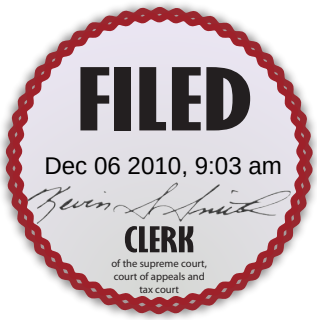

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IN THE
COURT OF APPEALS OF INDIANA

STEPHEN RAY JONES, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A04-1003-CR-161
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-1001-FD-25

December 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Stephen Ray Jones, Jr., appeals the revocation of his probation. Jones raises one issue, which we revise and restate as follows:

I. Whether the trial court abused its discretion by admitting probable cause affidavits;

II. Whether the court violated Jones's due process rights in revoking his probation; and

III. Whether the court abused its discretion in ordering Jones to serve the previously-suspended portion of his sentence in the Indiana Department of Correction.

We affirm.

The relevant facts follow. On November 24, 2008, the State charged Jones with possession of marijuana as a class D felony. On July 16, 2009, Jones pled guilty as charged and, pursuant to a plea agreement, the court imposed a total sentence of three years, with six months executed and the balance to be served on formal probation.

On August 15, 2009, Anderson Police Officer Naselroad initiated a traffic stop of a vehicle in which Jones was a passenger. Officer Naselroad noticed a strong odor of marijuana coming from the inside of the vehicle. Sergeant John Branson, who was a "K-9 supervisor and patrol [officer]," was called to the scene of the traffic stop to perform a "K-9 sniff." Transcript at 15-16. Sergeant Branson performed an exterior search of the vehicle with his police dog, and the dog alerted on both the passenger's side and driver's side of the vehicle. Officer Naselroad discovered in the vehicle a "white powdery substance rock" and a "small blue pill," which were field tested by Anderson

Police Department Officer Matt Guthrie and identified to be cocaine and ecstasy, respectively. Transcript at 25. Officer Naselroad also located a small amount of green plant material along with some seeds on the center of the rear passenger seat which field tested positive for marijuana. The officers placed Jones under arrest for drug violations.

On October 19, 2009, the State filed a petition for violation of probation which alleged that Jones violated his probation when he was arrested on August 15, 2009, and later charged with possession of cocaine and possession of a controlled substance, each as class D felonies. On December 8, 2009, the court held an initial hearing at which Jones denied the allegations in the State's petition and the court scheduled an evidentiary hearing for January 19, 2010.

On January 18, 2010, Anderson Police Detective Clifford Cole received information regarding a package which was en route from California to Anderson, Indiana, and may have contained illegal narcotics, and located the package at a Fed Ex location. Sergeant Branson performed a K-9 sniff of the package, and the dog alerted. Detective Cole obtained a search warrant for the package and found approximately four pounds of marijuana inside. Police took "most of the marijuana out" of the package, put "approximately one pound back in," and "repackaged the package." Transcript at 28. Police set up surveillance around the residence to which the package was addressed, and then a police officer delivered the package to the residence. Approximately ten minutes after the package was delivered, Jones and another man left the residence with the

package and drove away in a vehicle. After "about a half a block down the road," Jones "entered a separate vehicle and drove off." Id. at 29. Detective Cole observed Jones pull into a gas station. Police officers approached Jones's vehicle, discovered that his license was suspended, and placed Jones under arrest. A subsequent search of the vehicle revealed a "small plastic bag of green plant material that weighed approximately six (6) grams and field tested positive for marijuana." Id. at 30. Police also found that Jones had approximately $628 in his possession.

On January 26, 2010, the State filed an amended notice of probation violation which alleged, in addition to those allegations in the original October 19, 2009 petition, that Jones "[o]n/about 1/19/10"[1] committed new criminal offenses of dealing in marijuana as a class D felony and possession of marijuana. Appellant's Appendix at 17.

On February 17, 2010, the court held an evidentiary hearing at which the State presented evidence including two probable cause affidavits, one prepared by Detective Cole and the other prepared by Officer Naselroad, and the testimony of Sergeant Branson, Officer Guthrie, and Detective Cole. The court found by a preponderance of the evidence that Jones violated conditions of his probation, revoked Jones's probation and suspended sentence, and ordered Jones to serve the previously-suspended portion of his sentence in the Indiana Department of Correction. Additional facts will be provided as necessary.

[1] The evidence shows that the offenses were alleged to have been committed on January 18, 2010.

I.

The first issue is whether the trial court abused its discretion in admitting two probable cause affidavits at the evidentiary hearing. 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.

Jones argues that the admission of the affidavits denied his due process right to confront and cross examine all witnesses against him. Jones further argues that "the trial court improperly admitted a probable cause affidavit during his probation revocation hearing . . . ." Appellant's Brief at 8. Jones argues that he was denied "his right to confront Officer [Naselroad] as to the reliability of the affidavit" related to his arrest on August 15, 2009, and "his right of confrontation of the officers who made the stop" on January 18, 2010. Id. at 9-10. Jones also argues that the trial court "did not explain why the hearsay is reliable on the record to support good cause," id. at 10, and that "[t]here was no showing of reliability of any of the hearsay evidence proffered by the State." Id. at 11. The State argues that the probable cause affidavits prepared by Officer Naselroad

and Detective Cole were substantially trustworthy and that the court did not abuse its discretion in admitting the affidavits.

Initially, we observe that Sergeant Branson testified that on August 15, 2009, after his police dog alerted on both sides of the vehicle in which Jones had been a passenger, he assisted Officer Naselroad with a search of the vehicle and that Officer Naselroad had taken drug items into custody. Officer Guthrie testified that he performed a "field kit for methamphetamine and cocaine" at the scene of the stop on August 15, 2009, and that he "field tested the rock first which tested positive for cocaine" and that he then "tested the small blue pill which tested positive for methamphetamine ecstasy." Transcript at 24-25. In addition, Detective Cole testified that, following a controlled delivery and subsequent surveillance on January 18, 2010, police officers approached and arrested Jones at a gas station and a search of the vehicle Jones was driving revealed material which field tested positive for marijuana.

Our review of the evidence presented at the evidentiary hearing shows that, even if the probable cause affidavits challenged by Jones had not been admitted into evidence, the testimony of the three officers regarding Jones's offenses on August 15, 2009 and January 18, 2010 was sufficient to support the revocation of Jones's probation. The relevant information in the affidavits related to the alleged probation violations was merely cumulative of the police officers' testimony. See Decker v. State, 704 N.E.2d 1101, 1104 (Ind. Ct. App. 1999) (noting that even if the test results were inadmissible as

hearsay evidence, the evidence was merely cumulative of other testimony and that there is no ground for reversal if hearsay evidence erroneously admitted is merely cumulative), trans. dismissed.

Further, we cannot say that the court abused its discretion in admitting the probable cause affidavits prepared by Officer Naselroad and Detective Cole. The rules of evidence do not apply to probation proceedings. Ind. Evidence Rule 101(c)(2). However, 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; see also Figures v. State, 920 N.E.2d 267, 271 (Ind. Ct. App. 2010) (noting that "due process principles applicable in probation revocation hearings, also codified at Indiana Code section 35-38-2-3(e), afford the probationer 'the right to confront and cross-examine adverse witnesses'"). "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. (citation omitted). "It should not surprise, then, that probationers do not receive the same constitutional rights that defendants receive at trial." Id. (citation omitted). 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.

In Reyes, the Indiana Supreme Court adopted the substantial trustworthiness test for determining the hearsay evidence that should be admitted at a probation revocation hearing. Id. at 441. The substantial trustworthiness test requires that the trial court evaluate the reliability of the hearsay evidence. Id. The Court stated that "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 (citation omitted). In adopting the substantial trustworthiness test, the Court noted the "need for flexibility combined with the potentially onerous consequences of mandating a balancing inquiry for every piece of hearsay evidence in every probation revocation hearing" and stated that there was "no reason to require that the State expend its resources to demonstrate that its interest in not producing the declarant outweighs the probationer's interest in confronting the same . . . [or] to produce a witness . . . to give routine testimony . . . when a reliable piece of hearsay evidence is available as a substitute." Id. at 441-442.

We further observe that while the preference is for the trial court to make a determination of substantial trustworthiness on the record, the failure to do so is not fatal where the record supports such a determination. See id. at 442 (affirming trial court's admission of affidavits in probation revocation despite the court's failure to provide

detailed explanation on record, because evidence supported substantial trustworthiness of affidavits).

In addition, when the alleged probation violation is bad behavior based on the commission of a new crime, the State does not need to show that the probationer was convicted of a new crime. Whatley v. State, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006). Instead, the court only needs to find that there was probable cause to believe that the defendant violated a criminal law. Id.

Here, the court admitted into evidence two probable cause affidavits. The court first admitted an affidavit prepared by Officer Naselroad related to events leading to the arrest of Jones on August 15, 2009. The affidavit was completed and signed by Officer Naselroad under oath and penalties for perjury. Further, the testimony of Sergeant Branson and Officer Guthrie at the February 17, 2010 evidentiary hearing corroborated the matters asserted in the affidavit prepared by Officer Naselroad relating to the alleged probation violations. Specifically, the officers testified as to most of the facts set forth in the affidavit, including that Sergeant Branson's police dog alerted to both sides of the vehicle and that substances were discovered which field-tested positive for cocaine and ecstasy.

The court also admitted a probable cause affidavit prepared by Detective Cole related to events leading to the arrest of Jones on January 18, 2010. The affidavit was completed and signed by Detective Cole under oath and penalties for perjury. In

addition, the testimony of Detective Cole at the evidentiary hearing that police approached Jones at a gas station and arrested him, and that a subsequent search of the vehicle revealed approximately six grams of a green plant which field tested positive for marijuana, corroborated the matters asserted in the probable cause affidavit.

Based upon our review of the record, including the testimony of the three police officers and the two probable cause affidavits, we conclude that sufficient information was presented to deem the probable cause affidavits substantially trustworthy. See Reyes, 868 N.E.2d at 442 (holding that the evidence adequately supported a finding that the offered affidavits were substantially trustworthy); Whatley, 847 N.E.2d at 1009-1010 (holding that a probable cause affidavit prepared and signed by the officer who was listed as the affiant bore substantial indicia of reliability such that the trial court did not err in taking judicial notice of it at the defendant's probation revocation hearing). Accordingly, we cannot say that the court abused its discretion in admitting the probable cause affidavits prepared by Officer Naselroad and Detective Cole.

In addition, to the extent that Jones argues that the probable cause affidavits were inadmissible because their admission violated his right to confrontation under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), the Court in Reyes noted that because probation revocation hearings are not criminal trials, Crawford is not implicated. See Reyes, 868 N.E.2d at 440 n.1.

II.

The next issue is whether the trial court violated Jones's due process rights in revoking his probation. Although probationers are not entitled to the full array of constitutional rights afforded defendants at trial, the Due Process Clause of the Fourteenth Amendment does impose procedural and substantive limits on the revocation of the conditional liberty created by probation. Woods v. State, 892 N.E.2d 637, 640 (Ind. 2008). The minimum requirements of due process that inure to a probationer at a revocation hearing include: (a) written notice of the claimed violations of probation; (b) disclosure of the evidence against him; (c) an opportunity to be heard and present evidence; (d) the right to confront and cross-examine adverse witnesses; and (e) a neutral and detached hearing body. Id.

Probation revocation is a two-step process. Parker v. State, 676 N.E.2d 1083, 1085 (Ind. Ct. App. 1997). First, the court must make a factual determination that a violation of a condition of probation actually occurred. Id. If a violation is proven, then the trial court must determine if the violation warrants revocation of the probation. Id. When reviewing an appeal from the revocation of probation, we consider only the evidence most favorable to the judgment, and we will not reweigh the evidence or judge the credibility of the witnesses. Vernon v. State, 903 N.E.2d 533, 536 (Ind. Ct. App. 2009), trans. denied. Probation is an alternative to commitment in the Department of Correction, and it is at the sole discretion of the trial court. Lightcap v. State, 863 N.E.2d 907, 911 (Ind. Ct. App. 2007) (citing Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999),

reh'g denied). Probation is a favor granted by the State, not a right to which a criminal defendant is entitled. Parker, 676 N.E.2d at 1085. However, once the State grants that favor, it cannot simply revoke the privilege at its discretion. Id. Probation revocation implicates a defendant's liberty interest, which entitles him to some procedural due process. Id. (citing Morrissey v. Brewer, 408 U.S. 471, 482, 92 S. Ct. 2593, 2600-2601 (1972)). Because probation revocation does not deprive a defendant of his absolute liberty, but only his conditional liberty, he is not entitled to the full due process rights afforded a defendant in a criminal proceeding. Id. The due process rights granted to a probationer at a revocation hearing include the opportunity to be heard and present evidence. Vernon, 903 N.E.2d at 536-537.

Jones appears to argue that his due process rights were violated because the trial court: (A) revoked his probation based upon violations for which he had not received notice; and (B) did not set forth written reasons for revoking his probation.

A. Notice of Probation Violations

Jones argues that "the trial court violated his due process rights when it made findings with regard to probation violations with which he had not received notice." Appellant's Brief at 12. It is error for a probation revocation to be based upon a violation for which the defendant did not receive notice. Bovie v. State, 760 N.E.2d 1195, 1199 (Ind. Ct. App. 2002) (citing Hubbard v. State, 683 N.E.2d 618, 622 (Ind. Ct. App. 1997)). However, such error may be harmless. Id.

Here, the State's original petition on October 19, 2009 alleged that Jones violated his probation due to his arrest and charges related to the possession of cocaine and a controlled substance. The State's amended petition on January 26, 2010 additionally alleged that Jones violated his probation when he committed the crimes of dealing in marijuana and possession of marijuana. At the evidentiary hearing, the court found by a preponderance of the evidence that Jones violated conditions of his probation, and specifically found that Jones "has not behaved well in society in that he . . . drove while suspended; had constructive possession of marijuana and cocaine; was visiting a common nuisance; [and] violated his curfew."[2] Transcript at 46.

Neither of the State's petitions alleged that Jones violated his probation by driving while suspended, visiting a common nuisance, or violating his curfew. Jones received no notice of these claimed violations, and the court may not base revocation on them. However, it is harmless error in this case because Jones was found to have had constructive possession of marijuana and cocaine, violations for which he did receive notice, and proof of a single violation of the conditions of a defendant's probation is sufficient to support a trial court's decision to revoke probation. See Hubbard, 683 N.E.2d at 622 (noting that one of four reasons found by the trial court for revoking the defendant's probation was not set out in the State's petition for revocation and that thus

[2] The court's CCS entry dated February 17, 2010, stated that Jones "drove while suspended; possessed marijuana; violated curfew." Appellant's Appendix at 2, 19.

the court may not base revocation on it, but holding that the defendant was not harmed by the error because the court found that the defendant had violated several conditions of his probation of which he did receive notice).

B. Written Statement

Jones argues that "a trial court must give a written reason along with the facts relied upon for revoking probation" and that the court's "vague statement is clearly insufficient and does not comply with the requirements of due process." Appellant's Brief at 13.

Due process requires a written statement by the fact finder regarding the evidence relied upon and the reasons for the revocation. Washington v. State, 758 N.E.2d 1014, 1018 (Ind. Ct. App. 2001). This requirement may be satisfied by placement of the transcript of the evidentiary hearing in the record if the transcript contains a clear statement of the trial court's reasons for revoking probation. Id.

Here, the transcript of the February 17, 2010 evidentiary hearing has been placed in the record. The transcript discloses that the court revoked Jones's probation on the bases that he "had constructive possession of marijuana and cocaine." Transcript at 46. As previously stated, proof of a single violation of the conditions of a defendant's probation is sufficient to support a trial court's decision to revoke probation. Hubbard, 683 N.E.2d at 622. Reversal on this basis is not warranted. See Washington, 758 N.E.2d

at 1018 (noting that the transcript of the revocation hearing had been placed in the record and clearly disclosed the court's basis for revoking the defendant's probation).

III.

The next issue is whether the court abused its discretion in ordering Jones to serve the previously-suspended portion of his sentence in the Indiana Department of Correction. Jones argues that "there were several possible alternative sentences for the court to consider" and that "[t]he court could have sentenced [him] to only a portion of his suspended sentence, extended the length of [his] probation or modified the terms of the probation." Appellant's Brief at 13.

"Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled." Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). "The trial court determines the conditions of probation and may revoke probation if the conditions are violated." Id. (citing Indiana Code Section 35-38-2-3). A trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. Id. "An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances." Id. Upon the revocation of probation, the trial court may impose one or more of the following sanctions: (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; and (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing. Ind. Code § 35-38-2-3(g).

Here, on July 16, 2009, the trial court sentenced Jones to three years, with six months executed and the balance to be served on formal probation. On August 15, 2009, Jones was arrested after a dog sniff alerted on both sides of a vehicle Jones was in and items discovered in the vehicle field tested positive for cocaine and ecstasy. On January 18, 2010, Jones was arrested after he was stopped at a gas station and a search of the vehicle he was driving revealed plant material which field tested positive for marijuana. After revoking Jones's probation, the court reinstated the previously-suspended portion of Jones's sentence and ordered him to serve the sentence in the Indiana Department of Correction.

Given the circumstances, we cannot say that the court abused its discretion in ordering Jones to serve the entire portion or balance of his previously-suspended sentence. See Wilkerson v. State, 918 N.E.2d 458, 464 (Ind. Ct. App. 2009) (holding that the court did not abuse its discretion in ordering probationer to serve the balance of his previously-suspended sentence in the Department of Correction); Milliner v. State, 890 N.E.2d 789, 793 (Ind. Ct. App. 2008) (holding that the trial court did not abuse its discretion in reinstating the probationer's entire previously-suspended sentence), trans. denied.

For the foregoing reasons, we affirm the trial court's revocation of Jones's probation and its order that he serve his previously-suspended sentence in the Department of Correction.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.