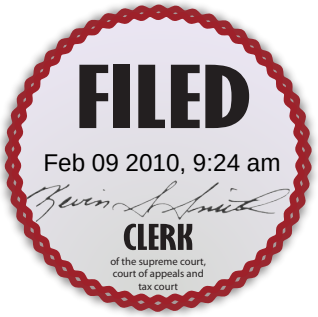

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IN THE
COURT OF APPEALS OF INDIANA

D.G.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0906-JV-543
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Scott Stowers, Magistrate
Cause No. 49D09-0707-JD-2138

February 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

D.G. appeals the trial court's revocation of his probation for running away from a court-ordered residential facility. D.G. raises several issues for our review; however, we find the following restated issue to be dispositive: whether the trial court abused its discretion during the probation revocation hearing by admitting into evidence hearsay testimony that was not substantially trustworthy.

We reverse.

FACTS AND PROCEDURAL HISTORY

In August 2007, fifteen-year-old D.G. pleaded guilty to criminal trespass. The trial court adjudicated him to be delinquent and awarded wardship to the Indiana Department of Correction; however, the court suspended commitment and placed D.G. on probation. Because of some noncompliance issues, the trial court ordered in July 2008 that D.G. be placed at Lutherwood, a residential facility in Indianapolis.

On August 28, 2008, Marion County probation officer Janel French filed an information of probation violation, alleging that D.G. had run away from Lutherwood on that date.[1] According to the record before us, D.G.'s mother returned him to Lutherwood on August 29. *Appellant's App*. at 150. On October 7, 2008, Marion County probation officer Dianne Kearns filed another information of probation violation, alleging that D.G. failed to return to Lutherwood after exercising a weekend pass. D.G. never came back to

[1] It appears that D.G. went to see his girlfriend, C.M., who had a baby on August 23, 2009; subsequent paternity testing established that D.G. is the father.

Lutherwood, and the trial court determined that his placement at Lutherwood was "failed and closed" effective October 24, 2008. In April 2009, D.G. was arrested on a detention order.

On May 13, 2009, the trial court held an evidentiary hearing on the two charged violations. D.G.'s then-probation officer,[2] Kearns, testified that she had received information from Donna Vaughn, a staff member at Lutherwood, that D.G. left the facility on October 4, 2008 on a home pass, but did not return to the facility as required. D.G. objected to Kearns's testimony on hearsay grounds, but the trial court overruled the objection. Thereafter, Marion County probation officer Margaret Bickel testified.[3] She stated that on August 28, 2008, a Lutherwood representative had contacted the Marion County probation department and advised probation officer French that D.G. had run away from Lutherwood on that date. D.G. again objected on hearsay grounds, and the trial court overruled the objection. The State did not present any other witnesses or documentary evidence. Ultimately, the trial court determined that D.G. had violated his probation based on the August and October 2008 incidents. The trial court modified D.G.'s suspended commitment and ordered that placement at the Department of Correction was appropriate.[4] D.G. now appeals.

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[2] Kearns was D.G.'s probation officer from September 2008 to the end of February 2009.

[3] Bickel was not, and had never been, D.G.'s probation officer. Bickel explained that she was a "court team officer," responsible for providing verbal recommendations to the court. *Tr.* at 32.

[4] According to the Chronological Case Summary ("CCS"), the trial court awarded wardship of D.G. to the Department of Correction "for housing in a correctional facility for children until the age of 21, unless sooner released by the Department of Correction[.]" *Appellant's App.* at 6. As part of its disposition, the trial court's recommendation to the Department of Correction that D.G. "be committed to Department of Correction for a period of 6 [m]onths." *Id.*

DISCUSSION AND DECISION

I. Standard of Review

D.G. asserts that the trial court abused its discretion when it revoked his probation and ordered him committed to the Department of Correction. We review a trial court's decision to revoke probation under an abuse of discretion standard. *Jones v. State*, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005), *trans. denied*. A probation revocation hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999). When reviewing an appeal from the revocation of probation, we will consider all the evidence most favorable to the judgment of the trial court without reweighing that evidence or judging the credibility of witnesses. *Id*. If there is substantial evidence of probative value to support the trial court's conclusion that a defendant violated any terms of probation, we will affirm its decision to revoke probation. *Id*. "Evidence of a single probation violation is sufficient to sustain the revocation of probation." *Smith v. State*, 727 N.E.2d 763, 766 (Ind. Ct. App. 2000).

II. Hearsay Evidence

D.G. asserts that the trial court erred in revoking his probation because the only evidence presented was hearsay testimony. In particular, he argues that the testimony of the two probation officers, Kearns and Bickel, constituted inadmissible hearsay, as it was based on information that each of them had learned from someone else who did not testify in court. Initially, we observe the general rule that decisions regarding the admission of evidence are left to the sound discretion of the trial court. *Mateyko v. State*, 901 N.E.2d 554, 557 (Ind. Ct.

App. 2009), *trans. denied*. Here, we are dealing with evidence presented in a probation revocation hearing. In such a case, we are mindful of the premise that 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." *Jones*, 838 N.E.2d at 1148. "It should not surprise, then, that probationers do not receive the same constitutional rights that defendants receive at trial." *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007). Strict rules of evidence, other than those with respect to privileges, do not apply to proceedings relating to probation. Ind. Evidence Rule 101(c)(2). Stated differently, trial courts may admit evidence during probation revocation hearings that would not be permitted in a criminal trial. *Mateyko*, 901 N.E.2d at 557. Indeed, judges may hear and "consider any relevant evidence bearing some substantial indicia of reliability." *Cox*, 706 N.E.2d at 551. However, hearsay evidence may not "be admitted willy-nilly in a probation revocation hearing." *Reyes*, 868 N.E.2d at 440. To be admissible, the hearsay must be substantially trustworthy. *Id*. The substantial trustworthiness test requires that the trial court evaluate the reliability of hearsay evidence. "[I]deally, [the trial court should explain] on the record why the hearsay [is] reliable and why that reliability [is] substantial enough to support good cause for not producing . . . live witnesses." *Mateyko*, 901 N.E.2d at 558 (quotations omitted).

Here, we are not presented with simple hearsay; it is double or even triple hearsay. Bickel testified as to what French's report said, which was based on a call from an unidentified person at Lutherwood reporting that D.G. had run away. Kearns testified that a Lutherwood office staff person named Donna Vaughn reported to Kearns that D.G. left on a

home pass on October 4 and did not return. Kearns did not know Vaughn's title or position at Lutherwood. Kearns did not know if Vaughn saw D.G. leave or whether she was told by someone else that he had left. The State did not present any reports, records, affidavits, letters, or any written documentation that would support the hearsay testimonies of Kearns and Bickel.

A similar situation was presented in *Mateyko*, where a department probation officer testified to what Mateyko's supervising probation officer had told her, which in turn included information about what Mateyko's therapist had told her. Mateyko's objections to the testimony were overruled, and, ultimately, his probation was revoked. On appeal, we reversed, finding that Mateyko established prima-facie error[5] in the admission of the hearsay. In doing so, we observed,

> Importantly, there is no indication in the record that the trial court explained why hearsay within hearsay within hearsay was reliable or why any reliability was substantial enough to support good cause for not producing a live witness.

901 N.E.2d at 558. The same is true in D.G.'s case; the trial court overruled D.G.'s objections, and it did not explain or elaborate in what way the probation officers' hearsay testimonies met the test of substantial trustworthiness.

When cross-examined about the fact that she did not have personal knowledge about the Lutherwood situation, Kearns explained, "We report to the court all the time about what we are told by other placement . . . agencies and therapists." *Tr*. at 27. While this may be

[5] The State in *Mateyko* did not file an appellee's brief. Thus, the appellant was required only to make a prima facie case of error.

true, the commonness of relying on second and third-hand information from placement agencies does nothing to assure us of the information's trustworthiness. Having said that, we are not oblivious or unsympathetic to the strained resources of courts and probation departments, and we do not intend to require or even suggest that in every probation revocation case live witnesses must be called to substantiate every allegation of violation. Here, however, the record before us is simply lacking. *See Carden v. State*, 873 N.E.2d 160, 164 (Ind. Ct App. 2007) (probation officer's hearsay testimony regarding unidentified "mapping system," which indicated defendant had violated probation by being too close to unnamed daycare center, was inadmissible because lacked substantial guarantee of trustworthiness); *J.J.C. v. State*, 792 N.E.2d 85, 87-88 (Ind. Ct. App. 2003) (trial court erred in finding that juvenile violated probation because daily activity printouts from electronic surveillance monitor, which was only evidence used to prove that particular probation violation, did not bear substantial indicia of reliability where State did not present evidence that the monitor was reliable, set up correctly, and functioning properly); *compare C.S. v. State*, 817 N.E.2d 1279, 1281 (Ind. Ct. App. 2004) (although probation officer was only witness who testified about failed drug test results, her testimony provided substantial indicia of reliability because she testified in detail about how urine sample was secured and sealed, how it was transported to lab, and how she received results).

Because we find that it was error to admit the hearsay testimony of Kearns and Bickel, and the testimony of those two probation officers constitutes the only evidence that the State

presented to prove the probation violations, we conclude there was insufficient evidence to find that either the August 2008 or the October 2008 probation violation occurred.

Reversed.

DARDEN, J., and MAY, J., concur.