

STATEMENT OF THE CASE

Nancy N. Bailey appeals the trial court's order that she execute the balance of her previously-suspended sentences after having violated her probation.

We affirm.

ISSUE

Whether the trial court abused its discretion when it ordered Bailey to execute the balance of her previously-suspended sentences.

FACTS

On January 5, 2005, in Cause Number 76C01-0501-FD-0006 ("No. 006"), the State charged Bailey with possession of methamphetamine, a class D felony, and possession of paraphernalia, a class A misdemeanor. On August 17, 2005, in Cause Number 76C01-0508-FD-0802 ("No. 802"), the State charged her with theft, as a class D felony, and two counts of battery resulting in injury, as class A misdemeanors. On January 30, 2006, a change of plea/sentencing hearing was set for February 13, 2006, on both cases. The Pre-Sentence Investigation Report, prepared therefor in January of 2006, reported to the trial court Bailey's multiple juvenile justice offenses, several involving marijuana, and her admission to frequent drug usage and to having a drug problem.

At the hearing on February 13, 2006, Bailey pleaded guilty to the class D felony possession of methamphetamine in No. 006; and to class D felony theft and one class A misdemeanor battery in No. 802.¹ The trial court imposed sentences as follows: on No.

¹ According to the PSI, Bailey's plea agreement as to No. 006 and No. 802 also included her pleas of guilty to two counts of battery resulting in bodily injury, as class A misdemeanors, in a third cause

006, three years -- with one year executed and two years suspended to probation; on No. 802, three years on the theft conviction -- with one year executed, and two years suspended to probation consecutive to the sentence in a third cause number, and a concurrent one year executed term on the misdemeanor battery conviction. Bailey's terms of probation included that she not violate any laws; not possess any illegal drugs; submit to probation department drug testing; comply with instructions from her probation officer to participate in and complete programs or treatment deemed necessary; report to her probation officer as directed; and notify her probation officer within two days of any change of residence.

On June 20, 2007, after serving her executed time, Bailey was placed on community corrections to serve one year. After Bailey had completed 46 days, a motion was filed to revoke her placement, alleging that Bailey failed to pay fees as instructed and violated rules by testing positive for THC (marijuana) on July 18, 2007, and being arrested for public intoxication on August 4, 2007. On September 17, 2007, Bailey appeared before the trial court and admitted using marijuana; her community corrections placement was revoked. On September 27, 2007, Bailey was placed on probation.

Early in December of 2007, Bailey was evaluated at Cameron Counseling and directed to participate in two treatment programs there. The first required 10 classes, which were offered weekly; she waited nearly two months to begin the classes, and then took 21 weeks to complete them. The second program consisted of 16 sessions, but by

number, and to one count of battery resulting in bodily injury, as a class A misdemeanor, in a fourth cause number.

September 29, 2008, Bailey had attended only 12 sessions -- despite having 42 opportunities in the nine months since beginning the program.

On April 10, 2008, and on July 3, 2008, Bailey tested positive for THC, the active element in marijuana, on drug tests performed for the probation department. Bailey admitted to her probation officer that she had used marijuana preceding the respective tests.

Cathy Hayes, her probation officer, “didn’t want to file” a violation for the positive drug tests, and arranged for Bailey to “stay in a half-way house,” Women In Transition, to “get the help she needed.” (Tr. 52, 53). Successful treatment at Women In Transition, a “recovery house for alcoholics and drug addicts,” is “stay[ing] at least 90 days.” (Tr. 27, 33). Bailey began living at Women In Transition on July 21, 2008, but she left after 27 days – on August 18, 2008, when “she tested positive for THC.” (Tr. 29).

Again trying to avoid filing a violation, Hayes arranged for Bailey to stay at Serenity House, “a recovery house with a nine (9) month minimal stay for women recovering from drug addiction and alcohol” addiction. (Tr. 42). Bailey was admitted to Serenity House on September 12, 2008, but left several hours thereafter.

On September 29, 2008, Cameron Counseling terminated her from its treatment program for her failure to participate and attend sessions as required. On October 10, 2008, the probation department filed a motion seeking to revoke Bailey’s probation, alleging (among other things) that Bailey had failed to provide verification of completing the recommended addiction treatment, twice violated the prohibition of illegal drug use,

and failed to comply with the probation officer's arrangement for her treatment at Serenity House.

Nevertheless, Hayes then asked Serenity House "to give [Bailey] a second chance," and after an interview there on October 14, 2008, it was agreed that Bailey could be re-admitted. (Tr. 46). Bailey, however, did not follow through and move in.

On January 5, 2009, Bailey re-entered the Women In Transition program. She left the program, however, on March 11, 2009 -- after 64 days.

On March 19, 2009, Bailey missed her scheduled appointment with Hayes. Later that day, a second motion was filed seeking to revoke Bailey's probation, alleging that she had failed to report for the probation appointment, and had failed to notify Hayes that she left the Women In Transition program.

The trial court conducted a fact-finding hearing on April 20, 2009. Evidence of the above was heard. In addition, Bailey admitted having used marijuana, but "not a lot," in the previous year. (Tr. 74). Hayes testified that she had exhausted the department's resources in trying to help Bailey. The trial court found that Bailey violated the terms of her probation by failing to complete addictions counseling, consuming marijuana on two occasions, failing to successfully complete the Serenity House recovery program, and failing to report to her probation officer on March 19, 2009. Finding that Bailey had "been given chance after chance after chance to try and get her life back together," it ordered Bailey to serve two years executed in No. 006 and two years executed in No. 802 "consecutive to the two (2) year term of incarceration imposed" in No. 006. (Tr. 82, 83).

DECISION

“Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled.” *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). The trial court determines the conditions of probation and may revoke probation if the conditions are violated. *Id.* (citing Ind. Code § 35-38-2-3). Once a trial court has exercised its grace by ordering probation rather than incarceration, it has “considerable leeway in deciding how to proceed.” *Id.* A trial court’s sentencing decision on probation violations is reviewed using an abuse of discretion standard. *Id.* (citing *Sanders v. State*, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), *trans. denied*). Moreover, a trial court’s order that the defendant serve her previously-suspended sentence is reviewed for an abuse of discretion. *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. *Prewitt*, 878 N.E.2d at 188.

Bailey argues that the trial court abused its discretion when it ordered her to serve the balance of her previously-suspended sentences² because her probation violations were “relatively minor.” Bailey’s Br. at 11. We are not persuaded.

As reflected in FACTS above, the record is replete with evidence that despite having been offered a multitude of opportunities to satisfy the terms of her probation, many of which also were in Bailey’s own interest -- addressing her substance abuse problem, Bailey repeatedly violated the terms of her probation. Bailey directs us to testimony by the manager of Serenity House and suggests that the facility was “ill suited” for her needs, such that Bailey was “not able” to comply with that program. Bailey’s Br.

² On June 30, 2009, this court granted Bailey’s motion to consolidate her appeals from both matters.

at 12, 13. The manager testified, however, that Bailey left the facility because she did not want to be parted from her boyfriend, wanted to take time to bid her family good-bye, and wanted to pack her own belongings. This evidence supports the inference that it was Bailey's choice not to stay at Serenity House. The failure during probation to complete a necessary treatment program allows the trial court to conclude the defendant continued to need treatment or did not appreciate the gravity of her situation. *Prewitt*, 878 N.E.2d at 188. Further, it is undisputed that Bailey failed to complete the addiction program at Cameron Counseling; she admitted having consumed marijuana on the two occasions when her probation department drug tests were positive, and her failure to report to her probation officer for the March 19, 2008, appointment is uncontroverted.

Bailey had the benefit of the trial court's grace for more than two and one-half years, yet her conduct during that time reflects a lack of respect for the law and authority. As Bailey conceded on the witness stand, she complied only "when it[] [was] convenient for [her]." (Tr. 73). We do not find that the trial court abused its discretion when it declined to further extend to her the grace of probation and ordered that she serve the balance of her previously-suspended sentences.

Affirmed.

MATHIAS, J., ROBB, J., and concur.