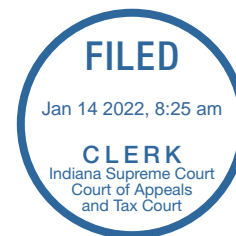


## MEMORANDUM DECISION

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

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Kathy J. Clapper,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

January 14, 2022

Court of Appeals Case No.  
21A-CR-1507

Appeal from the Delaware Circuit  
Court

The Honorable Linda Wolf, Judge

Trial Court Cause No.  
18C03-1312-FA-6

### **Friedlander, Senior Judge.**

- [1] Kathy J. Clapper pleaded guilty to one count of dealing in methamphetamine as a Class B felony, after having been charged with that count, two counts of dealing in methamphetamine as a Class A felony, one count of possession of

methamphetamine as a Class B felony, and one count of maintaining a common nuisance as a Class D felony. The remaining charges were dismissed, and the trial court sentenced Clapper to fourteen years executed in the Department of Correction (DOC). After Clapper's sentence was modified, she was placed on supervised probation and one year of home detention. A petition to revoke her probation was filed and Clapper admitted to some of the violations. The court then ordered Clapper to serve the remainder of her sentence in the DOC. Clapper now appeals, contending that the trial court abused its discretion in its sentencing decision. We affirm.

[2] In October 2014, Clapper pleaded guilty to dealing in methamphetamine as a Class B felony after having been charged with several controlled-substance-related offenses. She was sentenced to serve fourteen years executed in the DOC. While there, Clapper suffered from medical conditions that required treatment and requested that the court modify her sentence to electronic home detention. The court granted Clapper's request, suspending the remainder of her sentence, ordering that she be placed on supervised probation until her projected release date of December 7, 2020, and recommending at least one year on home detention. Among the terms and conditions of her probation were the conditions that she abide by all laws and not possess, consume, or distribute controlled substances.

[3] Next, Clapper's behavior became non-compliant with the terms and conditions of her probation. On April 5, 2019, while Clapper was on probation, she was charged with and convicted of resisting law enforcement as a Level 6 felony.

She was sentenced to a term of 545 days in the Madison County Jail, but the sentence was suspended to be served on probation. Clapper failed to notify her probation officer in this matter of her “contact with Law Enforcement,” which was a violation of the terms of her probation. *See* Appellant’s App. Vol. II, p. 15. Clapper continued to use controlled substances in violation of the terms and conditions of her probation. In June 2020, Clapper failed to report for a drug screen and tested positive for controlled substances on two occasions. On June 26, 2020, the State charged Clapper with dealing in methamphetamine, a Level 2 felony, possession of a controlled substance, a Level 6 felony, maintaining a common nuisance, a Level 6 felony, possession of marijuana, a Class A misdemeanor, driving while suspended, a Class A misdemeanor, and possession of paraphernalia, a Class C misdemeanor.

[4] The State filed a petition to revoke Clapper’s supervised probation, alleging that she had (1) been convicted of resisting law enforcement, (2) failed to contact her probation officer, (3) failed to report for a drug screen, (4) tested positive for multiple controlled substances, (5) was charged on June 26, 2020, with several crimes, (6) failed to cooperate and truthfully answer reasonable inquiries made by her probation officer, (7) failed to report to the probation office as directed, and (8) failed to notify the probation office of a change in her address. *See id.* at 15-16.

[5] Clapper was arrested on March 3, 2021, and after that arrest, the State filed an amended petition alleging those things and also that Clapper was charged on March 24, 2021, with dealing in methamphetamine as a Level 2 felony, driving

while suspended as a Class A misdemeanor, and possession of marijuana, a Class A misdemeanor. Clapper admitted to violating the terms and conditions of her probation by being charged with new offenses under two cause numbers. The trial court found that Clapper had violated her probation and later, after a dispositional hearing, ordered her to serve the remainder of her sentence executed in the DOC. Clapper now appeals.

[6] Probation is a matter of grace left to the trial court's discretion, not a right to which a criminal defendant is entitled. *Prewitt v. State*, 878 N.E.2d 184 (Ind. 2007). The court determines the conditions of probation and may revoke probation if those conditions are violated. *Id.* Once a court has exercised its grace by ordering probation in lieu of incarceration, the court should have considerable leeway in deciding how to proceed. *Id.* If this discretion were not afforded to trial courts and sentences were scrutinized too severely on appeal, courts might be less inclined to order probation to future defendants. As a result, a court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. *Id.* An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

[7] In deciding whether to revoke probation, a court first must make a factual determination as to whether there was a violation of a condition of probation. *Pierce v. State*, 44 N.E.3d 752 (Ind. Ct. App. 2015). If a violation is found, then the court must determine the sanctions for the violation. *Id.* A revocation

proceeding is civil in nature and the State must prove its allegations by only a preponderance of the evidence. *Id.*

[8] This Court will affirm a court's decision to revoke probation if the court's finding of a violation is supported by substantial evidence of probative value. *Id.* A single violation of a condition of probation is enough to support a court's decision to revoke probation. *Id.*

[9] Here, the evidence supporting the court's decision to revoke Clapper's probation and to enter an order that she serve the remainder of her sentence in the DOC is substantial. She violated the laws by being arrested and convicted. Further, she was charged with multiple new drug-related offenses in two different cases while she was on probation. The new charges are related to the offenses for which Clapper was on probation. When the alleged probation violation is the commission of a new crime, conviction of the new crime is not required. *Id.* In this case, Clapper was convicted of resisting law enforcement and was charged with multiple drug-related offenses. There is substantial evidence to support the court's decision to find a violation and determine that an executed sentence in the DOC was the proper sanction. Plus, Clapper admitted as much.

[10] Clapper had been afforded the opportunity to show that she was rehabilitated and could live a law-abiding life outside prison walls. *See Purdy v. State*, 708 N.E.2d 20 (Ind. Ct. App. 1999). Instead, by her actions, she has demonstrated an inability to conform her behavior and abide by the law. We find no abuse of

discretion in the court's decision to revoke Clapper's probation and impose the remainder of her previously suspended sentence to be executed in the DOC as the appropriate sanction for her numerous violations.

[11] Clapper urges us to consider her medical conditions in our analysis of the court's decision to order an executed sentence in the DOC. Clapper made that similar argument to the court in her request for sentence modification. The court granted the request. Clapper's response to the grace given to her by the court when it allowed her to serve her sentence on supervised probation was to continue abusing controlled substances and disobeying the law. We find no abuse of discretion in the court's decision.

[12] Last, Clapper invokes language from our Supreme Court's opinion in *Livingston v. State*, 113 N.E.3d 611 (Ind. 2018), arguing that the court's placement decision—where her sentence is to be served—is appropriate for appellate review under Indiana Appellate Rule 7(B). That case, however, involved exceptional circumstances which are not present here. Further, *Livingston* did not involve review of a sentence imposed for a probation revocation. *Id.* As a result, arguments along those lines are inapposite. As a final point, to the extent Clapper might be suggesting that we review her initial sentence for its appropriateness, we decline to do so as that review would be inappropriate on review of a court's sentencing decision on a probation revocation. *See Cox v. State*, 850 N.E.2d 485 (Ind. Ct. App. 2006); *Crump v. State*, 740 N.E.2d 564 (Ind. Ct. App. 2000).

[13] Clapper's reliance on *Holsapple v. State*, 148 N.E.3d 1035 (Ind. Ct. App. 2020), is likewise misplaced. In *Holsapple*, we reversed a trial court's imposition of the maximum executed sentence, finding that the court did so under the mistaken premise that it had no discretion but to impose such sentence. Here, there is nothing in the record to suggest that the trial court believed it had no choice but to impose the entire remaining sentence executed in the DOC. We find no error here.

[14] Based on the foregoing, we affirm the trial court's judgment in all respects.

[15] Judgment affirmed.

Altice, J., and Weissmann, J., concur.