

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.



ATTORNEY FOR APPELLANT

Cara Schaefer Wieneke
Brooklyn, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Steven J. Hosler
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Andrew A. Dake,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 31, 2022

Court of Appeals Case No.
21A-CR-2041

Appeal from the Shelby Superior
Court

The Honorable R. Kent Apsley,
Judge

Trial Court Cause Nos.
73D01-2010-F5-80,
73D01-1701-F3-3, 73D01-1608-
F4-28

Altice, Judge.

Case Summary

- [1] Andrew A. Dake appeals the sentence imposed after he admitted to violating his probation. Specifically, Dake argues that the trial court abused its discretion in ordering him to serve the entirety of his suspended sentences.
- [2] We affirm.

Facts & Procedural History

- [3] In October 2015, Dake agreed to drive a friend to buy heroin. Dake knew his friend was planning to rob the individual selling the heroin but participated anyway in exchange for a portion of the heroin. During the robbery, Dake's friend used a BB gun to shoot the seller. On January 19, 2017, the State charged Dake with attempted robbery resulting in bodily injury, a Level 3 felony, and false informing, a Class B misdemeanor, in Cause No. 73C01-1701-F3-3 (F3-3).
- [4] In December 2015 and January 2016, Dake sold heroin to undercover police officers. The State charged Dake with two counts of Level 4 felony dealing in cocaine or a narcotic drug in Cause No. 73D01-1608-F4-28 (F4-28). Dake pled guilty to both counts, and on February 3, 2017, he was sentenced to concurrent terms of five years, with two and one-half years suspended to probation. Dake completed the executed portion of his sentence on July 31, 2018.
- [5] Just before his release from incarceration in F4-28, Dake pled guilty to the lesser included offense of robbery as a Level 5 felony in F3-3. He was

sentenced to five years, two years of which were suspended to probation. This sentence was ordered to be served consecutive to the sentence in F4-28. In May 2020, Dake completed the executed portion of his sentence in F3-3 and was released to probation.

[6] On October 16, 2020, Dake's probation officer conducted a search of Dake's home, during which the probation officer observed heroin and paraphernalia in the home. Dake was arrested and charged with Level 6 felony possession of a narcotic drug (heroin), Level 6 felony possession of a syringe, and Class C misdemeanor possession of paraphernalia in Cause No. 73D01-2010-F5-80 (F5-80). The State also filed a petition to revoke Dake's probation in F4-28 and F3-3 based on the new offenses. Ultimately, Dake admitted to violating his probation in both causes.

[7] Dake spent approximately ninety days in jail awaiting trial. Thereafter, the trial court allowed Dake to be released from jail to begin a residential recovery program at Home with Hope. Dake was admitted into the program on January 7, 2021. In June, Dake's case manager filed a report with the court in which she indicated that Dake had progressed to the final phase of the recovery program, his attitude and participation were "excellent", he had no compliance issues with the program structure or the support group, and he was current with payment of his program fees. *Appellant's Appendix Vol. 2* at 98. His case manager commented that Dake was doing "extremely well" and that he was taking his recovery "very seriously." *Id.* In fact, Dake was doing so well and had displayed such a "great deal of integrity" that he had been offered the

resident manager position, which is a position of trust in the program. *Id.* The case manager also stated that “all of [Dake’s] alcohol/drug screens continue to yield negative results.” *Id.*

[8] On June 9, 2021, Dake pled guilty to Level 5 felony possession of heroin in F5-80 and the remaining charges were dismissed. The plea agreement provided that Dake’s sentence was capped at four years. The trial court scheduled a joint dispositional and sentencing hearing for August 18, 2021.

[9] Prior to the hearing, Dake wrote a personal letter to the court with the purpose of providing “some perspective” as to how his life had changed since his most recent arrest. *Id.* at 125. He explained:

When I was released from prison in April 2020 I had no real plan. I was released from prison with little to no idea of what it meant to be a truly productive member of society and no real support structure to aid me in being that. I was going in blind and my first attempt proved to be less than fruitful. I relapsed very quickly and found myself once again lost and vulnerable to my nascent addiction. I was injecting heroin once again after just a few months and trying (and failing) to regain control of myself. I was in over my head before I knew it and was caught at home with some heroin and accompanying paraphernalia by the probation department on October 15. After spending about 90 days in the Shelby County Jail I posted bond and moved in the Home with Hope sober living facility in Lafayette, Indiana.

Since being at Home with Hope I have developed a support system unlike any I’ve ever had in my life. I have gotten a taste of what a practical program of recovery can do for my life and I am happier and more fulfilled than ever. I have become

involved in Heroin Anonymous by becoming a core member of the budding HA group being formed in Lafayette. I have also been a dedicated member of Crystal Meth Anonymous and Alcoholics Anonymous, attending all three fellowships weekly. I am currently working step 4 of the AA program with my sponsor . . . and have reached new heights and revelations about what recovery can truly be. I have started taking antidepressants daily, as well as a monthly shot of Vivitrol which have done wonders for my mental health (the primary driving factor in my drug use) as well as all but eliminating any cravings I once had to relapse. I have obtained gainful employment at Subaru of Indiana Automotive and have every intention of staying there for the long haul as it presents an opportunity for a future that I have never before had within my grasp. I have obtained my driver's license for the first time in my life and also purchased my own vehicle so that I can get myself to and from work reliably without having to depend on someone else. I have graduated from the Home with Hope program and been granted to [sic] opportunity to continue to live here as the Resident Manager, helping to facilitate the growth of the program and guiding new residents in the right direction in hopes of granting each new client a chance to thrive in recovery the same way that I have.

In conclusion I ask very simply to be given the chance to stay in society and continue on the path that I have set for myself in the six months since leaving jail. At this point returning to the Department of Corrections [sic] would serve only to destroy everything that I have worked so hard to build and force me back to a state of desperation, having to start all over from square one whenever I am finally released again. I appreciate your time and consideration in this matter.

Id. Dake's counselor at Home with Hope also submitted a letter to the court in which she stated that Dake "continue[s] to show growth and integrity,"

“remains focused on his recovery,” and “continues to be determined to move forward and be a productive member of the community.” *Id.* at 123.

[10] At the sentencing hearing, Lindsey Kreps, who worked with Dake at Home with Hope, testified that Dake has done “very well” with the program and that he has “carried an incredible level of honesty, open mindedness, and willingness.” *Transcript* at 19. In her opinion, Dake “is actually fueled from a place of wanting to recover.” *Id.* at 20. Dake also testified and informed the court that he was employed and that his attendance at work was perfect except for missing shifts for court dates. He also testified that he is having child support taken out of his pay and that his arrearage is now “no more than five hundred.” *Id.* at 27. He admitted to the court that in October 2020, he “had a relapse. I mean, there’s no way to sugarcoat that. I, I’m a heroin addict and I ended up using again.” *Id.* at 28. He then pleaded with the court:

[S]ince I’ve been at the Home with Hope, I’ve actually been able to rebuild my life. I’ve got a great job. I got my license back. I bought a car. I’m doing better now than I’ve done in my entire life. I mean, it’s no doubt about that. And I would very much like to continue to have the opportunity to build on that.

Id. at 28.

[11] In his argument to the court, Dake acknowledged his “extensive criminal history” and that his drug use was “[a]lmost as extensive.” *Id.* at 34. Emphasizing his progress, Dake requested that he be sentenced to a year of probation on each of his probation violation cases and a three-year direct

commitment on home detention followed by two years of probation on his new case. The State likewise acknowledged that Dake “in the immediate term is doing well.” *Id.* at 36. Nevertheless, the State asked the court to not overlook the fact that Dake’s criminal history included some serious cases. The State asked that, for his violations of probation the court order Dake to serve eighteen months in each of his suspended sentences in F3-3 and F4-28, to be followed by two years in the Department of Correction (DOC) and two years of home detention under F5-80.

[12] The trial court ordered Dake to serve the entirety of his suspended sentences in F4-28 and F3-3, for a total of fifty-four months in the DOC. This was to be followed by a “three year sentence to be served as a direct commitment to home detention” under F5-80. *Id.* at 40. As part of his plea agreement with the State, Dake waived appellate review of the sentence on the new conviction and does not challenge it on appeal. Dake does, however, challenge the trial court’s order that he serve the entirety of his suspended sentences.

Discussion & Decision

[13] We review a trial court’s sentencing decision in a probation revocation proceeding for an abuse of discretion. *Jones v. State*, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005). An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). Moreover, “[o]nce a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have

considerable leeway in deciding how to proceed.” *Id.* “If the court finds the defendant has violated a condition of his probation at any time before the termination of the probationary period, and the petition to revoke is filed within the probationary period, then the court may order execution of the sentence that had been suspended.” *Gosha v. State*, 873 N.E.2d 660, 664 (Ind. Ct. App. 2007); *see also* Ind. Code § 35-38-2-3(h).

[14] In setting forth the sanction, the trial court explained:

In this case I’ll find as mitigating circumstances that you have accepted responsibility[y] for your actions by taking a plea agreement in this case. I’ll also find that you, as a mitigator, have sought treatment for your longstanding issues and addictions to controlled substances. I balance those against aggravating circumstances. An aggravating circumstance includes your substantial criminal history, which has resulted, at least by the Pre-Sentence Investigation Report, in five felony convictions and three misdemeanor convictions as an adult. That’s on top of five juvenile cases that you had, which preceded your adult history resulting in three formal adjudications and one informal adjudication. I also find as an aggravator that you recently violated the terms of probation or court supervision. As a practical matter, obviously, Mr. Dake, I have to weigh all those things. I’m certainly happy to see you’re dealing with your addiction problem, you’re clean, you’re in a program. I released you to that program. Ultimately, you being sober is your responsibility, and you’re the one who benefits from that, and I do think that’s good. I have to balance that then with your prior criminal history, and it’s not unsubstantial, prior criminal history. What I find concerning is not only were you on probation. Not only are we dealing with two probation matters here when you pick up this F5 felon[y], but one of those probation matters involve[d] dealing a controlled substance and the other one

involved robbery with serious bodily injury. So those are very significant matters that you were on probation for when you committed this F5 offense.

Transcript at 39-40.

[15] We recognize that this is a close case and commend Dake for making positive strides in addressing his addiction to controlled substances and for his efforts toward becoming a productive member of society. However, we will not second guess the trial court with regard to sentencing matters. The trial court clearly considered Dake's recent efforts but was persuaded more by his criminal history, which even Dake acknowledges is quite substantial. Based on the record before us, we cannot say the trial court abused its discretion in ordering Dake to serve the balance of both of his suspended sentences at the DOC.

[16] We affirm.

Bailey, J. and Mathias, J., concur.