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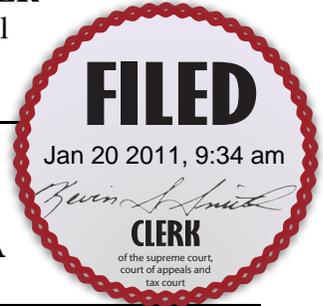
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**IN THE  
COURT OF APPEALS OF INDIANA**

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AUSTIN ZELL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 48A05-1006-CR-371

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APPEAL FROM THE MADISON SUPERIOR COURT  
The Honorable Dennis D. Carroll, Judge  
Cause No. 48D01-0910-FB-208

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**January 20, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

Austin Zell was on probation for burglary. His probation was revoked after the trial court found that he had violated the conditions of his probation by testing positive for drugs, battering his girlfriend, and failing to pay various financial obligations. Zell argues that the only evidence supporting the finding that he committed battery was unreliable hearsay, and that without that testimony, there was insufficient evidence that he committed battery. He also argues that the trial court abused its discretion by ordering him to serve three years of his previously suspended sentence. We find that the hearsay testimony had substantial indicia of reliability such that the trial court could consider it. We also conclude that the trial court did not abuse its discretion in ordering Zell to serve three years in the Department of Correction (“the DOC”). Therefore, we affirm.

## **Facts and Procedural History**

On November 3, 2008, Zell pled guilty to class B felony burglary. On November 24, 2008, he was sentenced to six years of probation with credit for time served. He was ordered to pay \$549 in restitution, \$164 in court costs, an administrative fee of \$100, and monthly probation fees.

On June 29, 2009, the trial court found that Zell had violated the conditions of his probation and ordered him to serve ninety days on work release, to be served consecutively to an eighteen-month sentence under a separate cause number.<sup>1</sup> On September 21, 2009, the

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<sup>1</sup> It was alleged that Zell committed the offenses of class D felony criminal confinement, class B misdemeanor battery, and class B misdemeanor criminal mischief and that he failed to pay court costs, fees, and restitution. The record does not reflect what violations were found.

trial court found that he had violated the conditions of work release by testing positive for cannabinoids, possessing contraband, and having periods of time where he was not where he was supposed to be and ultimately absconding from work release. Zell was sentenced to one year in the DOC and was ordered to report to probation upon release.

Zell was released from prison on February 22, 2010 and began probation. On April 6, 2010, a notice of probation violation was filed. Later that month, Zell was arrested for battery. An amended notice of probation violation was filed, which alleged that he had tested positive for barbiturates, benzodiazepines, and cannabinoids; that he committed the offense of battery; and that he had failed to pay court costs, restitution, probation fees, and an administrative fee.

On May 18, 2010, an evidentiary hearing was held. Zell admitted that he had tested positive for barbiturates, benzodiazepines, and cannabinoids. He also admitted that he had not paid or had “got[ten] behind” on court costs, restitution, probation fees, and the administrative fee. Tr. at 7.

The State’s only evidence was the testimony of Officer Chris Christian, who had arrested Zell for battery. Officer Christian testified that on April 24, 2010, he responded to a complaint of battery. The complainant, Helen Goff, told him that she and Zell had been riding in a car with a Mr. Bear.<sup>2</sup> Bear stopped at a gas station and got out of the car. At that time, Goff told Zell that she wanted to break up with him, and Zell hit her. After Bear returned to the car and started driving again, Zell “went crazy and began punching [Goff]

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<sup>2</sup> Bear’s first name is not mentioned in the record.

numerous times in the back of the head.” *Id.* at 11. Officer Christian saw that Goff had a bruise on her chin that “looked kind of like a newer injury.” *Id.* at 12. Officer Christian separately interviewed Bear, who confirmed that Zell had thrown several punches at Goff while he was driving. Officer Christian located Zell about twenty minutes after talking to Goff and Bear. When Zell saw Officer Christian’s police car, he immediately went inside a residence. Officer Christian called for backup, and Zell was found hiding under blankets or a mattress. Zell objected on hearsay grounds to Officer Christian’s testimony of what Goff and Bear had told him, but the trial court overruled the objection.

The trial court found that Zell had committed the violations as alleged. During the penalty phase of the hearing, Zell testified that he had a long-term addiction to opiates and benzodiazepines and had taken Xanax the day of the battery. Zell stated that he had some job prospects and asked to be placed in the drug court program. Trina Murphy, a probation officer who had supervised Zell in the past, was aware of some instances of drug use by Zell, but she testified that she was not aware of any ongoing drug issues.

The trial court determined that after credit for time served, Zell had about four years and two months remaining on his original burglary sentence. The trial court ordered him to serve three years in the DOC with no return to probation.

### **Discussion and Decision**

“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. If a violation is proven, then the trial court must

determine if the violation warrants revocation of the probation.” *Id.* A probation hearing is civil in nature; therefore, the State need only prove the alleged violations by a preponderance of the evidence. *Holmes v. State*, 923 N.E.2d 479, 485 (Ind. Ct. App. 2010).

### ***I. Sufficiency of the Evidence***

Zell argues that there is insufficient evidence that he violated the conditions of his probation by committing the offense of battery. When reviewing the sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Smith v. State*, 727 N.E.2d 763, 765 (Ind. Ct. App. 2000). We consider the evidence most favorable to the judgment of the trial court, and we will affirm if there is substantial evidence of probative value to support the trial court’s determination. *Holmes*, 923 N.E.2d at 485.

The trial court’s finding that Zell committed battery was based on Officer Christian’s testimony about what Goff and Bear had told him. In a probation revocation proceeding, the trial court may admit hearsay testimony if it finds that the evidence has substantial indicia of reliability. *Reyes v. State*, 868 N.E.2d 438, 442 (Ind. 2007). The trial court found that the hearsay evidence was reliable because Goff and Bear could be prosecuted for false reporting if they lied to the police, Bear’s statements were consistent with Goff’s, Officer Christian observed that Goff had a bruise on her chin that appeared to be a recent injury, and Zell hid from the police.

Zell argues that having a bruised chin is not consistent with being hit in the back of the head. However, Officer Christian did not testify that all of the punches were to the back of the head. Zell also questions the officer’s memory, noting that he could not remember

which side of Goff's chin was bruised. The quality of the officer's memory, however, is a question of credibility that rests with the trial court. Finally, Zell also argues that the officer should have taken a picture of the injury. Although a picture might have enhanced the officer's credibility, the absence of a picture does not seriously undermine the reasons that the trial court gave for finding the hearsay reliable. Therefore, we conclude that the trial court did not abuse its discretion by admitting the testimony and finding that Zell had committed battery.<sup>3</sup>

## *II. Sentence*

“Probation is a matter of grace and a conditional liberty which is a favor, not a right.” *Cooper v. State*, 917 N.E.2d 667, 671 (Ind. 2009). When the trial court finds a probation violation, the court may continue the person on probation, extend the probationary period, or order execution of all or part of the suspended sentence. Ind. Code § 35-38-2-3(g). “A trial court’s sentencing decisions for violations of probation are reviewed for an abuse of discretion. An abuse of discretion occurs where the trial court’s decision is clearly against the logic and effect of the facts and circumstances.” *Figures v. State*, 920 N.E.2d 267, 273 (Ind. Ct. App. 2010) (citations omitted).

Zell has received leniency on several occasions, but has not been able to comply with the law. Zell first violated his probation by committing new offenses and/or failing to pay his financial obligations, and he was put on work release. He then violated the conditions of

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<sup>3</sup> Even if there had been insufficient evidence that Zell committed battery, Zell admitted to committing other violations, and the violation of a single condition of probation is sufficient to permit a trial court to revoke probation. *Rosa v. State*, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005).

work release by testing positive for cannabinoids, possessing contraband, and absconding from work release. As a result, he was sentenced to a year in the DOC. About two months after he was returned to probation, he committed battery. Zell also admitted to testing positive for barbiturates, benzodiazepines, and cannabinoids and that he had not paid his financial obligations. Zell had about four years and two months remaining on his original sentence, but the court ordered him to serve three years.

Zell argues that he has a long history of substance abuse and is addicted to benzodiazepines, and a more appropriate sanction would be involvement in the drug court program. Our review of the record reflects that the trial court carefully considered the drug court option. While the record reflects that Zell has used drugs at least on isolated occasions, there was no clear evidence that Zell had an ongoing drug problem. At the time that the presentence investigation report was compiled for Zell's burglary conviction, Zell reported that drugs and alcohol were "of no interest to him." Appellant's App. at 64. A probation officer who had supervised Zell in the past also testified that she was not aware that he had an ongoing drug problem. In light of the lack of evidence that Zell was an appropriate candidate for drug court and his failure to respond to lenient treatment, we cannot say that the trial court abused its discretion by ordering him to serve three years of his previously suspended sentence.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.