



## STATEMENT OF THE CASE

Defendant-Appellant Edward Spencer appeals the sentence imposed by the trial court following his admission to violating his probation.

We affirm.

## ISSUE

Spencer presents one issue for our review which we restate as: whether the trial court abused its discretion by failing to consider Spencer's mental illness as a mitigating factor when it ordered him to serve the entire six years of his previously suspended sentence.

## FACTS AND PROCEDURAL HISTORY

In June 1994, Spencer pleaded guilty to burglary, a Class B felony, and theft, a Class D felony. He was sentenced to 12 years with 6 years suspended for the burglary and to 3 years for the theft, to be served concurrently, and was placed on probation for 6 years. In February 2000, Spencer began serving his six-year probationary term. Subsequently, in November 2000, a petition for revocation of probation was filed. Spencer admitted to the violation, and was ordered to serve 20 days of his previously suspended sentence and then continue on probation. In July 2005, a revocation of probation was filed based upon charges of child molesting. After pleading guilty to one count of sexual misconduct with a minor as a Class B felony, Spencer admitted to the probation violation at his probation revocation hearing. At the hearing, Spencer introduced evidence that he has certain mental health issues. The court ordered Spencer

to serve the previously suspended sentence of 6 years. It is from the imposition of this suspended sentence that Spencer now appeals.

### DISCUSSION AND DECISION

Spencer contends that the trial court abused its discretion by reinstating his entire suspended sentence. Particularly, he argues that the trial court should have considered his mental illness as a mitigating factor when deciding to impose the suspended portion of his sentence.

A defendant is not entitled to serve a sentence on probation; rather, such placement is a matter of grace and a conditional liberty that is a favor, not a right. *Jones v. State*, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005). Probation is a criminal sanction in which a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment. *Id.* The restrictions of probation are designed to ensure that the probationary period serves as a period of genuine rehabilitation and that the public is not harmed by a probationer living within the community. *Id.* We review a trial court's decision to revoke probation and a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion. *Sanders v. State*, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), *trans. denied*.

Probation revocation is a two-step process. *Cox v. State*, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006). First, the court must make a factual determination that a violation of a condition of probation has occurred. *Id.* Indiana has codified the due process requirements for probation revocation proceedings at Ind. Code § 35-38-2-3. When a probationer admits to the violation, these safeguards are not necessary. *Id.* Instead, the

court can proceed to the second step of the inquiry and determine whether the violation warrants revocation. *Id.* In making this determination, the court must give the probationer the opportunity to present evidence that explains and mitigates his violation. *Id.*

Here, Spencer admitted that he had violated the conditions of his probation. The trial court then had to proceed to the second inquiry of whether the violation warranted revocation. Spencer testified that he is on disability due to several disorders including schizophrenia, multiple personality disorder, bi-polar disorder, and anti-social disorder. Based upon these mental health issues, Spencer requested the court to continue his probation rather than to impose the suspended portion of his sentence. The State cited to Spencer's extensive criminal history and the fact that he was on probation for a prior offense when the offenses of burglary and theft, for which his probation is currently being violated, were committed. The State also pointed out that Spencer had previously violated his probation in this case and was allowed to continue his probationary term. Following that violation, the current violation of sexual misconduct with a minor, a felony offense, occurred. The trial court adopted the State's reasoning as its own, determined that the violation warranted a revocation and imposed the entire suspended sentence of six years.<sup>1</sup>

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<sup>1</sup> Once the court determines that the probationer has violated a condition, it is statutorily limited in the action it may take. Ind. Code § 35-38-2-3(g) provides that 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 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.

Although not mentioned by either party, *Patterson v. State*, 659 N.E.2d 220 (Ind. Ct. App. 1995) (J. Friedlander, concurring in part and dissenting in part) is relevant to our discussion. There, while affirming the revocation of probation, the majority determined that the probationer's mental state at the time and under the circumstances of the alleged violation is a factor to be considered in the dispositional determination of a probation revocation proceeding. *Id.* at 222-23. The evidence showed that for approximately one year prior to the purse snatching which led to the probation revocation, Patterson had been under the care of a psychiatrist. Patterson testified that he had trouble distinguishing between right and wrong and had trouble conforming his actions to what is right. He also testified that at the time he took the victim's purse, he didn't know what he was doing. Thus, Patterson presented evidence that he had a mental disease or defect that prevented him from knowing right from wrong during the commission of the offense that was the basis of his probation violation.

In the instant case, Spencer did not argue that his mental health issues mitigated his violation. Indeed, Spencer testified that although he was not on medication at the time of the probation revocation hearing, he was on medication at the time of the offense. Spencer provided no evidence relating his mental health issues to his commission of the offense of sexual misconduct with a minor. He simply argued that because of these health issues, he should be allowed to continue his probation with close monitoring rather than be imprisoned. Yet, he indicated that he had been able to attend either group or individual counseling sessions while incarcerated.

Given that Spencer was receiving treatment for his mental health issues while he was incarcerated, that there was no evidence that the probation violation was excused or mitigated by his alleged mental health issues, and that the trial court had already graciously chosen not to revoke his probation on one prior occasion, we conclude that the trial court's decision to order execution of his entire suspended sentence for the commission of the felony of sexual misconduct with a minor was not an abuse of discretion.

### CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the trial court properly exercised its discretion by reinstating Spencer's entire six-year suspended sentence.

Affirmed.

BAILEY, J., and CRONE, J., concur.