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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



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FILED: 09/11/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

STATE OF ARIZONA, ) No. 1 CA-CR 11-0785  
)  
Appellee, ) DEPARTMENT A (AUGUST)  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
JOHNNY HAROLD DAVIS, SR., ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR20090186

The Honorable Jennifer B. Campbell, Judge

**AFFIRMED**

Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Division  
And Matthew H. Binford, Assistant Attorney General  
Attorneys for Appellee

White Law Offices, PLLC Flagstaff  
By Wendy F. White  
Attorney for Appellant

**S W A N N**, Judge

¶1 Johnny Harold Davis, Sr., appeals the superior court's revocation of his probation and imposition of a prison sentence. Davis argues that the state presented insufficient admissible

evidence to support the court's finding that he violated the conditions of his probation. We disagree, and therefore affirm.

*FACTS AND PROCEDURAL HISTORY*

¶2 In April 2010, Davis pled guilty to two counts of misconduct involving weapons, two counts of possession of drug paraphernalia, one count of aggravated robbery, and one count of aggravated assault. Davis was sentenced to time served for the misconduct involving weapons offenses. For the remaining offenses, the superior court suspended the imposition of sentence and placed Davis on supervised probation for three years. The conditions of Davis's probation included: "Obey all laws" ("Condition 1"); and "Not possess or use any illegal drugs, toxic vapors, or controlled substances, or use or possess any prescription drugs without a valid prescription" ("Condition 7").

¶3 In July 2010, Davis's probation officer petitioned the court to revoke Davis's probation based on violations of Conditions 1 and 7. At the violation hearing, the state presented the testimony of Detective John McClain of the Prescott Police Department. Detective McClain acknowledged that he had no firsthand knowledge of the events underlying the alleged violations but explained that he had reviewed the relevant police reports and spoken to one of the detectives with

firsthand knowledge. Davis made no objection to the admissibility of Detective McClain's testimony.

¶14 Detective McClain testified to the following facts. On July 21, 2010, police stopped a car in which Davis was a passenger because they were trying to arrest him for a different violation. In the backseat of the car, where Davis was sitting, police found two cell phones, a box-cutter-type knife, and two plastic "tear-offs" -- bindle-like pieces of plastic commonly used to store and sell drugs -- that later tested negative for methamphetamine residue.

¶15 Shortly after the items were recovered from the car's backseat, one of the cell phones received a text message asking to meet at a local store. Police used the cell phone to respond to the message and arrange the meeting. At the meeting spot, they encountered John Eric Tone. Tone told police that he had received approximately one gram of methamphetamine from Davis earlier that day. Tone had asked to meet Davis again after Davis called to say that Tone received too much methamphetamine in the transfer and needed to return some of it. Police found methamphetamine in Tone's car. Davis, after being advised of his *Miranda*<sup>1</sup> rights, admitted that he had given methamphetamine to Tone and was seeking to recover it.

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶16 The court found that the state carried its burden to prove by a preponderance of the evidence that Davis violated Condition 1 of his probation by transferring methamphetamine to Tone and violated Condition 7 of his probation by possessing the methamphetamine during the transfer. At the disposition hearing, the court revoked Davis's probation and imposed prison sentences for the offenses for which he had been placed on probation.

¶17 Davis timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033.

#### DISCUSSION

¶18 Davis contends that the state failed to present sufficient reliable evidence to support the court's finding that he violated Conditions 1 and 7 of his probation. Specifically, he argues that Detective McClain's testimony was unreliable and therefore inadmissible hearsay and argues that any finding of a violation would therefore necessary conflict with the *corpus delicti* rule. We reject both of Davis's arguments and conclude that the state presented sufficient reliable evidence to support the court's finding.

I. *DETECTIVE MCCLAIN'S TESTIMONY WAS RELIABLE HEARSAY, PROPERLY ADMISSIBLE UNDER ARIZ. R. CRIM. P. 27.8(b)(3).*

¶9 Because Davis made no objection to Detective McClain's hearsay testimony at the violation hearing, we review the admission of the testimony for fundamental error. *State v. Stotts*, 144 Ariz. 72, 82, 695 P.2d 1110, 1120 (1985). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶10 In probation violation proceedings, "[t]he court may receive any reliable evidence not legally privileged, including hearsay." Ariz. R. Crim. P. 27.8(b)(3). For purposes of this rule, reliable evidence is evidence that is trustworthy. *Stotts*, 144 Ariz. at 82, 695 P.2d at 1120 (construing predecessor rule to Ariz. R. Crim. P. 27.8(b)(3)). Hearsay evidence qualifies as reliable "where, in the sound discretion of the trial court, the circumstances are such as to afford a reasonable assurance of the truthfulness of the hearsay." *Id.* (citation omitted). An explanation of the bases for the testimony is required. See *State v. Baylis*, 27 Ariz. App. 222, 224, 553 P.2d 675, 677 (1976) (petition that provided no explanation for probation officer's belief of violations was not

reliable, but officer's testimony at a later hearing was reliable). Other relevant factors include the out-of-court speaker's identity and his position on the "hearsay ladder." *State v. Portis*, 187 Ariz. 336, 339, 929 P.2d 687, 690 (App. 1996). Where hearsay is reliable, it may form the exclusive basis for an order revoking probation. *State v. Smith*, 112 Ariz. 416, 421, 542 P.2d 1115, 1120 (1975).

¶11 Here, Detective McClain explained that his testimony was based on his review of the police reports and his conversation with one of the detectives involved in Davis's arrest. We find no reason to conclude that those sources of information were inherently unreliable. Indeed, as the state points out, police records are considered sufficiently reliable for other purposes, such as showing aggravating and mitigating circumstances for sentencing. *State v. Marquez*, 127 Ariz. 3, 6, 617 P.2d 787, 790 (App. 1980).

¶12 Davis contends, however, that the testimony about Tone's statements to police was unreliable because the testimony was "double hearsay" and Tone "was himself under arrest at the time for possession of [the] methamphetamine that inculpated [Davis]." By this, we take Davis to argue that the testimony about Tone's statements was unreliable because of Tone's position on the "hearsay ladder" and because Tone had a motive

to untruthfully shift blame to Davis.<sup>2</sup> But Tone's position on the "hearsay ladder" is only one factor, and the superior court specifically explained why it believed his statements were reliable: he told an unusual story that was independently corroborated by Davis's admission, and the two men had not been given an opportunity to coordinate their stories because Davis was in custody. We note that an additional indication of reliability is that Tone's story did not absolve him of criminal liability -- he admitted purchasing and possessing an illegal drug.

¶13 We find no abuse of discretion, let alone fundamental error, in the superior court's admission of Detective McClain's hearsay testimony, including his testimony describing Tone's statements to police. Davis was allowed to cross-examine Detective McClain and was given the opportunity to present his own evidence but did not do so.

*II. SUFFICIENT EVIDENCE SUPPORTED THE COURT'S FINDING OF VIOLATIONS.*

¶14 Davis's *corpus delicti* argument fails because that doctrine does not apply in probation violation proceedings.

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<sup>2</sup> The state correctly observes that no evidence was presented to show whether Tone was (as Davis asserts) "under arrest" at any time. But regardless whether Tone was under arrest when he made the statements in question, under the circumstances he was certainly reasonably aware of his potential criminal liability and had the same potential motive to be untruthful.

*State v. Lay*, 26 Ariz. App. 64, 65, 546 P.2d 41, 42 (1976). But even if the doctrine were applicable, Davis's argument would still fail because it assumes that the hearsay evidence corroborating his admission was inadmissible. As explained above, that assumption is incorrect.

¶15 We conclude that the state presented admissible evidence sufficient to show that Davis transferred methamphetamine to Tone and thereby violated the conditions of his probation requiring him to obey all laws and not possess illegal drugs. The court did not err by finding the violations and revoking Davis's probation.

*CONCLUSION*

¶16 We affirm for the reasons set forth above.

/s/

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PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

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PATRICIA A. OROZCO, Judge

/s/

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MARGARET H. DOWNIE, Judge