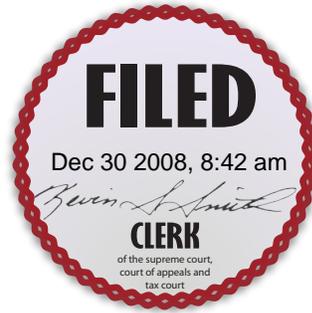


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOSEPH G. ROSS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 22A01-0806-CR-262

APPEAL FROM THE FLOYD SUPERIOR COURT
The Honorable Susan L. Orth, Judge
Cause No. 22D01-0602-CM-96

December 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Joseph G. Ross appeals the trial court's revocation of his probation and order that he serve the one-year previously suspended sentence.

We affirm.

ISSUE

Whether the trial court erred when it found that Ross had violated his probation and ordered him to serve the one-year sentence that had previously been suspended to probation.

FACTS

On February 7, 2006, the State charged Ross with one count of battery resulting in bodily injury, a class A misdemeanor. On June 1, 2006, Ross tendered to the trial court his agreement with the State whereby he would plead guilty to the charge and be sentenced to a one-year term, with one year suspended. On August 28, 2006, the trial court accepted Ross's guilty plea, entered judgment of conviction, and imposed a one-year sentence – with that year suspended to probation. The terms and conditions of his probation included that he pay specified court costs and probation user fees and that he not commit another criminal offense.

On September 26, 2006, the State filed a petition to revoke probation, alleging that Ross had violated probation by being charged with criminal offenses in two separate causes and failing to pay probation user fees and court costs. At a revocation hearing on May 9, 2007, Ross stipulated to having violated probation; his probation was revoked; and he was ordered to serve the one-year sentence. On June 28, 2007, the trial court set aside the stipulation and ordered further revocation proceedings.

On April 9, 2008, the trial court held the evidentiary hearing on the petition to revoke Ross's probation. A witness from the probation department testified that Ross had paid no court costs or probation user fees.

Rick Sowders testified that as an officer of the New Albany Police Department, he investigated a burglary at Ashley McMahan's residence on August 7, 2006. Sowders testified that McMahan told him that she had returned to her residence that day to find the back door, which she had left closed, "standing open" and with "pry marks on the lock"; one man "ran out the back door" and fled; she went inside and saw Ross, "who she knew," in her bedroom; sticking out of Ross's pants pocket, she saw part of a plastic bag that she recognized as one that she had put in her wall safe with her jewelry inside; she "grabbed that baggie and saw that it was her property"; "she confronted Mr. Ross about any other property that he might have that belonged to her and he . . . pulled out three gold rings that had previously been inside the plastic baggie, but were now loose in his front pocket, and he gave those items to her." (Tr. 13, 14, 15). Sowders further testified that he had confirmed "pry marks on the back door" and "quite a bit of damage to the lock area." (Tr. 15). Sowders also testified that from a photo array that he presented to her, McMahan identified Ross as the man inside her house with her jewelry in his pocket.

The State tendered, and the trial court admitted, McMahan's taped statement to Sowders "to prove the accuracy of the hearsay statements" in his testimony. (Tr. 17). The taped statement was played for the trial court. On cross-examination, a question by Ross's counsel confirmed that "we've heard her taped statement here today." (Tr. 18).

Ross was charged with the August 7, 2006 burglary of McMahan's residence in a cause number cited in the petition to revoke Ross's probation.

Additional testimony provided details of an armed robbery which occurred on August 25, 2006, during which a victim was beaten and a firearm was discharged inside a vehicle. The State presented evidence that a witness implicated Ross in the robbery and beating, and Ross's blood was found inside the vehicle where the victim was beaten. An officer testified that a cause number cited in the petition to revoke probation charged Ross with the robbery and beating.

Evidence was also presented at the evidentiary hearing which established that before his plea of guilty to the instant misdemeanor assault offense, Ross had been previously convicted of a class B felony. At the conclusion of the hearing, the trial court found that Ross "did violate probation." (Tr. 58). It issued a modified judgment of conviction, ordering Ross to serve the one-year executed sentence.

DECISION

Ross asserts that his "sentence was inappropriate under the circumstances," and "that a sentence of less than the full, aggravated sentence should have been imposed in this cause." Ross's Br. at 9, 11. His argument itself asserts that "sufficient evidence was not offered at the hearing" that Ross "committed another offense," and "the evidence of" his failure to pay fees was "sparse." *Id.* at 10, 11.

The violation of probation is a matter established by the preponderance of the evidence, and when reviewing the trial court's decision to revoke probation, we consider only the evidence most favorable to the judgment. *Cox v. State*, 706 N.E.2d 547, 551

(Ind. 1999). The evidence before the trial court established that Ross had failed to pay probation fees and court costs, both of which were terms of his probation. It further established that a home had been burglarized, and that the homeowner had found Ross on the premises with her possessions on his person. This evidence was sufficient to show by a preponderance of the evidence that Ross had violated the law.¹

By statute, when the trial court “finds that a person has violated a condition [of probation] during the probationary period,” the trial court “may . . . 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). Hence, the order that Ross serve the one-year sentence executed was within the trial court’s authority.

As to Ross’s argument that it is “inappropriate” that he serve the one-year executed sentence, we note having a prior class B felony conviction, he committed the instant assault offense which resulted in his guilty plea and one-year suspended sentence. Nevertheless, during his probationary period, Ross failed to pay fees as ordered, and admitted evidence established by a preponderance that he had committed another criminal offense.

Our Supreme Court has summarized appellate review of a challenge to the trial court’s sentencing order upon the defendant’s violation of his probation, as well as the basis for that review standard, as follows:

Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled. The trial court determines the conditions of probation and may revoke probation if the conditions are

¹ Therefore, we need not address whether sufficient evidence established that Ross violated the law in the armed robbery and beating matter.

violated. 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. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances.

Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007) (internal citations omitted).

Ross was placed on probation after having expressly agreed to the terms and conditions of that probation in his plea agreement. His placement on probation was a matter of grace, and the alternative to serving an executed sentence. He failed to comply with the terms and conditions of his probation. We find no abuse of discretion in the trial court's order that he serve the one-year executed sentence.

Affirmed.

RILEY, J., and VAIDIK, J., concur.