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**IN THE
COURT OF APPEALS OF INDIANA**

ALEXANDER KUPCZYNSKI,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 57A05-0703-CR-136

APPEAL FROM THE NOBLE CIRCUIT COURT

The Honorable G. David Laur, Judge

Cause No. 57C01-0409-FC-051

Cause No. 57C01-0610-FD-17

September 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Alexander Kupczynski appeals his two-year sentence for Failure to Return to Lawful Detention,¹ a class D felony, and the trial court's decision to impose eight years probation less credit for time served in an unrelated cause. Specifically, Kupczynski argues that (1) the trial court erred by sentencing him to eight years probation and (2) his two-year sentence for the failure to return to lawful detention conviction is inappropriate. Finding no error, we affirm the judgment of the trial court.

FACTS

On February 10, 2005, Kupczynski pleaded guilty to class C felony non-support of a dependent child in cause number 57C01-0409-FC-051 (FC-51). On March 17, 2005, the trial court sentenced Kupczynski to an aggregate term of eight years, with four years to be served in a work release program and four years to be suspended to probation. The trial court also ordered Kupczynski to pay \$28,582 in restitution.

On July 2, 2005, Kupczynski was released for eight hours but failed to return to the work release center by 5:00 p.m. as instructed. The following day, the State charged Kupczynski with class D felony failure to return to lawful detention under cause number 57C01-0610-FD-17 (failure to return). A warrant was issued for Kupczynski's arrest, and he was arrested four days later in Arkansas after he allegedly committed new crimes.²

On September 15, 2005, the State filed a probation violation report, alleging that Kupczynski had violated his probation by failing to return to the work release program as instructed and failing to pay the court-ordered \$100 per week on the child support arrearage.

¹ Ind. Code § 35-44-3-5.

Appellant's App. p. 41. On December 6, 2006, Kupczynski pleaded guilty to class D felony failure to return and admitted to an FC-51 violation, specifically, that he failed to return to the work release program as instructed. Tr. p. 27-28.

On January 11, 2007, the trial court conducted a consolidated sentencing hearing on the FC-51 violation and the failure to return conviction. The trial court sentenced Kupczynski to two years imprisonment for the failure to return conviction and to eight years probation minus credit for time served for the FC-51 violation. The trial court ordered the sentences be served consecutively. Kupczynski now appeals.

DISCUSSION AND DECISION

I. Sentence for the FC-51 Violation

Placement in a work release program is “an alternative to commitment to the [D]epartment of [C]orrection.” Ind. Code § 35-38-2.6-3(a). Placement in a work release program is not an entitlement and, instead, “as with probation, placement in the program is a matter of grace and a conditional liberty that is a favor, not a right.” Patterson v. State, 750 N.E.2d 879, 882 (Ind. Ct. App. 2001). When a court orders placement in a work release program, reasonable terms may be imposed. I.C. § 35-38-2.6-3(a). If a person violates the terms of his placement,

the court may, after a hearing, do any of the following:

- (1) Change the terms of the placement.
- (2) Continue the placement.
- (3) Revoke the placement and commit the person to the department of

² On July 8, 2005, the State of Arkansas charged Kupczynski with burglary, theft, possession with intent to manufacture methamphetamine, and intent to deliver marijuana. Appellant's App. p. 65.

correction for the remainder of the person's sentence.

I.C. § 35-38-2.6-5.

Here, the State alleged that Kupczynski violated the terms of his placement by not returning to the facility by the designated time. The trial court held a hearing and Kupczynski admitted that violation. Tr. p. 27-28. While sentencing Kupczynski, the trial court stated, "Uh, because I need to figure out how much credit time you've got . . . you're going to continue on probation, less whatever credit you've got and I don't know how much that is." Id. at 61. The trial court's written order "modifies [Kupczynski's FC-51] sentence and [Kupczynski] is placed on probation for eight (8) years under the terms and conditions previously entered in this cause. . . . The Court also finds that [Kupczynski] shall be given 351 days good-time credit for time spent in confinement as a result of this charge." Appellant's App. p. 9.

Kupczynski argues that the trial court "exceeded its statutory authority when it extended Kupczynski's probation by four years, given that Ind. Code 35-38-2-3(g)³ authorized an extension of only one year beyond the original four-year term of probation." Appellant's Br. p. 7. While the entirety of Kupczynski's argument focuses on Indiana Code

³ Indiana Code section 35-38-2-3(g) provides that

(g) 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.

section 35-38-2-3(g), he was on work release, not probation, when he violated the conditions of his placement, as he admitted at the hearing. Tr. p. 27-28. Therefore, it was within the discretion of the trial court to change the terms of Kupczynski's placement and sentence him to eight years probation less credit for time he had already served.

Frankly, we are unsure why Kupczynski appeals this sentence when a sentence for eight years probation is less restrictive than a sentence for four years work release and four years probation. Furthermore, we appreciate that the trial court's ultimate goal was to minimize Kupczynski's aggregate term of imprisonment in hope that Kupczynski would maintain gainful employment and pay the mounting child support arrearage when he was released from the two-year sentence the trial court ultimately imposed on the failure to return conviction. In sum, we do not take issue with the trial court's sentence and affirm its decision to impose eight years probation less credit for time served for Kupczynski's FC-51 violation.

II. Sentence for Failure to Return

Kupczynski appeals his two-year sentence for the class D felony failure to return conviction. Specifically, he argues that the sentence is inappropriate in light of the nature of the offense and his character because he pleaded guilty, expressed remorse, and "has shown an interest in improving himself." Appellant's Br. p. 12.

The amended sentencing statute⁴ provides that for a class D felony, a person "shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory

⁴ Kupczynski committed the offense after the April 2005 amendment of the sentencing statutes; thus, we will apply the amended versions thereof. Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

sentence being one and one-half (1 1/2) years.” Ind. Code § 35-50-2-7. Our court has the constitutional authority to revise a sentence if, after due consideration of the trial court’s decision, we find that the sentence is “inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Regarding the nature of the offense, Kupczynski had been in a work release program for less than four months when he failed to return to the facility by the designated time. Kupczynski fled the state and was eventually arrested in Arkansas on new charges for crimes he committed in that state. While Kupczynski claims that “his motivation was not selfish” when he fled Indiana, appellant’s br. p. 13, we fail to see how committing crimes in another state can be viewed in an unselfish light. In sum, the nature of Kupczynski’s offense does not aid his inappropriateness argument.

Turning to Kupczynski’s character, he committed the instant offense while he was serving his sentence for class C felony non-support of a dependent child. And instead of working towards paying the nearly \$30,000 in child support arrearage he owed, Kupczynski absconded and demonstrated a lack of responsibility. Furthermore, Kupczynski’s lengthy criminal record consists of numerous felonies and exposes his recurring decisions to flout the law and disobey authority. In sum, Kupczynski’s constant disregard for the law, failure to support his child, and decision to leave the work release program demonstrate his true

character and do not aid his inappropriateness argument. Although Kupczynski emphasizes his guilty plea and the alleged remorse he showed at the sentencing hearing, we do not find the two-year sentence to be inappropriate.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.