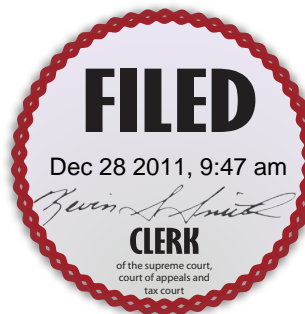


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KEVIN BACKUS,)
)
Appellant-Defendant,)
)
vs.) No. 79A04-1105-CR-276
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-1003-FB-8

December 28, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Kevin Backus appeals the trial court's sentence that was imposed upon revoking his placement in community corrections. Specifically, Backus argues that the trial court abused its discretion when it ordered him to serve the remainder of the executed portion of his sentence at the Department of Correction (DOC). Finding no error, we affirm.

FACTS

On March 25, 2010, the State charged Backus with conspiracy to commit burglary, a class B felony, burglary, a class B felony, and two counts of theft, a class D felony. Backus entered into a plea agreement with the State, pursuant to which he pleaded guilty to burglary, and the State dismissed the other counts. The plea agreement also provided that the executed portion of his sentence be no less than six years and no greater than ten years. The trial court accepted Backus's plea and, following a hearing on October 1, 2010, sentenced him to the DOC for a term of eight years, with six years executed and two years suspended to probation. The trial court ordered Backus to serve four years of his executed sentence with the Tippecanoe County Community Corrections (TCCC), with 195 days good time credit.

On March 24, 2011, the TCCC filed a non-compliance report, alleging that Backus violated the rules of his placement for failing to return to lawful detention following work release within two hours of his scheduled return time. That same day, the State filed its motion to commit Backus to the DOC for the remainder of his executed sentence. At a hearing on the motion on May 6, 2011, Backus admitted to failing to

return to the TCCC within two hours of his scheduled return time. The trial court found Backus in violation of his Community Correction placement and, after applying good time credit, sentenced him to the DOC for 1,410 days. Backus now appeals.

DISCUSSION AND DECISION

Backus argues that the trial court erred when it ordered Backus to serve the remainder of his executed sentence in the DOC. Specifically, Backus maintains that the trial court failed to consider mitigating factors and relied on evidence outside the record.

For the purposes of appellate review, we treat the revocation of placement in a community corrections program the same as we do the revocation of probation. Brown v. State, 947 N.E.2d 486, 489 (Ind. Ct. App. 2011). Placement in a community corrections program is an alternative to commitment to the DOC and made at the sole discretion of the trial court. Id. A defendant is not entitled to serve his sentence in a community corrections program but rather placement in the program is a “matter of grace” and “a conditional liberty” that is a favor, not a right. Id. Indiana Code section § 35-38-2.6-5 provides that if a person violates the terms of his placement, the trial court may, after a hearing, do any of the following: (1) change the terms of placement, (2) continue the placement, or (3) revoke the placement and commit the person to the DOC for the remainder of the person’s sentence. Upon finding that an offender has violated the terms of placement, whether to revoke that placement and order the offender to serve the remainder of his sentence at the DOC is a decision within the trial court’s discretion.

Brown, 947 N.E.2d at 489. A court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances. Id.

Backus argues it was error for the trial court to sentence him to the remainder of his executed sentence without considering the mitigating factors found during his original sentencing hearing. However, Indiana Code section 35-38-2-3, which governs the revocation of probation, does not require a trial court to consider mitigating circumstances, with one exception not relevant here,¹ when imposing sentencing upon a finding of probation violation. See Patterson v. State, 659 N.E.2d 220, 222-23 (Ind. Ct. App. 1995). Community corrections revocation hearings are no different. More specifically, Indiana Code section 35-38-2.6-5 does not require that trial courts consider mitigation factors when determining whether to revoke a defendant's placement in community corrections. Thus, we conclude that the trial court did not err when it revoked Backus's placement in community corrections without considering mitigating factors.

Backus's next challenge to his sentence is that the trial court erred when it purportedly considered matters outside the record during the hearing on the motion to commit Backus to the DOC. He points to the following statement of the trial court as improper and "outside the evidence:"

¹ In Patterson, a panel of this court held that the probationer's mental state must be considered in a dispositional determination of probation revocation proceedings. See Patterson, 659 N.E.2d at 222. Backus did not raise his mental state as an issue at the community corrections hearing, nor does he address it on appeal. Thus we do not address it here.

The defendant did receive a lenient sentence. I'm aware of the---the victim of the crime made a very passionate statement at each of the sentencings for each of the four sentencings for each of the four people involved and stated her forgiveness and asked for a lenient sentence herself. The---as is often the case, people point fingers at each other in the case and the picture, you know, that one gets from the first people who testify winds up being difference than the other people that testify and the impression that I had initially was that Moe Moore was the ring leader, but Moe Moore denied that. Certainly Tasha Pearson and Ashley Pendley were not the ring leaders or you said that they weren't and so that---if they are to be believed, you played a greater role in this than you admitted at the time of your sentencing. Either that or I just got confusing stories about what went on.

I'm not inclined to be lenient again and so I'm going to order---grant the motion and order that the defendant spend the remainder of his executed sentence on in the Department of Correction.

Tr. p. 72-73. Additionally, in support of his contention that the trial court revoked his placement in community corrections because of evidence that was not made part of the record, Backus directs us to a statement made by the trial court during his original sentencing hearing. More particularly, the trial court commented that:

I have frequently had the experience of hearing one side of the story and being convinced by that side of the story until I heard everybody else's point of view and then it turns out there was no leader. There was no---they were all followers and they were pointing the fingers at everybody else. So I have to withhold judgment on who is most responsible and who is least responsible until I have heard the evidence and I may not hear that until I've had all four cases.

Id. at 52.

Notwithstanding the comments above, Backus has failed to show that the trial court statements and facts discussed therein were the reasons for its sentencing decision. Here, following Backus's own admission, the trial court found that Backus had violated

the terms of his placement in community corrections. Id. at 64-71. Given the finding that Backus had violated the terms of his placement in community corrections, it was well within the trial court's discretion to order that Backus serve the remainder of his sentence. I.C. § 35-38-2.6-5(3). Therefore, we conclude that trial court did not abuse its discretion when it ordered Backus to serve the remainder of his executed sentence in the DOC.

We affirm the judgment of the trial court.

DARDEN, J., and BAILEY, J., concur.