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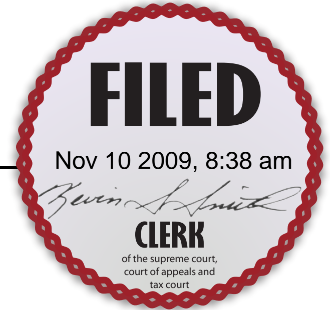
ATTORNEY FOR APPELLANT:

KIMBERLY A. JACKSON
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana



IN THE COURT OF APPEALS OF INDIANA

COREY L. MEYER, Appellant-Defendant, vs. STATE OF INDIANA, Appellee-Plaintiff.	)	No. 01A05-0906-CR-313

APPEAL FROM THE ADAMS SUPERIOR COURT
The Honorable Patrick R. Miller, Judge
Cause No. 01D01-0602-FD-15

November 10, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Corey L. Meyer (Meyer), appeals the trial court's Order revoking his probation.

We affirm.

ISSUES

Meyer raises two issues for our review, which we restate as:

(1) Whether the trial court properly admitted affidavits of Meyer's urinalysis report into evidence; and

(2) Whether the trial court abused its discretion in revoking Meyer's probation by imposing the remainder of his suspended sentence.

FACTS AND PROCEDURAL HISTORY

On February 8, 2006, the State filed an Information charging Meyer with Count I, possession of marijuana in an amount greater than thirty grams, as a Class D felony, Ind. Code § 35-48-4-11(1); and Count II, possession of paraphernalia, as a Class D felony, I.C. § 35-48-4-8.3(a)(1). On May 16, 2007, he pled guilty to possession of marijuana in exchange for the State dismissing Count II. Meyer received a 730 day sentence with all but thirty days suspended to probation.

As part of the terms of his probation, specifically Condition of Probation No. 7, Meyer was "to refrain from the use of all forms of drugs and prohibited substances except those prescribed by a physician." (Appellant's App. p. 76). Meyer was also subject to random drug testing upon request by his probation officer, the court, or law enforcement. According

to Meyer's probation officer, Rhonda McIntosh (McIntosh), Meyer was frequently screened for drugs. However, in February 2008, Meyer's probation officer tested him for marijuana and he tested positive. Instead of filing a violation against Meyer, his probation officer advised him to enter into and successfully complete additional substance abuse counseling.

On February 3, 2009, Meyer was required to submit to a random drug test. Probation officer Darrell Sigworth (Sigworth) observed Meyer provide the urine sample and then took the sample, sealed it, gave it to Meyer to initial the seal, and then placed the sealed sample with identifying information, such as Meyer's name and Sigworth's initials, inside a sealed bag. The urine sample was placed inside a freezer, to which only probation officers have access, until the chief probation officer packaged the sample and mailed it to Witham Memorial Hospital Toxicology Laboratory (Witham). If there was any indication of tampering, Witham would have rejected the sample and notified the probation department of the problem. Meyer's sample tested positive for marijuana.

On March 4, 2009, Meyer's probation officer filed a probation violation petition alleging that Meyer violated Condition of Probation No. 7. On March 20, 2009, the trial court conducted an initial hearing on the probation violation allegation and appointed counsel for Meyer. On April 20, 2009, during the fact finding hearing, the State introduced an affidavit by Jeff Retz (Retz), the Scientific Director at Witham. The affidavit indicated that Meyer's urine sample tested positive for marijuana, and that in Retz' opinion, "Meyer would have had to use marijuana sometime in the 60 days prior to collection." (State's Exhibit 1).

Attached to the affidavit was a toxicology report showing Meyer's urine sample tested positive for cannabinoids and Retz's curriculum vitae.

The trial court found that Meyer violated the terms of his probation by testing positive for marijuana. In deciding a disposition, the trial court stated that its "policy" on violations "when they are [] criminal in nature" is a complete revocation [of probation]." (Transcript p. 45). Therefore, the court revoked Meyer's probation and ordered him to serve the previously suspended sentence.

Meyer now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

Meyer contends that the trial court erred when it admitted into evidence State's Exhibit 1, which consisted of Retz's affidavit and the urinalysis report from the Lab, showing that his urine sample tested positive for marijuana. A probation 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). On review, we consider only the evidence most favorable to the judgment without reweighing that evidence or judging the credibility of witnesses. *Id*. at 861. 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.*

A. *Chain of Custody*

First, Meyer contends that the State failed to establish a proper chain of custody for the urine sample. Specifically, he argues that the State offered "no other evidence of the whereabouts of the urine sample from the time it departed the chief probation officer's custody until it arrived at Witham." (Appellant's Br. p. 11).

The State is required to show a chain of custody for the purpose of showing the unlikelihood of tampering, loss, substitution, or mistake. *McCotry v. State*, 722 N.E.2d 1265, 1267 (Ind. Ct. App. 2000), *trans. denied*. It is not necessary for the State to establish a perfect chain of custody, and once the State strongly suggests the exact whereabouts of the evidence, any gaps go to the weight of the evidence and not its admissibility. *Bussberg v. State*, 827 N.E.2d 37, 42 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*. There is a "presumption of regularity in the handling of exhibits by public officers." *Murrell v. State*, 747 N.E.2d 567, 572 (Ind. Ct. App. 2001).

Nothing in the evidence calls into question the urine sample's chain of custody. Merely raising the possibility of tampering, as Meyer does here, is insufficient to challenge the chain of custody. *Cockrell v. State*, 743 N.E.2d 799, 809 (Ind. Ct. App. 2001). Sigworth testified that he personally observed Meyer provide his urine sample, and then he took possession of the sample. The sample was then sealed, labeled, placed in a sealed bag along with the chain of custody form containing the identifying information for the sample and then placed in a locked freezer. The chief probation officer mailed the urine sample by U.S. Postal Service to the toxicologist who signed the chain of custody receipt indicating that he

had received the sample. Sigworth testified that if the seal on either the urine sample or the bag it was placed in had been tampered with, Witham would have notified the probation department. Additionally, as a safeguard,

> [i]f the paper work does not match up, the sample is rejected and the facility is notified of the rejection. If the sample is to be run in spite of being rejected, [Witham] will place a disclaimer on the report indicating 'Non-forensic specimen—results for non-legal purposes only.'

(State's Exh. 1). Here, the sample was not rejected or given a disclaimer; instead, it was tested. There were no significant gaps in the chain of custody; the sample was maintained in a locked freezer and delivered to Witham in its undisturbed condition as the seal was never broken.

B. *Substantial Trustworthiness*

Second, Meyer argues that Retz's affidavit was not substantially trustworthy because Retz did not personally test the urine sample and thus could not review someone else's test. Additionally, he contends that if the affidavit is substantially untrustworthy, then its admission violates Meyer's right to confront witnesses.[1]

Probationers do not receive the same constitutional rights that defendants receive at trial. *Carden v. State*, 873 N.E.2d 160, 163 (Ind. Ct. App. 2007). "The due process right application in probation revocation hearings allow for procedures that are more flexible than

[1] To the extent that Meyer relies on *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), this case is inapposite. *See* Reyes, 868 N.E.2d 438, 440 n.1, stating "Because probation revocation hearings are not criminal trials, the United States Supreme Court's decision on the Sixth Amendment right to confrontation in criminal trials, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, (2004), is not implicated." *See e.g., United States v. Kelley,* 446 F.3d 688, 690-92 (7th Cir. 2006); *United States v. Rondeau*, 430 F.3d 44, 47-48 (1st Cir. 2005); *Marsh v. State*, 818 N.E.2d. 143, 146-47 (Ind. Ct. App. 2004).

in a criminal prosecution." *Id*. (citing *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007)). As such, "courts may admit evidence during probation revocation hearings that would not be permitted in a full-blown criminal trial." *Id*. (citing *Reyes*, 868 N.E.2d at 440); *see also* Ind. Evidence Rule 101(c) (providing that the Indiana rules of Evidence do not apply in probation proceedings).

Even though trial courts may admit hearsay during probation revocation hearings, "[t]his does not mean that hearsay evidence may be admitted willy-nilly in a probation revocation hearing." *Reyes,* 868 N.E.2d at 440. In determining the admissibility of hearsay evidence in probation revocation proceedings and whether such admission violates a probationer's confrontation right, Indiana has adopted the "substantial trustworthiness test." *Id.* at 442. Under this test, rather than require that a trial court make an explicit finding of good cause every time hearsay evidence is admitted during a probation revocation hearing, the court must evaluate the hearsay's substantial trustworthiness. *Id.*

In *Reyes*, a case nearly identical to the present case, the defendant violated the terms of his probation by testing positive for cocaine. *Id*. at 439. During the probation revocation hearing, the defendant objected to the State's admission into evidence affidavits from Witham's director stating that cocaine had been found in the defendant's urine, along with the urinalysis results and the director's curriculum vitae. *Id*. The trial court stated that the director was "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 at Witham." *Id*. at 442. Our supreme court held that based on the newly adopted "substantial

trustworthiness test," the trial court had sufficient information to deem the hearsay statements in the affidavits concerning the defendant's cocaine use as substantially trustworthy. *Id*.

Just as in *Reyes*, where the director provided an affidavit determination that the defendant had used drugs in violation of the defendant's probation in addition to the director's qualifications and experience, here too, Retz provided the same information and perhaps even more, as the affidavit set out in detail the precise testing process used at Witham. Because our supreme court held that the affidavit submitted in *Reyes* was substantially trustworthy, we likewise hold that Retz's affidavit and urinalysis report was substantially trustworthy. [2]

II. *Revocation of Probation*

Finally, Meyer argues that the trial court abused its discretion in revoking his probation. In particular, Meyer asserts that the trial court's "policy" of full revocation when the violation is "criminally related" is improper, especially because the two-year sentence is overly harsh and creates an undue hardship on his family. (Tr. p. 45).

Probation is a favor granted by the State, not a right to which a criminal defendant is entitled. *Sanders v. State*, 825 N.E.2d 952, 954-55 (Ind. Ct. App. 2005), *trans denied*. Criminal defendants must agree to abide by specific conditions imposed by the court to avoid imprisonment. *Mathews v. State*, 907 N.E.2d 1079, 1081 (Ind. Ct. App. 2009), *reh'g denied*. Indiana Code section 35-38-2-3(g)(3) provides:

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[2] Because we find State's Exhibit 1 to substantially trustworthy, we will not address Meyer's insufficient evidence assertion which depended upon the success of his admission of evidence claim.

> If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may impose . . . all or part of the sentence that was suspended at the time of the initial sentencing.

"Generally, violation of a single condition of probation is sufficient to revoke probation." *Bradbandt v. State*, 797 N.E.2d 855, 860-61 (Ind. Ct. App. 2003) ((quoting *Pittman v. State*, 749 N.E.2d 557, 559 (Ind. Ct. App. 2001)). "We review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion." *Carneal v. State*, 859 N.E.2d 1255, 1257 (Ind. Ct. App. 2007). An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. *Whatley v. State*, 847 N.E.2d 1007, 1009 (Ind. Ct. App. 2006).

Meyer cites to *Woods v. State*, 892 N.E.2d 637 (Ind. 2008) for the proposition that the trial court's "policy" of imposing full revocation whenever a probationer violates his probation is "constitutionally suspect" because it denies the probationer the "individualized determination to which he is entitled." (Appellant's Br. p. 16-17). While we agree with that notion, *Woods* is inapplicable based on the fact that in this case, the trial court imposed the full sentence based on the fact that it was the second time Meyer violated the terms of his probation. As part of Meyer's probation for a marijuana conviction, Meyer was to abstain from drug use. When Meyer first tested positive for marijuana in February 2008, his probation officer did not file a violation but gave him another chance and required that he attend a substance abuse program. Even though Meyer successfully attended the program, a

year later, he tested positive again. Despite having been given the grace of a second chance, Meyer chose to violate the conditions of his probation by using marijuana again.

Meyer argues that the sentence would cause an undue hardship because he would not be able to work and provide for his family. However, Meyer has been unemployed since May of 2008 and is not eligible for work release because he has not maintained employment at any one place long enough to qualify. Even though the trial court acknowledged that the revocation would present a hardship on his family, the court also duly noted that, "it's a hardship that clearly had to be foreseen by you are the time of the usage []." (Tr. p. 45).

In sum, the probation revocation court properly revoked his sentence because Meyer had been given a second chance and continued to violate his probation. Meyer also has not presented evidence that the sentence would be an undue hardship upon his family as he was unemployed at the time of the probation revocation hearing.

CONCLUSION

Based on the foregoing, we conclude that: (1) the trial court properly admitted State's Exhibit 1; and (2) the trial court did not abuse its discretion in revoking Meyer's probation by imposing the remainder of his suspended sentence.

Affirmed.

BAKER, C.J., and FRIEDLANDER, J., concur.