

Case Summary

Tommy Watson, Jr., appeals the trial court's termination of his participation in a drug court program and order that he serve a sentence that had been stayed pending his successful completion of that program. We affirm.

Issue

The restated issue before us is whether the trial court properly relied upon a probable cause affidavit, which stated that Watson had committed a new criminal offense, to support its conclusion that his participation in the drug court program should be terminated.

Facts

On April 13, 2009, the State charged Watson with Class D felony resisting law enforcement and Class A misdemeanor operating while intoxicated. Watson originally entered into a plea agreement to both charges whereby he would be sentenced to no more than thirty-six months, with a cap of twenty-four months executed time. However, at sentencing on February 11, 2010, Watson, with the agreement of the State, withdrew the earlier plea agreement. In its place, Watson again agreed to plead guilty to both charges, with a total sentence of thirty-six months. The new agreement also provided that the sentence would be "stayed on the condition that the defendant participate in and successfully complete the Madison County Drug Court Program." App. p. 135. The trial court accepted this new agreement and sentenced Watson accordingly.

On February 17, 2010, Watson was arrested on a charge of Class A felony possession of cocaine. On that same date, the drug court issued an order denying Watson admission to the program because of his arrest and referred the matter back to the trial court. On June 4, 2010, the State filed with the trial court a notice that Watson had violated his drug court placement. The trial court held a hearing on the matter on June 10, 2010. The only witness called by the State was the director of the drug court program, who testified that Watson was not permitted to complete the process to enter the program because of his new arrest.

The evidence the State presented with respect to that arrest was the charging information for Class A felony possession of cocaine and the accompanying probable cause affidavit, prepared and signed by the arresting officer. The affidavit related that officers had seen Watson, whose license is suspended, sitting in the driver's seat of a car. When the officers told Watson not to drive anywhere, he asked the officers for a ride. The officers told Watson that they would have to search him for drugs or weapons before entering the police vehicle. When the arresting officer patted Watson down, he discovered two baggies in Watson's jacket that contained a white substance, which field tested positive as cocaine and weighed over eighteen grams.

At the conclusion of the hearing, the trial court found that Watson had violated the conditions of his stayed thirty-six-month sentence and ordered that he serve the entirety of that sentence. Watson now appeals.

Analysis

Watson contends the trial court erred in relying upon a hearsay probable cause affidavit to support its conclusion that he had violated the conditions of his stayed sentence, i.e. successful completion of the drug court program. This court has held that the due process rights afforded to a defendant facing revocation of probation or parole also apply to a defendant facing termination of participation in a drug court program. Gosha v. State, 931 N.E.2d 432, 434-35 (Ind. Ct. App. 2010). Those rights include “written notice of the claimed violations, disclosure of the evidence against him, an opportunity to be heard and present evidence, the right to confront and cross-examine witnesses, and a neutral and detached hearing body” Id. at 435 (quoting Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999)). Watson specifically contends introduction of the probable cause affidavit as the sole basis for finding that he violated the conditions of the drug court program violated his right to confront and cross-examine witnesses.

Confrontation rights in the context of probation revocation and similar matters are not as extensive as they are in criminal trials. See Reyes v. State, 868 N.E.2d 438, 440 (Ind. 2007). The Indiana Rules of Evidence, including those governing hearsay, do not apply in such proceedings. See Ind. Evidence Rule 101(c)(2). Additionally, the scope of the right to confrontation as defined in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), does not apply in such proceedings. See Reyes, 868 N.E.2d at 440 n.1. That is not to say that hearsay may be admitted “willy-nilly” in a revocation hearing. Id. at 440. Nonetheless, due process does not prohibit the use “where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and

documentary evidence.” Id. (quoting Gagnon v. Scarpelli, 411 U.S. 778, 782-83 n.5, 93 S. Ct. 1756, 1760 n.5 (1973)).

In order to admit hearsay evidence at a probation revocation hearing or similar matter in lieu of live testimony, the State must demonstrate “good cause” for utilizing the hearsay. Id. (citing Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593 (1972)). This requirement is met so long as the hearsay bears substantial guarantees of trustworthiness. Id. at 441. This satisfies the need for flexibility in routine probation revocation and similar hearings. See id. at 441-42.

This court has held that a probable cause affidavit prepared and signed by the officer listed as the affiant generally bears sufficient indicia of reliability to be introduced into evidence at probation revocations hearings. Whatley v. State, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006).¹ Additionally, a sufficiently reliable probable cause affidavit may, by itself, be sufficient to support a finding that a defendant has committed another crime in violation of his or her terms of probation. See id. By contrast, this court has not approved of the use of a police investigative report that is unverified and unsigned by either the arresting officer or the author of the report. See Baxter v. State, 774 N.E.2d 1037, 1043-44 (Ind. Ct. App. 2002), trans. denied. We also have refused to condone the use of a probable cause affidavit in a probation revocation hearing, where the case for which the affidavit was prepared had been dismissed because of “evidentiary problems.” Figures v. State, 920 N.E.2d 267, 272 (Ind. Ct. App. 2010).

¹ Although Whatley predates Reyes, the analysis in Whatley, focusing on whether the probable cause affidavit bore sufficient indicia of reliability to be admissible, is consistent with Reyes.

Here, the officer who arrested Watson for Class A felony possession of cocaine both prepared the probable cause affidavit and signed it under penalty of perjury. It thus meets the criteria we announced in Whatley both for admissibility and for sufficiency of evidence that Watson committed that crime. Figures does not apply here, because there is no evidence that the possession of cocaine case against Watson has been dismissed for “evidentiary problems.”

Watson also takes issue with the fact that the probable cause affidavit does not indicate that the substances recovered from his pockets were tested by a laboratory, as opposed to merely being field tested and weighed by the arresting officer. Watson is contending in part that live testimony of a lab technician verifying the testing of the substances was required by Melendez-Diaz v. Massachusetts, -- U.S. --, 129 S. Ct. 2527 (2009). Melendez-Diaz, however, like Crawford, simply does not apply in probation revocation and similar proceedings. See U.S. v. Minnitt, 617 F.3d 327, 333 n.3 (5th Cir. 2010). To the extent Watson is claiming that field testing of the substances was insufficient to prove that they were cocaine, that may be true with respect to a criminal trial. The State’s burden of proof in probation revocation and similar proceedings, however, is merely to prove an alleged violation by a preponderance of the evidence, not beyond a reasonable doubt. See Rosa v. State, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005). As such, we conclude that the arresting officer’s field testing of the substances was sufficient to support the conclusion, by a preponderance of the evidence, that Watson committed the offense of possessing cocaine.

Conclusion

The trial court did not err in admitting the probable cause affidavit into evidence at Watson's hearing, finding that he committed the offense of Class A felony possession of cocaine, which made Watson ineligible for the drug court program, and requiring him to serve his previously-stayed sentence. We affirm.

Affirmed.

BAKER, J., and VAIDIK, J., concur.