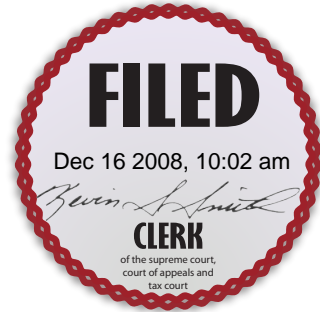


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

NANCY L. WOODARD,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 34A02-0808-CR-736

APPEAL FROM THE HOWARD CIRCUIT COURT
The Honorable Lynn Murray, Judge
Cause No. 34C01-0104-CF-108

December 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Nancy L. Woodard appeals the one-year executed sentence that was imposed following the revocation of probation. Specifically, Woodard maintains that the trial court abused its discretion in ordering her to serve an executed sentence “without considering [her] condition and circumstances.” Appellant’s Br. p. 1. Finding no error, we affirm the judgment of the trial court.

FACTS

On April 9, 2001, Woodard was charged with possession of cocaine, a class A felony, in Count I, and dealing in cocaine, a class B felony, in Count II. Thereafter, Woodard pleaded guilty pursuant to a fixed plea agreement to dealing in cocaine for a sentence of fifteen years, ten executed with five years suspended, and to probation for five years. In accordance with the plea agreement, the State dismissed Count I and another unrelated charge of possession of cocaine, a class B felony.

On May 25, 2005, the trial court modified Woodard’s sentence and placed her in the Howard County Community Transition Program. Thereafter, on December 28, 2005, Woodard was released to probation. One of the requirements of probation was for Woodard to refrain from consuming or possessing any controlled substances. On February 14, 2008, Woodard tested positive for cocaine.

On February 28, 2008, the State petitioned to revoke Woodard’s suspended sentence in light of the probation violation. At the May 14, 2008, revocation hearing, Woodard admitted to the allegation. The State and Woodard agreed that if Woodard did not test positive for cocaine that day and participated in an Intensive Outpatient Program (IOP), the result of the motion to revoke would be “time served.” Tr. p. 10-12.

However, if Woodard failed the test, she would plead “open to the court.” Id. at 12.

Woodard failed the drug screen and tested positive for cocaine. At the sentencing hearing that commenced on July 16, 2008, the following exchange occurred between Woodard’s defense counsel and the trial court:

[Defense Counsel]: In the meantime my client has enrolled herself in the IOP Program at Trinity House. Apparently as a part of that they did another drug screen on 27 of May. It appears to be one of the best screening reports, drug screen but as the court is aware they tend to be inclusive in nature rather than exclusive.

Court: Right.

[Defense Counsel]: [S]he did not test positive on that date and as I’ve indicated she is in the IOP Program and is also currently scheduled to commence class at IVY Tech in the meantime. My client, Your Honor, as you know, has a rather long-standing history of cocaine abuse. As you’re aware, this is not something that is easy for anybody who has the kind of history she has to get by and one would anticipate that on occasion she would relapse. I would ask that the court take those additional factors into consideration in terms of fashioning a response and remedy by way of the Petition to Revoke.

Tr. p. 15-16. In revoking Woodard’s probation, the trial court determined that

The record of this case shows that this, the underlying offense here was Dealing in Cocaine as a Class B felony in which Ms. Woodard was sentenced to the Department of Corrections for a period of 15 years, 10 years executed, 5 years supervised probation. Upon her release from the Department of Corrections, she was subject to the rules, regulations and restrictions of supervised probation as well as regular random drug screens. This Petition to Revoke was filed in February of ‘08 and due to the fact that M[s]. Woodard showed positive for using cocaine on a drug test that was taken February 14 of ‘08. The court was prepared to pretty well not order executed time if she was able to test negative and otherwise complete a program when we were here in May. Instead she tested positive for cocaine again. Yeah, I don’t see anything less than equitable in this matter and appropriate in this matter than being some executed jail time. I’m going to order that Ms. Woodard serve 1 year of her suspended sentence in the Department of Corrections and upon her release from that 1 year that

she be ordered to successfully complete a drug treatment program as ordered or recommended by the Probation Department and again be subject to random and regular drug screen tests. She would be entitled to credit toward any time she spent in jail on this petition. I believe though she bonded the same day, March 18, '08. It almost seems ironic that it would have been better for her in the long run if she would have stayed in jail for a while.

Id. at 16-18. Woodard now appeals.

DISCUSSION AND DECISION

In addressing Woodard's contention that the trial court abused its discretion in ordering her to serve a one-year executed sentence, we initially observe that probation is a favor granted by the State, not a right to which a criminal defendant is entitled. Sanders v. State, 825 N.E.2d 952, 955 (Ind. Ct. App. 2005). When reviewing an appeal from the revocation of probation, we consider only the evidence most favorable to the judgment, and we will not reweigh the evidence or judge the credibility of the witnesses. Id. at 955. We review a trial court's decision regarding the proper penalty for a probation violation for an abuse of discretion. Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before the court. Brattain v. State, 777 N.E.2d 774, 776 (Ind. Ct. App. 2002). If the trial court has determined that a defendant has violated the terms of probation, a court may: (1) continue a person on probation; (2) extend probation; or (3) order execution of all or part of the sentence that was suspended at the time of the initial sentencing. Ind. Code § 35-38-2-3(g).

In this case, Woodard maintains that her sentence must be set aside because the trial court failed to consider the fact that she passed a drug screen after two failed tests,

enrolled in Ivy Tech, and attended an outpatient treatment course. Moreover, Woodard asserts that the trial court did not consider her lengthy history of substance abuse in deciding what sentence to impose. Notwithstanding these contentions, the trial court's statement at the sentencing hearing makes it clear that it found in aggravation that Woodard "tested positive for cocaine again." Tr. p. 17. And, despite being incarcerated for several years, receiving a sentence modification to a community transition program, and being placed on probation, Woodward continued to use cocaine.

In our view, the record demonstrates that although Woodard has been afforded ample opportunities at reformation, she has failed in light of her continued cocaine use. Moreover, that Woodard tested negative for cocaine at a later date and began outpatient treatment is of little consequence compared to her two prior positive drug screens for cocaine when she knew the consequences of a positive test. As a result, we conclude that the trial court's revocation of Woodard's previously-suspended sentence and order that she serve an executed one-year sentence was not an abuse of discretion.

The judgment of the trial court is affirmed.

NAJAM, J., and KIRSCH, J., concur.