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**IN THE
COURT OF APPEALS OF INDIANA**

ALEXANDER KUPCZYNSKI,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 57A05-0703-CR-136

APPEAL FROM THE NOBLE CIRCUIT COURT

The Honorable G. David Laur, Judge

Cause No. 57C01-0409-FC-051

Cause No. 57C01-0610-FD-17

December 18, 2007

MEMORANDUM DECISION ON REHEARING - NOT FOR PUBLICATION

BAKER, Chief Judge

We grant appellant-defendant Alexander Kupczynski's petition for rehearing to address his argument regarding the sentence he received after violating a condition of his work release. As detailed in our previous memorandum decision, Kupczynski was originally sentenced to four years work release and four years probation after pleading guilty to class C felony non-support of a dependent child. Kupczynski v. State, No. 57A05-0703-CR-136, slip op. at 2 (Ind. Ct. App. Sept. 17, 2007). After violating a condition of the work release program, the trial court revised Kupczynski's sentence and imposed eight years of probation.

In his petition for rehearing, Kupczynski argues that we erroneously addressed his case as one arising from a work release violation when, in fact, the State alleged a probation violation. Because the trial court's sentencing authority varies depending on the type of violation that occurs,¹ Kupczynski argues that the trial court was required to sentence him pursuant to the probation violation statute and that the trial court only had the authority to extend his probation term by one year. Ind. Code § 35-38-2-3(g). Since he was originally sentenced to four years of probation, Kupczynski asks us to reverse the judgment of the trial court and impose a term of five years probation.

We agree with Kupczynski that our previous memorandum decision erroneously states that he was not in the probationary phase of his sentence when he committed the underlying

¹ Pursuant to the probation violation statute, a trial court that finds that a defendant has violated a condition of his probation may (1) continue the defendant on probation with or without modifying or enlarging the conditions; (2) extend the defendant's probationary period for not more than one year beyond the original probation period; or (3) order all or part of the sentence that was suspended to be executed. Ind. Code § 35-38-2-3(g). Pursuant to the work release program violation statute, a trial court that finds that a defendant has violated the terms of his placement may (1) change the terms of the placement; (2) continue the placement; or (3) revoke the placement and commit the person to the department of correction for the remainder of the sentence. Ind. Code § 35-38-2.6-5.

violation because he was involved in a work release program. Kupczynski, slip op. at 4-5. We turn to Crump v. State for guidance. 740 N.E.2d 564 (Ind. Ct. App. 2000). In Crump, a defendant who was sentenced to five years work release, two years probation, and one-year home detention violated the terms of his probation even though he was on work release when he committed the violation. Id. at 567-69. Specifically, we held that a defendant’s “probationary period begins immediately after sentencing and ends at the conclusion of the probationary phase.” Id. at 568. Concluding that Crump was in the probationary phase of his sentence even though he was involved in a work release program when he committed the violation, we affirmed the trial court’s imposition of an eight-year executed sentence. Id. at 569.

Although we incorrectly concluded that Kupczynski was not in the probationary period of his sentence when he violated the terms of his work release program, we emphasize that, pursuant to Crump, the probationary period of his sentence was eight years long. The probation violation statute allows a trial court to “continue the person on probation, with or without modifying or enlarging the conditions,” and, consequently, it was within the trial court’s authority to modify the conditions of Kupczynski’s sentence by removing the work release restriction and continuing him on probation for eight years. I.C. § 35-38-2-3(g)(1).

Furthermore, as we observed in our previous memorandum decision:

Frankly, we are unsure why Kupczynski appeals this sentence when a sentence for eight years probation is less restrictive than a sentence for four years work release and four years probation. Furthermore, we appreciate that the trial court’s ultimate goal was to minimize Kupczynski’s aggregate term of imprisonment in hope that Kupczynski would maintain gainful employment and pay the mounting child

support arrearage when he was released from the two-year sentence the trial court ultimately imposed on the failure to return conviction. In sum, we do not take issue with the trial court's sentence and affirm its decision to impose eight years probation less credit for time served for Kupczynski's FC-51 violation.

Kupczynski, slip op. at 5. Thus, while we grant Kupczynski's petition for rehearing, we nonetheless affirm the judgment of the trial court.

BAILEY, J., and VAIDIK, J., concur.