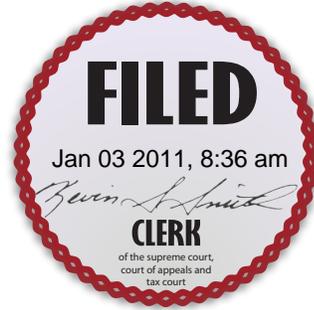


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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GARY HAYWOOD, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 31A01-1001-CR-4

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APPEAL FROM THE HARRISON SUPERIOR COURT  
The Honorable Roger D. Davis, Judge  
Cause Nos. 31D01-0702-FD-125 and 31D01-0606-FD-398

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**January 3, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Gary Haywood appeals the revocation of his probation.

We affirm.

### ISSUE

Whether the trial court abused its discretion by ordering Haywood to serve his suspended sentences.

### FACTS

On June 1, 2006, the State charged Haywood under Cause Number 31D01-0606-FD-398 (“Cause No. 398”) in Harrison Superior Court with Count I, operating a vehicle while intoxicated with a blood-alcohol content of .15% or greater, a class A misdemeanor; Count II, operating a vehicle while intoxicated in a manner that endangers a person, a class A misdemeanor; Count III, operating a vehicle while intoxicated as a class C misdemeanor; and Count IV, operating a vehicle while intoxicated with a previous conviction as a class D felony.<sup>1</sup>

On February 14, 2007, the State charged Haywood under Cause Number 31D01-0702-FD-125 (“Cause No. 125”) in Harrison Superior Court with Count I, operating a vehicle while intoxicated with a blood-alcohol content of .15% or greater, a class A misdemeanor; Count II, operating a vehicle while intoxicated in a manner that endangers a person, a class A misdemeanor; Count III, operating a vehicle while intoxicated as a

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<sup>1</sup> According to the charging information, Haywood had been convicted of operating a vehicle while intoxicated on August 3, 2005.

class C misdemeanor; and Count IV, operating a vehicle while intoxicated with a previous conviction as a class D felony.

On May 2, 2007, the State and Haywood entered into plea agreements under both Cause No. 398 and Cause No. 125. Under each plea agreement, Haywood agreed to plead guilty to operating a vehicle while intoxicated with a previous conviction as a class D felony. In return, the State agreed to dismiss the remaining charges.

Pursuant to the plea agreements, the trial court sentenced Haywood to three years, with two and one-half years suspended to probation, on each count. The trial court ordered that the sentences be served consecutively.

On March 10, 2009, the State filed petitions to revoke a suspended sentence under Cause Nos. 398 and 125. The State alleged in both petitions that Haywood had violated his probation by 1) committing theft, a class D felony, on or about January 21, 2009; 2) failing to report to probation; 3) failing to complete a court-ordered alcohol and drug program; 4) possessing alcohol on or about January 21, 2009; and 5) failing to pay court-ordered fees and costs. On April 3, 2009, the State filed an amended petition in Cause No. 125, asserting that Haywood had tested positive for marijuana on January 8, 2009, and March 5, 2009.

The trial court held a consolidated probation revocation hearing on December 2, 2009. The trial court heard testimony that Haywood took a case of beer from a convenience store without paying for it; failed to report to his probation officer; and failed two court-ordered drug tests. The trial court revoked Haywood's probation and

imposed executed sentences of two years under each cause number, to be served consecutively.

### DECISION

Haywood asserts that the trial court abused its discretion in imposing a four-year executed sentence. Specifically, he argues that the trial court should have ordered that a portion of the sentence be “served in a halfway house or other drug and alcohol rehabilitation facility.” Haywood’s Br. at 6.

Indiana Code section 35-38-2-3(g) provides as follows:

If the court finds that the person has violated a condition [of probation] at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may:

- (1) continue the person on probation, with or without modifying or enlarging the conditions;
- (2) extend the person’s probationary period for not more than one (1) year beyond the original probationary period; or
- (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing.

Probation is a matter of grace. *Runyon v. State*, No. 57S04-1006-CR-317, 2010 WL 4977997, at \*4 (Ind. Dec. 8, 2010). ““Once 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.* (quoting *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007)). Thus, a trial court’s sentencing decision in a probation revocation proceeding “is subject to appellate review for abuse of discretion ‘where the decision is clearly against the logic and effect of the facts and circumstances.’” *Id.*

As a condition of Haywood's probation, the trial court ordered, inter alia, that he not use illegal drugs; "attend and complete an alcohol/drug program"; and "not purchase, use or possess alcoholic beverages." (App. 24; 77). Despite the trial court's order and three alcohol-related convictions, Haywood failed to attend an alcohol-rehabilitation program. He also committed theft of alcohol; twice tested positive for marijuana; and failed to report to probation. We find no abuse of discretion in ordering Haywood to serve his suspended sentences in the Department of Correction.

Affirmed.

NAJAM, J., and BAILEY, J., concur.