

## 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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Tina L. Fleener-Tays,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff,*

May 17, 2021

Court of Appeals Case No.  
20A-CR-2289

Appeal from the Bartholomew  
Circuit Court

The Honorable Kelly S. Benjamin,  
Judge

Trial Court Cause Nos.  
03C01-2009-F6-4412  
03C01-1811-F6-6376  
03C01-1809-CM-5216

**Pyle, Judge.**

## Statement of the Case

[1] Tina Fleener-Tays (“Fleener-Tays”) appeals the trial court’s judgment ordering her to serve the balance of her previously suspended sentence after she had violated her probation. She also appeals the two (2) year sentence imposed after she pleaded guilty to Level 6 felony unlawful possession of a legend drug.<sup>1</sup> Concluding that the trial court did not abuse its discretion in ordering Fleener-Tays to serve the balance of her previously suspended sentence after she had violated probation and that her two (2) year sentence is not inappropriate, we affirm the trial court’s judgment and sentence.

[2] We affirm.

## Issues

1. Whether the trial court abused its discretion in ordering Fleener-Tays to serve the balance of her previously suspended sentence after she had violated probation.
2. Whether Fleener-Tays two (2) year sentence is inappropriate.

## Facts

[3] In September 2018, forty-eight-year-old Fleener-Tays went to D.H.’s house in Columbus in violation of a protective order. Fleener-Tays threw a boat oar

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<sup>1</sup> IND. CODE §§ 16-42-19-13 and -27.

through the glass window in D.H.'s back door and attempted to enter D.H.'s house. Police officers arrived at the scene and subsequently found two pipes and a bag of marijuana in Fleener-Tays' backpack. The State charged Fleener-Tays with Class A misdemeanor invasion of privacy, Class B misdemeanor possession of marijuana, and Class C misdemeanor possession of paraphernalia in Cause 03C01-1809-CM-5216 ("CM-5216").

[4] In November 2018, while the protective order was still in place. Fleener-Tays returned to D.H.'s house and hit him in the face with a glass cooking dish. When D.H. attempted to call 911, Fleener-Tays threw D.H.'s phone across the room. The State charged Fleener-Tays with Level 6 felony domestic battery, Class A misdemeanor invasion of privacy, and Class A misdemeanor interference with the reporting of a crime in Cause 03C01-1811-F6-6376 ("F6-6376").

[5] In February 2019, pursuant to a plea agreement, Fleener-Tays pleaded guilty to Class A misdemeanor invasion of privacy in CM-5216 and Level 6 felony domestic battery in F6-6376. Pursuant to the terms of the plea agreement, the State dismissed the remaining counts in both causes. The trial court sentenced Fleener-Tays to 365 days, with 120 days on probation, in CM-5216 and 912 days, with 730 days on probation, in cause F6-6376. The trial court ordered the sentences to run consecutive to each other and suspended them both.

[6] Two months later, in April 2019, the State filed a petition to revoke Fleener-Tays' probation. The petition specifically alleged that Fleener-Tays had

violated probation when she had: (1) twice used methamphetamine in March 2019; (2) been charged with another count of invasion of privacy in April 2019; and (3) used methamphetamine again in April 2019.

- [7] In July 2019, the State amended its petition to revoke Fleener-Tays' probation. The amended petition specifically alleged that Fleener-Tays had also violated her probation when she had: (1) used methamphetamine and marijuana in June 2019; and (2) failed to both report to her probation officer for scheduling and contact her probation officer to report an address change. Fleener then absconded and did not contact her probation officer for over a year.
- [8] In September 2020, police officers located Fleener-Tays in a Columbus house. Fleener-Tays told the officers that she had been hiding in the house for over a year to avoid being arrested. When the officers found Fleener-Tays, she had in her possession several drugs, including Gabapentin. Because Gabapentin is a legend drug, and Fleener-Tays did not have a prescription for it, the State charged Fleener-Tays with Level 6 felony unlawful possession of a legend drug in Cause 03C01-2009-F6-4412 ("F6-4412") in September 2020.
- [9] In November 2020, pursuant to a plea agreement, Fleener-Tays pleaded guilty to Level 6 felony unlawful possession of a legend drug in F6-4412 and admitted that she had violated probation in CM-5216 and F6-6376. Pursuant to the terms of the plea agreement, sentencing for the Level 6 felony and the probation violations was left to the trial court's discretion.

[10] The trial court held a sentencing hearing in November 2020. Fleener-Tays' Pre-Sentence Investigation Report ("PSI") revealed that she has a twenty-year criminal history that includes two felony convictions for possession of methamphetamine and failure to return to lawful detention. Fleener-Tays also has seven misdemeanor convictions, including two convictions for false informing and one conviction each for public intoxication, operating a vehicle while intoxicated, domestic battery, resisting law enforcement, and criminal mischief.

[11] At the hearing, Fleener-Tays admitted that she had "struggl[ed] with . . . methamphetamine." (Tr. Vol. 2 at 30). The testimony further revealed that Fleener-Tays had had previous opportunities for drug treatment but had "not taken advantage of those opportunities." (Tr. Vol. 2 at 39).

[12] At the end of the sentencing hearing, the trial court found the following aggravating factors: (1) Fleener-Tays' criminal history; (2) Fleener-Tays had absconded while on probation; (3) she had been previously offered drug treatment but had failed to take advantage of it; (4) she had not taken advantage of probation; and (5) she had violated the terms of her probation and was on probation at the time she committed the offense of Level 6 felony unlawful possession of a legend drug. The trial court further found Fleener-Tays' guilty plea to be a mitigating factor.

[13] The trial court sentenced Fleener-Tays to two (2) years for the unlawful possession of a legend drug conviction in F6-4412. In addition, the trial court

ordered Fleener-Tays to serve 62 days of her previously suspended sentence in CM-5216 but determined that, after applying Fleener-Tays' credit time, the sentence had been served. Lastly, the trial court ordered Fleener-Tays to serve the balance of her previously suspended 912-day sentence in F6-6376 in the Department of Correction.

[14] Fleener-Tays now appeals.

## **Decision**

[15] Fleener-Tays argues that the trial court abused its discretion in ordering her to serve the balance of her previous suspended sentence in F6-6376 after she had violated probation and that her two (2) year sentence for Level 6 felony unlawful possession of a legend drug is inappropriate. We address each of her contentions in turn.

### **1. Probation Violation**

[16] Fleener-Tays first argues that the trial court abused its discretion in ordering her to serve the balance of her previously suspended sentence in F6-6376 after she had violated probation. We disagree.

[17] "Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled." *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). Once a trial court has exercised its grace, it has considerable leeway in deciding how to proceed when the conditions of probation are violated. *Id.* If this discretion were not given to trial courts and sentences were scrutinized too

severely on appeal, trial courts might be less inclined to order probation. *Id.* Accordingly, a trial court's sentencing decision for a probation violation is reviewable for an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances. *Id.* If a trial court finds that a person has violated his probation before termination of the probationary period, the court may order execution of all or part of the sentence that was suspended at the time of the initial sentencing. IND. CODE § 35-38-2-3.

[18] Here, Fleener-Tays argues that the trial court abused its discretion in ordering her to serve the balance of her previously suspended sentence. However, our review of the evidence reveals that Fleener violated her probation by using methamphetamine several times, failing to both report to her probation officer for scheduling and contact her probation officer to report an address change, and committing Level 6 felony unlawful possession of a legend drug. In addition, while on probation, Fleener-Tays absconded and hid for a year to avoid being arrested. Based on these facts, the trial court's decision to order Fleener-Tays to serve the balance of her previously suspended sentence in F6-6376 is not clearly against the logic and effect of the facts and circumstances before it, and the trial court did not abuse its discretion.

## **2. Inappropriate Sentence**

[19] Fleener also argues that the two (2) year sentence imposed in F6-4412 for her Level 6 felony unlawful possession of a legend drug conviction is inappropriate.

Indiana Appellate Rule 7(B) provides that we may revise a sentence authorized by statute 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. The defendant bears the burden of persuading this Court that her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Whether we regard a sentence as inappropriate turns on the “culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008).

[20] The Indiana Supreme Court has further explained that “[s]entencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Id.* at 1222. “Such deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant’s character (such as substantial virtuous traits or persistent examples of good character).” *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[21] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. Here, Fleener-Tays was convicted of Level 6 felony unlawful possession of a legend drug. The sentencing range for a Level 6 felony is six (6) months and two and one-half (2½) years, and the advisory sentence is one (1) year. IND. CODE § 35-50-2-



7(b). Here, the trial court sentenced Fleener-Tays to two (2) years, which is less than the maximum sentence.

[22] Regarding the nature of the offense, Fleener-Tays possessed a legend drug, Gabapentin, without a prescription. Regarding Fleener-Tays' character, we note that Fleener-Tays' PSI reveals an extensive twenty-year criminal history that includes two felony convictions and seven misdemeanor convictions. In addition, Fleener-Tays was convicted of Level 6 felony domestic battery in F6-6376 and Class A misdemeanor invasion of privacy in CM-5216. Further, when Fleener-Tays committed the Level 6 felony unlawful possession of a legend drug offense in F6-4412, she was on probation for the convictions in F6-6376 and CM-5216, and the State had already filed two petitions to revoke probation in those cases. After the State had filed those petitions, Fleener-Tays absconded and hid from the police for one year in order to avoid being arrested. Fleener-Tays' former contacts with the law have not caused her to reform herself. *See Jenkins v. State*, 909 N.E.2d 1080, 1086 (Ind. Ct. App. 2009), *trans. denied*. Based on this evidence, Fleener-Tays has failed to meet her burden to persuade this Court that her two (2) year sentence imposed in F6-4412 is inappropriate.

[23] Affirmed.

Najam, J., and Tavitas, J., concur.