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**IN THE
COURT OF APPEALS OF INDIANA**

MARK GREGORY,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 48A02-1009-CR-984

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Rudolph R. Pyle III, Judge
Cause Nos. 48C01-9803-CF-49 and 48C01-9809-CF-226

April 8, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Mark Gregory pled guilty to sixteen felony charges and was sentenced to a total of eighty years, with fifty-five years in prison and twenty-five suspended to probation. Three years later, he was convicted of escape and given a consecutive eight-year sentence, with four years' in prison and four years' probation. Eight years later, he requested that his sentence be modified, and the trial court granted his request, ordering him to be released on probation for the balance of his term. Less than two months after his release, he was charged with burglary and theft in a neighboring county. As a result, the trial court revoked Gregory's probation and ordered that he serve his remaining term of approximately sixty-five years in prison.

Gregory now appeals. He argues that under Indiana's probation revocation statute, the trial court lacked the authority to order him to serve a prison term that exceeds twenty-nine years. Finding no error, we affirm.

Facts and Procedural History

On May 6, 1998, Gregory pled guilty to eight counts of class B felony burglary and eight counts of class D felony theft in Madison County under Cause Number 48C01-9803-CF-49 ("Cause No. -49"). On August 17, 1998, the trial court sentenced him to ten years on each of the eight burglary counts, to run consecutively, and three years on each of the theft counts, to run concurrently. His aggregate sentence was eighty years, with fifty-five years executed and twenty-five years suspended to probation. At sentencing, the State dismissed a habitual offender charge against him.

On April 20, 2001, the State charged Gregory with class C felony escape in Madison County under Cause Number 48C01-9809-CF-226 (“Cause No. -226”). The trial court subsequently sentenced him to an eight-year term, with four years executed and four years suspended to probation, to run consecutive to his eighty-year sentence in Cause No. -49.

Gregory filed a request for sentence modification on March 31, 2009, which the trial court denied following an April 20, 2009 hearing. On June 18, 2009, he filed an amended request for sentence modification. The trial court held a hearing on July 6, 2009, and granted his modification request. The abstract of judgment stated that Gregory’s sentence was “modified to probation for balance of sentence.” Appellant’s App. at 47-48.

On September 3, 2009, the Probation Department filed a petition for violation of probation in Cause No. -49, asserting that on August 31, 2009, Gregory had committed burglary and theft of a Hancock County residence.¹ On May 25, 2010, the Probation Department filed an amended notice of violation of probation in Cause Nos. -49 and -226. The trial court held hearings on June 14 and August 16, 2010. Thereafter, the court revoked Gregory’s probation and remanded him to the Indiana Department of Correction (“DOC”) to serve 20,914 days for Cause No. -49 and eight years for Cause No. -226. Gregory now appeals. Additional facts will be provided as necessary.

¹ The State charged Gregory with class B felony burglary and class D felony theft in Hancock County, and ultimately, Gregory pled guilty to class B felony burglary.

Discussion and Decision

Gregory challenges the length of the sentence imposed by the trial court following the revocation of his probation. We review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.*

At the outset, we note that

[p]robation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment. These restrictions are designed to ensure that the probation serves as a period of genuine rehabilitation and that the public is not harmed by a probationer living within the community. As we have noted on numerous occasions, a defendant is not entitled to serve a sentence in a probation program; rather, such placement is a "matter of grace" and a "conditional liberty that is a favor, not a right."

Abernathy v. State, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006) (citations omitted).

Because Gregory's appeal involves a sanction resulting from a probation revocation, we may not review his original sentence. *See Jones v. State*, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005) (a defendant may not collaterally attack a sentence on appeal from a probation revocation). However, a defendant "is entitled to dispute on appeal the terms of a sentence ordered to be served in a probation revocation proceeding that *differ* from those terms originally imposed." *Cox v. State*, 850 N.E.2d 485, 489 (Ind. Ct. App. 2006) (emphasis added) (citation and quotation marks omitted).

Here, Gregory asserts that the trial court's order remanding him to sixty-five years in the DOC following his probation violation exceeds the parameters of the sentence originally

imposed. According to Indiana Code Section 35-38-2-3(g), if a probation revocation petition is filed within the defendant's probationary period and the trial court finds the defendant has violated any terms of probation,

the court may impose *one (1) or more* of the following sanctions:

(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 year beyond the original probationary period.

(3) Order execution of all or part of the sentence that was suspended at the time of *initial* sentencing.

(Emphases added.) The statute indicates that the trial court may choose among the options listed. *See Figures v. State*, 920 N.E.2d 267, 273 (Ind. Ct. App. 2010) (holding that notwithstanding trial court's other available options besides ordering full execution, trial court acted within its discretion in ordering defendant to serve the entire balance of his previously suspended sentence).

Gregory claims that the statute limits his prison exposure to twenty-nine years. He bases this argument on subparagraph (3), which specifically addresses the part of the sentence that was suspended at the time of his "initial" sentencing. Ind. Code § 35-38-2-3(g)(3). His initial sentence carried a suspended portion of twenty-five years in Cause No. -49 and four years in Cause No. -226. What Gregory fails to address, however, is that he sought and was granted a sentence modification in 2009, pursuant to which the *balance* of the sentences on both causes was modified to probation. Thus, executed time was converted to suspended time. As a result, when the modification took effect, the suspended portion of

his aggregate sentence was increased to include the remainder of what was previously the executed portion of his sentence. He cannot, by violating his probation, simply erase the portion of his sentence that he originally was ordered to spend in the DOC. As such, we conclude that the trial court acted within its discretion in ordering the execution of the sixty-five-year balance of his term. Accordingly, we affirm.

Affirmed.

ROBB, C.J., and NAJAM, J., concur.