orders, we find no error.

Affirmed.

NAJAM, J., and CRONE, J., concur.