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**IN THE
COURT OF APPEALS OF INDIANA**

ERIC TELLEZ,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A04-0704-CR-212
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0501-FC-3985

November 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Erik Tellez (“Tellez”) appeals his three-year executed sentence that was imposed following the revocation of his probation. Because Tellez’s probation was revoked for repeating the very same conduct that led to him being placed on probation in the first place, we conclude that the trial court did not abuse its discretion in ordering Tellez to serve three years of his four-year suspended sentence.

Facts and Procedural History

In the early morning hours of January 10, 2005, Tellez, who was eighteen years old, was driving a van with four passengers. Tellez drove because “a friend had called for us to do him a favor and go get him to take him home.” Tr. p. 23. Tellez ran a red flashing light at Hanna Avenue and Meridian Street in Indianapolis and collided with another vehicle. The van struck a telephone pole and came to a stop. Tellez exited the van and spoke with the other driver, who said that she was going to call the police because of the accident. Tellez and three of the passengers fled on foot but were soon apprehended. It was later discovered that the other passenger had been ejected from the van and died on the scene.

Thereafter, the State charged Tellez with Failure to Stop after Accident Resulting in Death as a Class C felony and Operating a Vehicle Having Never Received a License, a Class C misdemeanor. The State and Tellez entered into a plea agreement, whereby Tellez pled guilty to Failure to Stop after Accident Resulting in Death as a Class C felony¹ and the State dismissed the other charge and recommended a sentence with an

¹ Ind. Code §§ 9-26-1-1(1), -8(a)(2).

“open cap of 4 years.” Appellant’s App. p. 53. On July 22, 2005, the trial court sentenced Tellez to four years, all suspended, and two years of probation, which included the condition that he not commit a criminal offense.

On December 8, 2006, the State filed a Notice of Probation Violation alleging that on December 5, 2006, Tellez was arrested for and charged with Reckless Driving as a Class B misdemeanor, Failure to Stop after Accident with Property Damage as a Class B misdemeanor, and Operating a Vehicle Having Never Received a License, a Class C misdemeanor. At the probation violation hearing, Tellez admitted that he committed Reckless Driving as a Class B misdemeanor.² As such, the trial court found that Tellez violated his probation and set the matter for sentencing.

At the sentencing hearing, Tellez explained that he drove on December 5, 2006, because “a friend of mine asked me to bring my brother’s car so he could go to [the] BMV to get his car because he had no way of going to work.” Tr. p. 25. After the accident, Tellez drove away because he was scared. Tellez asked the trial court to continue his probation. At the conclusion of the hearing, the court stated:

And having heard the evidence today, Mr. Tellez, I’m shocked that the thing that brings you into court on a probation violation is the same type of conduct that got you here in the first place, that is, driving a vehicle when you shouldn’t have been. And in this case, a reckless driving conviction. I noted from your testimony that you said that the first time when you drove and got the conviction for Failing to Stop Causing a Death, that you did it because a friend asked you to. And this time, your conviction for Reckless Driving, again, you did it because a friend asked you to. I have great concern for the safety of our community if you have anymore friends out there because it appears that if your friend asks you to do something, you’ll do whatever they ask knowing that you’re violating the Court’s order not to. You have committed another offense while you’ve been on probation.

² In fact, at the time of this hearing, Tellez had already pled guilty to Reckless Driving and received a sentence of 180 days with 145 days suspended and twenty-four hours of community service.

Because of the nature of that offense your probation is now revoked. You are ordered to the Department of Correction[] to serve a sentence of three years executed with any credit time as a result of the violation being given to you. Actually, you were given the benefit of an entirely suspended sentence when you were originally sentenced.

Id. at 38-39. Tellez now appeals his sentence.

Discussion and Decision

On appeal, Tellez “contends pursuant to Rules App. Proc., Rule 7 (B) that his three year executed sentence subsequent to the revocation of his probation was inappropriate in light of the character of the offender and the nature of the offense.” Appellant’s Br. p. 5. Although Tellez brings his sentencing challenge pursuant to Appellate Rule 7(B), this Court has held that the standard of review used for a defendant’s probation revocation sentence is abuse of discretion, not inappropriateness. *See Sanders v. State*, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), *trans. denied*. An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. *Rosa v. State*, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005).

Probation is a criminal sanction wherein a defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment. *Abernathy v. State*, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006). These restrictions are designed to ensure that 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. (quotation omitted).

Generally speaking, 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.* 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); *see also Stephens v. State*, 818 N.E.2d 936, 942 (Ind. 2004).

Here, the record shows that during both the original offense and the incident leading to the revocation of his probation, Tellez was involved in an automobile accident and then fled the scene. Also, in both cases, Tellez drove without a license because of a friend’s request. It is apparent from Tellez’s repetitive behavior that probation is not serving as a period of genuine rehabilitation and is not ensuring that the public is not harmed by him living within the community. Accordingly, the trial court did not abuse its discretion in ordering Tellez to serve three years of his four-year suspended sentence.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.