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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL POWELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A03-0912-CR-589
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D03-0407-FB-1865

September 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Michael Powell appeals the revocation of his probation. Powell raises two issues, which we revise and restate as whether the trial court abused its discretion by ordering Powell to serve two years of his previously suspended sentence.[1] We affirm.

The facts most favorable to the probation revocation follow. The State charged Powell with three counts of dealing in cocaine, each as a class B felony.[2] Powell pled guilty to all three counts pursuant to a written plea agreement. On November 14, 2005, Powell was sentenced to concurrent terms of twelve years with seven years executed in the Indiana Department of Correction and five years suspended to probation. As part of his probation, Powell was required to successfully complete an alcohol and drug program and pay all probation user fees.

On August 6, 2008, the State filed a petition and notice to revoke probation alleging that Powell failed to enter, complete, and pay for the alcohol and drug program and failed to pay fifty dollars per month in program fees beginning in May 2008. After two hearings, the court entered a denial on Powell's behalf and continued the matter to January 26, 2009. Powell failed to appear at the scheduled January 26, 2009 hearing.

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[1] Powell 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 Powell's invitation to review his sentence under Appellate Rule 7(B).

[2] The State initially filed a charging information in July 2004 and later filed an amended charging information in April 2005. The amended charging information found in the record does not appear to differ from the original charging information.

On June 17, 2009, the State filed an amended notice of probation violation alleging that Powell failed to report to the adult probation office on a monthly basis and failed a drug screen on December 31, 2008 by testing positive for marijuana. On December 9, 2009, the court held a hearing on the amended notice of probation violation at which Powell admitted that he violated the terms of his probation and that the last time he saw his probation officer was on December 31, 2008. After a disposition hearing on December 10, 2009, the court issued an order which indicated that it accepted Powell's admission regarding the violation of the terms of his probation, ordered that two years of Powell's previously suspended sentence of five years be reinstated and served at the Department of Correction, and ordered that Powell be terminated from probation unsatisfactorily upon the completion of the reinstated executed sentence.

The sole issue is whether the trial court abused its discretion by ordering Powell to serve two years of the previously suspended portion of his sentence. Powell argues that "a 2 year executed sentence, based solely on his failure to check in with his Probation Officer is excessive" and that "the Court abused its discretion when imposing a 2 year executed sentence." Appellant's Brief at 8. Powell further argues that "the evidence establishes that [he] was fully employed and, apparently, had gotten caught up on all of his back child support, and according to the transcript, [he] had been doing pretty well . . . ." Id. at 10.

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, at the disposition hearing on December 10, 2009, the State commented that Powell was on probation for five years, that he "successfully went through . . . a little over a year" of probation, and that the State was going to "give him a little credit for that." December 10, 2010 Transcript at 5. The State then recommended that two years of Powell's suspended sentence be revoked and that his probation terminate following the reinstated sentence.

Powell stated to the court that, with respect to his failure to report to his probation officer, he had been served warrants in connection with child support in another state and "got scared." Id. Powell further argued that he had full-time employment for ten months, he worked six days a week, he was in line to become a manager at his job, his license had been reinstated, and he felt that "right now is [his] best chance to succeed outside of prison." Id. at 6. Powell stated that he would do whatever it took to be sent home, including catching up on his fees and his child support.

After hearing the State's recommendation and Powell's arguments, the trial court stated:

> Well the problem is[,] Mr. Powell, that you had five (5) years hanging over your head, and no one's seen you for eleven (11) months. I understand you may have been scared in January, but that leaves February, March, April, May, June, July, August, September, October, November, and here were are in December.
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> * * * * *

> I think the recommendation from the State . . . is two (2) years. And I think in light of the fact that that's giving you credit for some of the things that you've done, that's giving you credit for making it for a year on it, and so instead of giving you the maximum, I'm gonna give you two (2) years at the Indiana Department of Corrections, executed.

Id. at 8-9.

Given the circumstances, we cannot say that the trial court abused its discretion in ordering Powell to serve two years of the previously suspended portion of his sentence of five years. See Jones v. State, 838 N.E.2d 1146, 1149 (Ind. Ct. App. 2005) (holding that the trial court did not abuse its discretion in ordering the defendant to serve a portion of his previously suspended sentence as a result of probation violations).[3]

For the foregoing reasons, we affirm the trial court's order reinstating two years of Powell's previously suspended sentence.

Affirmed.

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

[3] Powell also argues that "in a probation violation hearing, the Rules of Probation are introduced into evidence" and that "[i]n this case, the record is void as to the Rules of Probation." Appellant's Brief at 9. Initially, we note that Powell does not raise the issue of the revocation of his probation on appeal. To the extent that Powell attempts to argue that the court's reinstatement of part of his previously suspended sentence was somehow affected by any failure of the trial court to conduct a proper revocation hearing, we note that Powell admitted to violating the terms of his probation and was given an opportunity to offer evidence suggesting that the violations did not warrant revocation, and we do not otherwise find Powell's argument persuasive. See Woods v. State, 892 N.E.2d 637, 640 (Ind. 2008) (noting that when a probationer admits to a violation, certain procedural safeguards and an evidentiary hearing are unnecessary but that a probationer must still be given an opportunity to offer evidence suggesting that the violation does not warrant revocation).