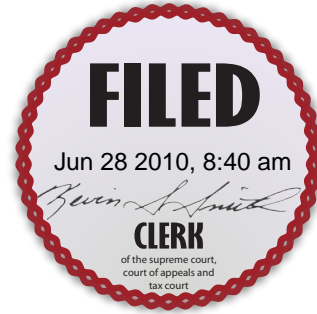


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

| | | |
|------------------------|---|------------------------|
| ELIUD ANTHONY DELGADO, |) | |
| |) | |
| Appellant-Defendant, |) | |
| |) | |
| vs. |) | No. 29A02-0911-CR-1142 |
| |) | |
| STATE OF INDIANA, |) | |
| |) | |
| Appellee-Plaintiff. |) | |

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0409-FA-131

June 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Eliud Anthony Delgado appeals the revocation of his placement in community corrections. Delgado raises two issues, which we revise and restate as:

- I. Whether the trial court abused its discretion by admitting toxicology reports and affidavits relating to the reports; and
- II. Whether the evidence is sufficient to revoke Delgado's placement in community corrections.

We affirm.

The relevant facts follow. On September 20, 2004, the State charged Delgado with dealing in cocaine as a class A felony. On July 29, 2005, Delgado pled guilty to dealing in cocaine as a class B felony. On August 26, 2005, the trial court sentenced Delgado to twelve years in the Indiana Department of Correction with six years executed (three years in the Department of Correction and three years in community corrections) and six years suspended with a probation period of four years.

On August 24, 2006, the State filed a Notice of Non-Compliance with Community Corrections Commitment alleging that Delgado had violated the rules and regulations of the community corrections program because he had "several unaccounted for hours between 7/3/06 and 8/16/06." Appellant's Appendix at 24. On August 30, 2006, the State filed a notice of probation violation alleging that Delgado failed to successfully complete a direct commitment through a community corrections program. Delgado admitted the violations, and the trial court ordered Delgado to serve three years in the Department of Correction with 768 days credit time and then serve six years on probation.

On July 18, 2008, the State filed a notice of probation violation alleging that Delgado was dishonest with his probation officer and had consumed illegal drugs. On August 4, 2008, the State filed a notice of probation violation alleging that Delgado failed to report to a scheduled appointment and left the State of Indiana without the consent of his probation officer. On April 22, 2009, the State filed a notice of probation violation alleging that Delgado possessed paraphernalia, was dishonest with his probation officer, consumed illegal drugs, and failed to complete a substance abuse assessment/evaluation. Delgado admitted to violating his probation, and on July 23, 2009, the trial court ordered Delgado to serve ninety days in the Hamilton County Jail, two years in work release, and day reporting to community corrections for twenty-one months.

On September 4, 2009, the State filed a Notice of Non-Compliance with Community Corrections Commitment alleging that Delgado began a period of work release on August 13, 2009, and that his urine tested positive for marijuana on August 20, 2009. The Notice alleged that Delgado had violated the following rule of the program: “I will not use or consume any illegal drugs, controlled substances, hemp, hemp products or extracts. I will not take any drugs unless I possess a current and valid prescription from a legally licensed physician.” *Id.* at 87. The Notice alleged that Delgado admitted to using marijuana forty-five minutes prior to moving to community corrections. The Notice also stated:

Resident Delgado’s baseline urine screen on 8/12/09 came back positive for Cannabinoids with a 39 creatinine ratio. A follow-up urine screen was requested to verify Resident Delgado has stopped using this drug since he began work release at Hamilton County Community Corrections.

Resident Delgado's follow-up urine screen on 8/20/09 came back positive for Cannabinoids with a 64 creatinine ratio. This Field Services Coordinator called Witham Toxicology Laboratory to discuss these results. Jeff Retz, certifying scientist, stated that "since the creatinine ratio has nearly doubled since the first urine screen, this participant has used marijuana since his first urine screen."

Id.

On October 2, 2009, the State filed a Notice of Non-Compliance with Community Corrections Commitment alleging that Delgado's urine tested positive for marijuana on September 20, 2009.

During a hearing, Delgado stipulated that when he came from the jail he admitted to his case manager that he had used marijuana while in the jail. The State moved to admit toxicology reports and two affidavits prepared by Jeff Retz, the Scientific Director at Witham Memorial Hospital Toxicology Laboratory, relating to the drug tests from August 20, 2009 and September 20, 2009. Delgado objected to the admission of the affidavits as hearsay and violative of his due process rights and his right to confrontation. The trial court admitted the affidavits. The trial court found that Delgado was in non-compliance with his community corrections commitment as alleged in the September 4, 2009 Notice of Non-Compliance, but that Delgado did not violate his community corrections commitment as alleged in the October 2, 2009 Notice of Non-Compliance. The trial court ordered Delgado to serve the remainder of his sentence in the Department of Correction.

I.

The first issue is whether the trial court abused its discretion by admitting Retz's affidavits and the toxicology reports. Delgado argues that the exhibits were inadmissible

because the State failed to produce the drafter of the exhibit, the exhibits did not meet the substantially trustworthy test, and the exhibits denied him of his right to confront witnesses.

Generally, we review the trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. Roche v. State, 690 N.E.2d 1115, 1134 (Ind. 1997), reh'g denied. We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997), reh'g denied. Even if the trial court's decision was an abuse of discretion, we will not reverse if the admission constituted harmless error. Fox v. State, 717 N.E.2d 957, 966 (Ind. Ct. App. 1999), reh'g denied, trans. denied.

For purposes of appellate review, we treat a hearing on a petition to revoke a placement in a community corrections program the same as we do a hearing on a petition to revoke probation. Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999), reh'g denied. Our standard of review of an appeal from the revocation of a community corrections placement mirrors that for revocation of probation. Id. at 551.

The Due Process Clause applies to probation revocation hearings. Reyes v. State, 868 N.E.2d 438, 440 (Ind. 2007) (citing Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S. Ct. 1756 (1973)), reh'g denied. “But there is no right to probation: the trial court has discretion whether to grant it, under what conditions, and whether to revoke it if conditions are violated.” Id. “It should not surprise, then, that probationers do not receive the same constitutional rights that defendants receive at trial.” Id.

The due process right applicable in probation revocation hearings allows for procedures that are more flexible than in a criminal prosecution. Id. Such flexibility allows courts to enforce lawful orders, address an offender's personal circumstances, and protect public safety, sometimes within limited time periods. Id. Within this framework, and to promote the aforementioned goals of a probation revocation hearing, courts may admit evidence during probation revocation hearings that would not be permitted in a full-blown criminal trial. Id. "This does not mean that hearsay evidence may be admitted willy-nilly in a probation revocation hearing." Id.

In Reyes, the Indiana Supreme Court acknowledged that there are multiple tests employed by courts to decide whether specific hearsay evidence may be admitted without violating a probationer's right to confront a witness against him or her. Id. at 441. The Court adopted the substantial trustworthiness test for determining the hearsay evidence that should be admitted at a probation revocation hearing. Id. This test requires that the trial court evaluate the reliability of the hearsay evidence. Id. The Court stated that "[a]s the Seventh Circuit explained in Kelley, 'ideally [the trial court should explain] on the record why the hearsay [is] reliable and why that reliability [is] substantial enough to supply good cause for not producing . . . live witnesses.'" Id. at 442 (quoting United States v. Kelley, 446 F.3d 688, 693 (7th Cir. 2006)).

Here, each of the State's exhibits contains an affidavit of Retz, the Scientific Director at Witham Memorial Hospital Toxicology Laboratory. The affidavit indicates that Retz has a Bachelor of Science degree in chemistry and has been a scientist at Witham Toxicology Laboratory since 1992. Before his employment as a toxicologist,

Retz worked for fifteen years as the laboratory supervisor at the Indiana Department of Toxicology. Retz is “familiar with the procedures employed to ensure the chain of custody of samples, the testing of those samples and the validity of the test procedures employed by” the laboratory. State’s Exhibits 1 and 2. Retz reviewed “all of the records in this laboratory in regard to the urine sample received which was labeled as a sample taken from: Eluid [sic] Delgado” on August 20, 2009 and September 20, 2009. State’s Exhibits 1 and 2. In his sworn affidavit, Retz concluded that Delgado “would have had to use: marijuana some time in the 60 days prior to collection.” State’s Exhibits 1 and 2.

While the trial court’s explanation on the record of its decision to admit the hearsay is not as detailed as we would prefer, we conclude that Retz’s affidavits were reliable and that the evidence adequately supports a finding that Retz’s affidavits are substantially trustworthy. See Reyes, 868 N.E.2d at 442 (holding that the trial court’s explanation was not as detailed as the Court would prefer but holding that the evidence supported a finding that Retz’s affidavits were substantially trustworthy). Consequently, we cannot say that the trial court abused its discretion in admitting the affidavits and toxicology reports.

To the extent that Delgado challenges the admissibility of the toxicology reports and affidavits on the ground that their admission violated his right to confrontation under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), the Indiana Supreme Court has specifically held that Crawford does not apply to probation revocation hearings

because they are not criminal trials.¹ Reyes, 868 N.E.2d at 440 n.1. Accordingly, Crawford is not implicated in this case. See id.

II.

The next issue is whether the evidence is sufficient to revoke Delgado's placement in the community corrections program. Delgado argues the evidence was insufficient to prove that he violated the terms of his community corrections placement because the record is devoid of the terms of the commitment contract. Delgado also argues that he "stipulated at the evidentiary hearing only to his use of marijuana while he was incarcerated, and not during the time he was under the Community Corrections program." Appellant's Brief at 10.

The State argues that "given the nature of the violation charged here, namely that he used the illegal substance marijuana, the State was not required to offer the contract into evidence to prove the violation." Appellee's Brief at 10. In response, Delgado argues that the State misstated the accusation of non-compliance and that "Delgado was not accused of violating state law as an automatic condition of this community corrections placement." Appellant's Reply Brief at 4. Rather, Delgado argues that "the non-compliance reports allege violations of a program rule, namely HCCC Contract Rule 12 B, which relates to use or consumption of illegal drugs, controlled substances, and use of legal drugs with a physician's prescription." Id.

¹ In Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), and Jackson v. State, 891 N.E.2d 657 (Ind. Ct. App. 2008), trans. denied, the Supreme Court and this court held that the evidence Delgado challenges was not admissible in a criminal trial unless the requirements of the Confrontation Clause were satisfied.

A defendant is not entitled to serve a sentence in either probation or a community corrections program. Cox, 706 N.E.2d at 549. Rather, placement in either is a “matter of grace” and a “conditional liberty that is a favor, not a right.” Id. (quoting Million v. State, 646 N.E.2d 998, 1002 (Ind. Ct. App. 1995) (internal quotation omitted)). As previously stated, for purposes of appellate review, we treat a hearing on a petition to revoke a placement in a community corrections program the same as we do a hearing on a petition to revoke probation. Id. Our standard of review of an appeal from the revocation of a community corrections placement mirrors that for revocation of probation. Id. at 551. A probation hearing is civil in nature and the State need prove the alleged violations only by a preponderance of the evidence. Id. We will consider all the evidence most favorable to supporting 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 has violated any terms of probation, we will affirm its decision to revoke probation. Id.

Addressing Delgado’s argument that the evidence is insufficient because the record is devoid of the terms of the commitment contract, we observe that generally the requirement that a probationer obey federal, state, and local laws is automatically a condition of probation by operation of law. Williams v. State, 695 N.E.2d 1017, 1019 (Ind. Ct. App. 1998); Ind. Code § 35-38-2-1(b) (“If the person commits an additional crime, the court may revoke the probation.”). “Although the community corrections statutes do not specifically set forth that the commission of a crime while in the program is grounds for revocation, persons in the program should know that they are not to

commit additional crimes during their placement.” Decker v. State, 704 N.E.2d 1101, 1103 (Ind. Ct. App. 1999), trans. dismissed. “[T]he commission of a crime while serving time in the community corrections program is always grounds for revocation, even if the sentencing court fails to notify the person of such condition.” Id.

To the extent that Delgado argues that his marijuana use occurred only during the time that he was incarcerated and not during the time he was in the community corrections program, we acknowledge that Retz’s affidavit relating to the September 4, 2009 Notice of Non-Compliance presents the possibility that Delgado used marijuana only during the time that he was incarcerated. Specifically, the record reveals that Delgado began his period of work release on August 13, 2009,² and Retz’s sworn affidavit, on the August 20, 2009 drug test, concludes that Delgado “would have had to use: marijuana some time in the 60 days prior to collection.” State’s Exhibit 1. However, some probation violations can serve as bases for revoking probation at any time between sentencing and the completion of the probationary period.³ See Crump v. State, 740 N.E.2d 564, 568-571 (Ind. Ct. App. 2000) (observing that the defendant’s violation of probation and his work release contract stemmed from a single incident and holding that although the defendant’s actual probation had not yet begun, a defendant’s

² At the hearing, Delgado’s attorney stated that “the information that is before the Court, I believe, was that the contract here appears to have been signed or he entered the work release program on August 13 of 2009.” Transcript at 12. Delgado’s attorney later stated that Delgado “began a period of two years work release on 8/13/2009” Id. at 16.

³ As noted in Gardner v. State, “[t]here are some rules of probation that may not be applicable to prospective violation.” 678 N.E.2d 398, 401 n.7 (Ind. Ct. App. 1997). “For example, a probationer is required to report to his probation officer. A defendant could hardly do so while incarcerated, and it would not be practical to do so before the period of probation commences. However, criminal conduct is always violative of probation.” Id.

“probationary period” begins immediately after sentencing), trans. denied; Gardner v. State, 678 N.E.2d 398, 401 (Ind. Ct. App. 1997) (holding that once a defendant has been sentenced, the court may revoke probation, upon a proper showing of a violation, at any time before the completion of the probationary period); Ashba v. State, 570 N.E.2d 937, 939 (Ind. Ct. App. 1991) (holding that a trial court may revoke probation before a defendant enters the probationary phases of his sentence), affirmed by 580 N.E.2d 244 (Ind. 1991), cert. denied, 503 U.S. 1007, 112 S. Ct. 1767 (1992).

Here, the September 4, 2009 Notice alleges that Delgado admitted to using marijuana forty-five minutes prior to moving to community corrections, and during the hearing, Delgado stipulated that when he came from the jail he admitted to his case manager that he had used marijuana while in the jail. Based upon the facts most favorable to the trial court’s judgment, we conclude that the State proved the alleged violation by a preponderance of the evidence and that the trial court did not err in revoking Delgado’s placement in community corrections.

For the foregoing reasons, we affirm the trial court’s revocation of Delgado’s placement in community corrections.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.