

STATEMENT OF THE CASE

William Moser appeals from the trial court's revocation of his probation. Moser raises two issues for our review:

1. Whether the trial court abused its discretion when it ordered Moser to serve two years of the suspended portion of his sentence.
2. Whether the trial court erred when it ordered Moser to reside in Dearborn County as a condition of probation following his release from incarceration.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 13, 2005, the trial court entered judgment of conviction following Moser's guilty plea to Operating a Vehicle After Lifetime Suspension, as a Class C felony, and Operating a Vehicle While Intoxicated, as a Class A misdemeanor, pursuant to a plea agreement.¹ The court sentenced Moser to eight years in the Department of Correction with four years suspended for the Class C felony and one year for the Class A misdemeanor, to be served concurrent with each other but consecutive to the sentences imposed in a Monroe County case. The court also ordered Moser to serve four years of probation following his release from incarceration, with the terms and conditions listed in the plea agreement.

On June 13, 2008, the State filed a Request for Probation Violation Hearing, alleging that Moser had violated the terms of his probation because he had missed two scheduled appointments with his probation officer, was not current in paying the Monthly

¹ As a result of the plea agreement, the State dismissed the following charges: Operating Vehicle with a BAC of .10, as a Class C misdemeanor; Failure to Signal Lane Changes, as a Class C infraction; and Operating a Vehicle with No Taillights, as a Class C infraction.

Probation User's Fees, and had not reported a change of address. On January 7, 2009, at the initial hearing, Moser admitted to the State's allegations. As a result, the court revoked two years of the suspended portion of his sentence. The court also ordered Moser to reside in Dearborn County following his release from incarceration. Moser now appeals.

DISCUSSION AND DECISION

Issue One: Sentence on Revocation of Probation

Moser contends that the trial court abused its discretion when it revoked his probation. Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled. Sanders v. State, 825 N.E.2d 952, 955 (Ind. Ct. App. 2005), trans. denied. The trial court determines the conditions of probation and may revoke probation if the conditions are violated. Ind. Code § 35-38-2-3. 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. Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). A trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. Id.; see also Sanders, 825 N.E.2d at 956. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. Guillen v. State, 829 N.E.2d 142, 145 (Ind. Ct. App. 2005).

At the time the State filed its petition alleging probation violations, Indiana Code Section 35-28-2-3(g) (2008) set out the possible sanctions for probation violations:

- (g) If the court finds that the person has violated a condition 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.

Moser argues that the trial court should not have ordered him to serve two years of the four years suspended from his sentence. In support, he observes that he has an alcohol problem and his probation violations were minor. But Moser cites no authority in support of his contention that the court abused its discretion when it ordered him to serve two years in the Department of Correction. Thus, he has waived the argument.

Waiver notwithstanding, we address the merits of Moser's contention. Moser admitted that he had missed two appointments with his probation officer and had not reported a change in his residential address.² He gave no reason for missing the two appointments with his probation officer. Moser had had his probation transferred to Daviess County, but then lost his job and began to drink again. And at the hearing he testified that he had no place to live.

This case represents Moser's sixth proceeding for probation violations in the course of his criminal history. And his argument is disingenuous, if not invited error, because he asked the trial court at the revocation hearing to order him to serve all four

² In the petition alleging probation violations, the State also alleged that Moser had failed to pay probation user's fees. The trial court found Moser indigent and therefore did not consider the failure to pay fees when it sentenced him for the present probation violation.

years of the suspended portion of his sentence. In light of his historical failure to successfully complete probation, his current probation violations, his lack of a permanent residence, and his request at the hearing that the court order him to serve the suspended portion of his sentence in its entirety, we cannot say that the trial court abused its discretion when it ordered him to serve two years of the four years that were suspended from his original sentence.

Issue Two: Additional Probation Term

Moser also contends that the trial court erred when it ordered him to serve a portion of his suspended sentence and added a condition of probation. Specifically, he argues that the “or” in Indiana Code Section 35-38-2-3(g) limited the trial court to choosing only one of the three listed sentencing options upon finding a violation of probation. Here, the trial court ordered Moser to serve two years that had been suspended under Indiana Code Section 35-28-2-3(g)(3) and added a condition of probation under Indiana Code Section 35-38-2-3(g)(1), namely, the requirement that he live in Dearborn County upon his release from incarceration.

But our supreme court has held that Indiana Code Section 35-38-2-3(g) permits judges to sentence offenders using any one or any combination of the enumerated options. Prewitt, 878 N.E.2d at 187. “This serves the public interest by giving judges the ability to order sentences they deem to be most effective and appropriate for individual defendants who violate probation.”³ Id. Thus, Moser’s argument must fail.

³ Our legislature has since confirmed the supreme court’s reading of Indiana Code Section 35-38-2-3(g) in Prewitt by revising the statute to state that the trial court may impose one or more of the three sentencing options in that statute and by removing “or.” That revision was effective July 1, 2008. Because it predates the probation violations, we apply the statute in effect at the time of the violations.

Affirmed.

KIRSCH, J., and BARNES, J., concur.