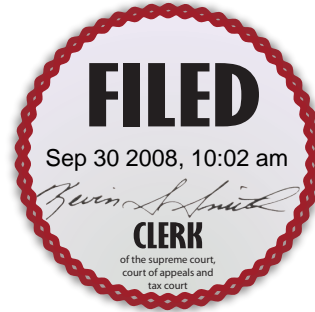


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JACQUELINE HOHENBERGER,)

Appellant-Defendant,)

vs.)

No. 38A04-0806-CR-375

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE JAY CIRCUIT COURT
The Honorable Brian D. Hutchinson, Judge
Cause No. 38C01-0407-CF-24

September 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Jacqueline Hohenberger appeals the decision to execute two years of her previously suspended sentence upon her admission that she violated the conditions of probation. Hohenberger's¹ sole claim upon appeal is that the two-year sentence thus executed is excessive.

We affirm.

The facts favorable to the judgment are that on May 15, 2005, Hohenberger entered into a plea agreement whereby she agreed to plead guilty to burglary as a class C felony, for which she would receive a six-year sentence, with two years executed and four suspended to probation. Judgment of conviction was entered on that agreement on July 25, 2005. Hohenberger served two years of her sentence and was released on probation. On September 10, 2007, the Jay County Probation Department (the Probation Department) filed a petition alleging Hohenberger had violated the conditions of her probation by committing the following violations:

- a. The defendant has failed to appear in the Jay County Probation Department for scheduled appointments on May 11, 2007; June 13, 2007; July 20, 2007; and September 04, 2007
- b. The defendant has failed to pay the court costs on or before ninety (90) days after release from Department of Corrections – balance owed is \$31.00
- c. The defendant has failed to pay the probation administration fee of \$100.00 on or before sixty (60) days after release from incarceration

¹ We note that Hohenberger included in her appendix a copy of the presentence investigation report on white paper. We remind Hohenberger that Ind. Appellate Rule 9(J) requires that documents and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1), which includes presentence investigation reports, must be filed in accordance with Ind. Trial Rule 5(G). That rule provides that such documents must be tendered on light green paper or have a light green coversheet and be marked "Not for Public Access" or "Confidential". Ind. Trial Rule 5(G)(1).

- d. The defendant has failed to pay the initial probation user fee of \$50.00 in August, 2006, and has failed to pay the monthly probation user fee of \$15.00 – defendant is delinquent \$245.00[.]

Appellant's Appendix at 61. On September 27, 2007, the Probation Department filed an addendum to the September 10 probation violation petition, adding the following allegations:

- a. On or about May 08, 2007, in Defiance County, Ohio, the defendant did commit the crime of Possession of Crack Cocaine, a Felony of the Fifth Degree []
- b. On or about August 30, 2007, in Defiance County, Ohio, the defendant did knowingly fail to appear, therefore, committing the crime of Failure to Appear, a Felony of the Fourth Degree[.] []

Id. at 62. By the time of the March 11, 2008 hearing on the probation violation petition and addendum, the parties had reached an agreement, which the State explained as follows:

Your Honor, the State's agreement with Defense counsel is that the Defendant will agree to admit to violating to the allegations contained in the petition alleging violation conditions [sic] of probation and that in exchange the State and Defense counsel will recommend that Ms. Hohenberger receive additional [sic] one year sent ... one year of her sentence to be executed at the Department of Corrections [sic] and then to be discharged from probation upon ... termination of her probation unsuccessfully in exchange for that admission your Honor.

Transcript of March 11, 2008 Hearing at 4. The court questioned the State as follows:

ALRIGHT. I GUESS MY QUESTION IS WHY THE STATE WOULD RECOMMEND ONE YEAR WHEN THERE, MY UNDERSTANDING IS THERE'S FOUR YEARS LEFT ON BALANCE OF HER PROBATION AND THE ALLEGATION IS A NEW CONVICTION FOR A FELONY AND I'M WONDERING WHY THE STATE WOULD RECOMMEND ONE YEAR AND THEN UNSUCCESSFUL DISCHARGE.

Id. at 5. The State responded that Hohenberger had been sentenced to roughly one year for the Ohio conviction that was the subject of the probation violation addendum, "so ... she will have spent the total of two years for this new crime plus the violation so the State

believes that given those circumstances, that this is an adequate resolution of this case.” *Id.*

The trial court was obviously not going to accept the State’s recommendation and the following colloquy ensued:

[DEFENSE COUNSEL]: Your Honor, we could revise the proposed agreement to the two years executed.

THE COURT: TWO YEARS EXECUTED ON THE SUSPENDED SENTENCE?

[DEFENSE COUNSEL]: Yes.

THE COURT: WHAT’S THE STATE’S POSITION?

[STATE]: State’s fine with that recommendation you Honor.

THE COURT: MS. HOHENBERGER, WHAT HAS BASICALLY HAPPENED IS YOU’VE BEEN TOLD THAT I WILL NOT, IF THERE IS A FINDING YOU VIOLATED THE CONDITIONS PROBATION [sic] AS ALLEGED, I WILL NOT SENTENCE YOU TO JUST ONE YEAR. YOUR ATTORNEY HAS INFORMED YOU OF THAT?

MS. HOHENBERGER: Yeah.

THE COURT: I WILL BEGRUDGINGLY SENTENCE YOU TO TWO YEARS AND THEN GIVE YOU AN UNSUCCESSFUL DISCHARGE IF YOU WERE TO ADMIT THE ALLEGATIONS CONTAINED IN THE PETITION. YOU’RE AWARE OF THAT?

MS. HOHENBERGER: Yes.

THE COURT: IS IT YOUR INTENTION TO ADMIT THE ALLEGATIONS?

MS. HOHENBERGER: Yes.

Id. at 6-7. Thereafter, Hohenberger admitted violating the conditions of her probation as alleged, and the trial court sentenced her consistent with the discussion reproduced above.

Probation revocation is a two-step process in which (1) the court decides whether a violation of a condition of probation actually has occurred, and (2) if it has, whether the violation warrants revocation of the probation. *Sanders v. State*, 825 N.E.2d 952 (Ind. Ct. App. 2005), *trans. denied*. When, as here, a probationer admits to the alleged violation or violations, the court can proceed to the second step of the inquiry and determine whether the violation or violations warrant revocation. *Id.* We review a trial court’s sentencing decisions for probation violations using the abuse of discretion standard. *Prewitt v. State*, 878 N.E.2d 184 (Ind. 2007). “An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances.” *Id.* at 188. In conducting our review, we consider only the evidence most favorable to the judgment and do not reweigh the evidence or judge the credibility of the witnesses. *Podluský v. State*, 839 N.E.2d 198 (Ind. Ct. App. 2005).

In this case, Hohenberger admitted to the alleged violations, which included a failure to report to probation on several occasions, the failure to pay fees, and the commission of two felonies. Hohenberger complains that the failure to report on the dates alleged has an innocent explanation, i.e., that she could not report to the Jay County Probation Department on those dates because she was at that time incarcerated in Ohio. Citing *Garrett v. State*, 680 N.E.2d 1 (Ind. Ct. App. 1997), she also challenges the propriety in this case of revoking probation upon the grounds of nonpayment of fees. Even assuming for the sake of argument that the failure to report and nonpayment of fees do not support the trial court’s judgment, there is still the matter of the two felony convictions.

Ind. Code Ann. § 35-38-2-3(g)(3) (West, PREMISE through 2007 1st Regular Sess.) provides that if a 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 ... order execution of all or part of the sentence that was suspended at the time of initial sentencing.” As indicated above, Hohenberger admitted she violated probation, and she does not challenge on technical or legal grounds the propriety of executing the suspended portion of her sentence on the strength of those two felony convictions. Given her admitted multiple violations of the conditions of her probation, and pursuant to I.C. § 35-38-2-3(g)(3), the trial court did not abuse its discretion in executing two years of the previously suspended portion of Hohenberger’s sentence.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur