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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL FELTON,)
)
Appellant-Defendant,)
)
vs.) No. 48A02-0706-CR-483
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0603-FC-79

December 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Michael Felton (“Felton”) was convicted of Intimidation and placed on probation. After he committed two additional felonies and violated other conditions of his probation, the trial court ordered him to serve three-and-one-half years of his previously-suspended sentence. We conclude that the trial court did not abuse its discretion in ordering Felton to serve this portion of his suspended sentence.

Facts and Procedural History

On March 20, 2006, eighteen-year-old Felton became upset with a fellow Elwood Community High School student while sitting in math class. He then threatened to stab the other student and exposed a pocket knife in a threatening manner. The State charged Felton with Intimidation as a Class C felony. Ind. Code § 35-45-2-1(b)(2). Felton pled guilty as charged, and on October 9, 2006, the trial court entered a judgment of conviction. The trial court sentenced Felton to four years in the Department of Correction, with three years and ten months suspended to probation. Felton’s probation included the conditions that Felton refrain from criminal activity,¹ obtain a psychological evaluation within sixty days at an approved treatment facility and provide written verification to the Probation Department, pay certain fees, and find and maintain employment of twenty-five hours per week within thirty days and provide written verification to the Probation Department. Appellant’s App. p. 22.

¹ Felton’s sentencing order does not expressly include the condition that he refrain from criminal activity. However, it does indicate that standard conditions of probation apply. This is of no moment because it is well-settled that “it is always a condition of probation that a probationer not commit an additional crime.” *Braxton v. State*, 651 N.E.2d 268, 270 (Ind. 1995).

On January 31, 2007, the State filed a Notice of Violation of Probation alleging that on January 24, 2007, Felton committed burglary as a Class B felony and theft as a Class D felony. The State further alleged that Felton failed to obtain a psychological evaluation within the requisite period of time, failed to pay the required fees,² and failed to find and maintain employment of twenty-five hours per week. *Id.* at 18. At the probation revocation hearing, Felton admitted that he failed to obtain a timely psychological evaluation, pay his required fees, and obtain employment. Tr. p. 59-61. He did not admit to the commission of the additional two felonies, but the State presented evidence that Felton and another young man broke into an Elwood home and stole cash and other items worth a total of fifteen thousand dollars. *Id.* at 64-68. This evidence included Felton's confession to the crime and return of \$1600, which he pulled from his pocket in front of a police officer. *Id.* at 66. At the conclusion of the hearing, the trial court stated:

[T]he Court specifically finds, based upon your admissions on the employment and psychological evaluation and fees, you, you violated those things, but much more importantly than that, obviously, the Court finds based upon evidence presented by the State that you participated in a burglary and theft as charged and therefore you are in violation of your probation. . . . And frankly, just to make it clear for the record, frankly the, the psychological evaluation, it's, it's hard to fault Mr. Felton for delaying that since his therapist had recommended he do things sequentially. So, although he was in technical violation, the Court would take no action against him. And the psychological factors also have something to do with the employment and so my guess is [we] would be working with Mr. Felton if it weren't for the fact that he was involved in serious criminal conduct. But, he did so as [the State] points out within weeks, literally, after his being in front of the Court and having kind of a short impact sentence to communicate with him what was going to happen if he continued his

² As of January 29, 2007, Felton was in arrears in the amount of \$105.

behavior. He continued it anyway. So the Court's order is that three years and six months . . . of the formally [sic] suspended sentence is now ordered executed.

Id. at 74, 76-77. Felton now appeals his sentence.

Discussion and Decision

On appeal, Felton argues that his three-and-one-half-year executed sentence is inappropriate in light of the nature of the offense and the character of the offender. Appellant's Br. p. 6. Although he challenges his sentence pursuant to Indiana Appellate Rule 7(B), the standard of review used for sentences imposed pursuant to probation revocation is abuse of discretion, not inappropriateness. *Prewitt v. State*, --N.E.2d--, 2007 WL 4395044, *4 (Ind. Dec. 18, 2007); *Sanders v. State*, 825 N.E.2d 952, 956-57 (Ind. Ct. App. 2005), *trans. denied*. An abuse of discretion occurs if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006) (citation omitted).

We have explained that probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his or her behavior in lieu of imprisonment. *Abernathy v. State*, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006) (citing *Brabandt v. State*, 797 N.E.2d 855, 860 (Ind. Ct. App. 2006)). These conditions are imposed "to ensure that the probation serves as a period of genuine rehabilitation and that the public is not harmed by a probationer living within the community." *Id.* "As we have noted on numerous occasions, a defendant is not entitled to serve a sentence in a probation program; rather, such placement is a 'matter of grace' and a 'conditional liberty

that is a favor, not a right.’” *Id.* (quoting *Strowmatt v. State*, 779 N.E.2d 971, 976 (Ind. Ct. App. 2002)).

Generally, as long as the trial court follows the procedures outlined in Indiana Code § 35-38-2-3, the trial court may properly order execution of a suspended sentence. *Id.* (citing *Crump v. State*, 740 N.E.2d 564, 573 (Ind. Ct. App. 2000), *trans. denied*).

Indiana Code § 35-38-2-3(g) provides:

If the 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:

- (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; or
- (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). Felton does not argue that the trial court improperly found him to be in violation of his terms of probation. His only challenge is to the imposition of a three-and-one-half-year sentence, which is a portion of his sentence that was suspended at the time of initial sentencing. *See* I.C. § 35-38-2-3(g)(3).

Here, the record shows that Felton’s underlying conviction stemmed from his decision to brandish a knife in a classroom and threaten to stab a fellow student. As a result of his plea agreement for Class C felony intimidation, the executed portion of Felton’s sentence was capped at two years, Appellant’s App. p. 27,³ and the trial court sentenced him to only thirty days executed and three years and ten months suspended, *id.*

³ This Court has previously held that, where a probationer was convicted and sentenced pursuant to a plea agreement containing a capped executed sentence, a trial court does not abuse its discretion by, after revoking probation, ordering the probationer to serve a previously-suspended sentence in excess of the cap. *Abernathy*, 852 N.E.2d at 1021.

at 22. Less than four months later, Felton committed burglary and theft, both felonies. It is apparent from Felton's behavior that he did not utilize his probationary period for "genuine rehabilitation" and that the conditions of his probation did not protect the public while he lived within the community. *See Abernathy*, 852 N.E.2d at 1020. Thus, we cannot say that the trial court abused its discretion in ordering Felton to serve three-and-one-half years of his previously-suspended sentence.

Affirmed.

SHARPNACK, J., and BARNES, J., concur.