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this Memorandum Decision shall not be
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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT L. SPANN, JR.,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 71A03-0603-CR-102

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-9304-CF-370

December 22, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Robert L. Spann, Jr. appeals the trial court's order revoking his probation. Specifically, Spann claims that the trial court's revocation of his probation was erroneous because the State's petition to revoke his probation was not timely filed. Concluding that the State filed the petition to revoke probation before the expiration of Spann's probationary period, we affirm the trial court's revocation of Spann's probation.

FACTS

In April 1993, the State charged Spann with Count I, possession of cocaine as a class C felony; Count II, maintaining a common nuisance as a class D felony; Count III, possession of marijuana as a class A misdemeanor; and Count IV, dealing in cocaine as a class B felony. In June 1994, Spann entered into a plea agreement in which he agreed to plead guilty to Count IV, and the State agreed to dismiss Counts I, II, and III. Thereafter, Spann pleaded guilty to the class B felony as alleged in Count IV, and the trial court accepted his guilty plea.

On September 5, 1995, the trial court sentenced Spann as follows:

[The] Court sentences Defendant to 15 years incarceration for the reasons stated. Orders Defendant to serve six-year mandatory minimum, 376 days pre-sentence jail credit applied. Probation requested to verify. Court orders Defendant to serve additional four years as condition of probation . . . Conditions of probation: random drug tests and pay for them, pay probation fees and get mental health counseling.

Appellant's App. p. 23. That same day, Spann signed a Terms of Probation form, which indicated that the length of his probation was "12 yrs from 9/5/1995[.]" Id. at 26.

Thereafter, Spann appealed to this court, challenging the adequacy of the factual basis underlying his guilty plea. In a memorandum opinion issued on May 13, 1996, we noted that

“as a general rule, a defendant may not pursue a direct appeal from a guilty plea unless sentencing errors are the only issue[,]” but, “in order to preserve judicial resources and promote efficiency in the resolution of cases,” we decided to “overlook [Spann’s] failure to file a petition for post-conviction relief and address the merits of the case.” Id. at 28. After concluding that there was an adequate factual basis, we affirmed Spann’s conviction.

On July 9, 1996, Spann filed a motion to correct erroneous sentence. In his motion, Spann alleged that he had been given an erroneous sentence because he had received a fifteen-year sentence¹ with six years executed, nine years suspended, four years as a condition of probation, and twelve years of probation from September 5, 1995. On August 13, 1996, the trial court denied Spann’s motion, finding “no error except that [the] Sentencing Order did not state [the] length of probationary term, which is now expressed to be twelve (12) years from September 5, 199[5].”² Id. at 36.

Spann was released from the Indiana Department of Correction (DOC) on May 19, 2001. On February 14, 2005, the State filed a petition to revoke Spann’s probation, alleging that Spann had violated the terms of his probation by committing a crime. On April 12, 2005, the trial court held a probation revocation hearing, wherein Spann admitted that he had been convicted of battery as a class B misdemeanor on March 22, 2005. During the hearing, the parties discussed the fact that Spann had served ten years of his fifteen-year sentence in

¹ At the time Spann was sentenced, Indiana Code section 35-50-2-5 provided that “[a] person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances.”

² The trial court’s order listed the year as 1996; however, because sentencing occurred in 1995, we have changed the date to reflect the year of sentencing.

the DOC and that he had a five-year-sentence that had not been served.³ Spann indicated that “he did three years, eight months, and twelve days of probation before the probation revocation was filed” and that he believed that he should receive some credit time for the amount of time he spent incarcerated following the filing of the petition to revoke his probation. Tr. of 4-12-05 Hrg. p. 7.⁴ The trial court found that Spann had violated his probation, determined that Spann was not entitled to have any credit time applied to his remaining five-year sentence because he was already being held in custody on another cause, and set a further hearing for disposition on the revocation.

On October 3, 2005, Spann filed a Brief on Issue of Time Served, in which he argued that his period of probation could not have exceeded five years, admitted that he was in the midst of serving his five-year probation when the State filed the petition to revoke his probation,⁵ and challenged the trial court’s prior ruling that he was not entitled to credit time for the time he spent incarcerated following the petition to revoke his probation. In its response to Spann’s motion, the State indicated that it “did not object to [Spann’s] assertion that his period of probation should be five years from the date of his release from the

³ The April 12, 2005 entry in the chronological case summary (CCS) indicates that the “Court f[ound] and [the] parties agree[d] that the Defendant has completed ten years of the fifteen year sentence originally imposed” and that he had a “remaining five year probationary sentence.” Appellant’s App. p. 21.

⁴ The transcript included in the record on appeal contains five separate hearings bound in a one-volume transcript; however, the pages contained therein are not numbered consecutively and, instead, are numbered for each separate hearing. Thus, we will cite to the transcript according to the date of the hearing and appropriate page.

⁵ Specifically, Spann noted that “[f]rom May 19, 2001, when defendant was released from the Indiana Department of Correction[] after serving ten (10) years of his sentence, to . . . when the State filed its Probation Revocation in this cause the defendant served three (3) years, eight (8) months and twelve (12) days on probation.”

Department of Correction[] on May 19, 2001[,]” but it disagreed that Spann was entitled to any credit time on any sentence imposed from his probation revocation based on the fact that he was being held in custody in two other unrelated charges. Appellant’s App. p. 73.

On November 3, 2005, the trial court held a hearing during which it acknowledged that Spann had received a fifteen-year sentence, had served six years executed and four years as a condition of probation, thus, leaving him with a five-year suspended sentence. During the hearing, Spann indicated that he believed that the petition to revoke his probation was belatedly filed, and the trial court reset the disposition hearing for January 10, 2006.⁶

On January 10, 2006, the trial court held a hearing regarding Spann’s challenge to the timeliness of the petition to revoke his probation. The trial court found that the State’s petition to revoke probation was timely because Spann’s five-year probation began on May 19, 2001, the date he was released from the DOC, and the petition to revoke probation was filed on February 14, 2005, during Spann’s probationary period.

On February 21, 2006, the trial court held a final hearing on Spann’s probation revocation and issued findings and conclusions regarding the “Present Status of [Spann’s] Suspended Sentence.” *Id.* at 77-78. The trial court’s findings and conclusions, provided, in part, that: (1) in September 1995 the trial court had sentenced Spann to serve fifteen years, with six years executed and an additional four years as a condition of probation; (2) on August 25, 1999, Spann completed his ten years of incarceration in this case, which left **“remaining a suspended sentence of 5 years[,]”** and began serving his sentence in an

⁶ The record presented on appeal does not contain a written motion challenging the timeliness of the State’s petition to revoke probation.

unrelated case that was ordered consecutive to this case; (3) on May 19, 2001, Spann was released from the DOC and began serving his five-year probation; (4) on February 14, 2005, the State timely filed the petition to revoke Spann's probation because it was within Spann's probationary period. Id. at 77 (emphasis in original). The trial court also issued a separate order in which it revoked Spann's probation and "continue[d] [Spann] on probation for five years but order[ed] as a condition of probation that [Spann] serve it in the Department of Correction." Appellant's App. p. 79. Spann now appeals.

DISCUSSION AND DECISION

Spann argues that the trial court abused its by revoking his probation because the State's petition to revoke his probation was not timely filed.⁷ We review a decision to revoke probation for an abuse of discretion. Marsh v. State, 818 N.E.2d 143,144 (Ind. Ct. App. 2004). An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. Id. at 145.

⁷ Spann also challenges the trial court's August 1996 order denying his motion to correct erroneous sentence and argues that: (1) the trial court erred by adding a term of probation to his original sentence; and (2) even if the trial court did not err by adding a probationary term, it erred by ordering that the length of probation be twelve years, which would result in an illegal sentence. First, we note that a defendant may not collaterally attack a sentence on appeal from a probation revocation. Stephens v. State, 818 N.E.2d 936, 939 (Ind. 2004) (citing Schlichter v. State, 779 N.E.2d 1155, 1157 (Ind. 2002)). Furthermore, while we agree that the trial court could not impose a twelve-year term of probation on a class B felony where it also ordered a ten-year executed term, see Ind. Code § 35-50-2-2(c) (providing that "whenever the court suspends a sentence for a felony, it shall place the person on probation under IC 35-38-2 for a fixed period to end not later than the date that the maximum sentence that may be imposed for the felony will expire"), we need not address these contentions because the record reveals that the trial court's original sentence included a probationary period and that the trial court corrected its imposition of a twelve-year period of probation and acknowledged that Spann, who served ten years in the DOC, could only have a suspended sentence and resulting probationary period of five years.

Indiana Code section 35-38-2-3(a) provides that a trial court may revoke a person's probation if:

(1) the person has violated a condition of probation during the probationary period; and

(2) the petition to revoke probation is filed during the probationary period or before the earlier of the following:

(A) One (1) year after the termination of probation.

(B) Forty-five (45) days after the state receives notice of the violation.

(Emphasis added). A defendant's "probationary period" begins immediately after sentencing—even if his actual probation begins at a later date—and ends at the conclusion of the probationary phases of the defendant's sentence. See Kopkey v. State, 743 N.E.2d 331, 339 (Ind. Ct. App. 2001); Crump v. State, 740 N.E.2d 564, 568 (Ind. Ct. App. 2000).

Here, the trial court found that on August 25, 1999, Spann completed his ten years of incarceration in this case but remained incarcerated in the DOC and began serving a sentence in an unrelated case that was ordered consecutive to this case. The trial court's findings and conclusions also indicate that Spann began serving his five-year probation in this case on May 19, 2001, when he was released from the DOC.⁸ Thus, Spann's probationary period did not expire until May 19, 2006. Accordingly, the State's petition to revoke Spann's probation, which was filed on February 14, 2005—before the expiration of Spann's

⁸ Spann does not specifically challenge the trial court's findings that his five-year probation commenced upon his release from the DOC but suggests that his probation might have started on August 25, 1999, following the completion of sentence in this case. However, as the trial court pointed out in its findings and conclusions, Spann conceded in a brief filed with the trial court that his five-year probation began upon his release from the DOC on May 19, 2001. See Appellant's App. p. 69, 77-78. "It is well-settled law in Indiana that a defendant may not argue one ground for objection at trial and then raise new grounds on appeal." Taylor v. State, 841 N.E.2d 631, 637 (Ind. Ct. App. 2006) (citations omitted), trans. denied.

probationary period—was timely. Therefore, the trial court did not abuse its discretion by revoking Spann’s probation.

Affirmed.

KIRSCH, C.J., and SHARPNACK, J., concur.