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**IN THE  
COURT OF APPEALS OF INDIANA**

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MELVIN WHITE, )

Appellant-Defendant, )

vs. )

No. 49A04-0809-CR-555

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
CRIMINAL DIVISION, ROOM 23  
The Honorable Steven R. Eichholtz, Judge  
Cause No. 49G23-0710-FD-218091

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**May 1, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Melvin White (White), appeals the trial court's revocation of his probation.

We affirm.

## ISSUE

White raises one issue on appeal, which we restate as follows: Whether the trial court committed fundamental error by admitting hearsay at his probation revocation hearing.

## FACTS AND PROCEDURAL HISTORY

On October 17, 2007, the State filed an Information charging White with possession of cocaine, as a Class D felony, and possession of paraphernalia, as a Class A misdemeanor. On February 4, 2008, White and the State entered into a plea agreement pursuant to which White pled guilty to possession of cocaine, with the State dismissing the possession of paraphernalia charge. That same day, he was sentenced to 365 days, with two days executed and 363 days suspended to probation.

On June 10, 2008, while White was on probation, Indianapolis Metropolitan Police Department Officer Adam Franklin (Officer Franklin) participated in executing a search warrant at White's residence. While other officers searched the residence, Officer Franklin searched White and found two white pills in his front pocket. Officer Franklin gave the pills to "control," which ran them through "poison control." (Transcript p. 15). "Control" then advised Officer Franklin that the pills were Vicodin. White did not have a prescription for the pills.

On June 17, 2008, the State filed a notice of probation violation for, among other, possessing a controlled substance. On August 21, 2008, after conducting an evidentiary hearing, the trial court found that White had violated his probation. The trial court revoked his probation and sentenced him to 363 days at the Department of Correction.

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

### DISCUSSION AND DECISION

White argues that the trial court erroneously admitted Officer Franklin's testimony into evidence because it lacked substantial trustworthiness. Specifically, White contends that the Officer's testimony included unreliable hearsay regarding the testing and identification of the pills found on White.

There is no right to probation, and a trial court has "discretion whether to grant it, under what conditions, and whether to revoke it if conditions are violated." *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007), *reh'g denied*. The due process right applicable in probation revocation hearings allows for procedures that are more flexible than in a criminal prosecution. *Id.* Accordingly, "courts may admit evidence during probation revocation hearings that would not be permitted in a full-blown trial." *Id.*; *see also* Ind. Evidence Rule 101(c)(2) (explaining that the Indiana Rules of Evidence are not applicable in probation proceedings).

Nevertheless, "[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 *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999), *reh'g denied*, the Indiana supreme court held that "judges may consider

any relevant evidence bearing some substantial indicia of reliability[,]” including reliable hearsay. More recently, in *Reyes*, our supreme court adopted the substantial trustworthiness test as the approach to be used in determining the reliability of hearsay evidence in probation revocation proceedings. *Reyes*, 868 N.E.2d at 441. Pursuant to the substantial trustworthiness test, “the trial court determines whether the evidence reaches a certain level of reliability, or if it has a substantial guarantee of trustworthiness.” *Id.* “[T]he substantial trustworthiness test implicitly incorporates good cause into its calculus.” *Id.* When a trial court applies this substantial trustworthiness test, “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 (citing *United States v. Kelley*, 446 F.3d 688, 693 (7<sup>th</sup> Cir. 2006)). However, failure to provide an explanation on the record is not fatal where the record supports such a determination. *Id.*

Here, Officer Franklin testified to hearsay statements without any objection from White. White’s failure to object contemporaneously to the testimony results in waiver of the issue on appeal. *Brown v. State*, 783 N.E.2d 1121, 1125 (Ind. 2003). Seeking to avoid procedural default, White claims that the trial court’s admission of the testimony constitutes fundamental error. The fundamental error exception is extremely narrow. *McQueen v. State*, 862 N.E.2d 1237, 1241 (Ind. Ct. App. 2007). To qualify as fundamental error, the error must be “so prejudicial to the rights of the defendant as to make a fair trial impossible.” *Carden v. State*, 873 N.E.2d 160, 164 (Ind. Ct. App. 2007). The fundamental error exception “applies only when the error constitutes a blatant violation of basic principles, the harm or potential

for harm is substantial, and the resulting error denies the defendant fundamental due process.” *McQueen*, 862 N.E.2d at 1241.

Here, the record supports a determination that Officer Franklin’s testimony was substantially trustworthy. Officer Franklin testified he was at White’s house to assist in the execution of a search warrant. While searching White, Officer Franklin discovered two pills on White’s person. He stated that it is standard procedure to give the pills to “control,” which runs them through “poison control.” (Transcript pp. 14, 15). Officer Franklin followed this procedure. Officer Franklin added that when “control” reported back to him and identified the pills as Vicodin, he informed the detective who was in charge of executing the search warrant. We find nothing in Officer Franklin’s testimony that indicates any misconduct on his part. Officer Franklin’s testimony regarding the procedure followed, combined with the fact that he testified under oath and was subject to cross-examination demonstrates the substantial trustworthiness of the hearsay testimony. Therefore, we do not

find that the trial court erred, let alone committed a fundamental error, by admitting Officer Franklin's hearsay statements during White's probation revocation proceedings.<sup>1</sup>

### CONCLUSION

Based on the foregoing, we conclude that the trial court properly revoked White's probation.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.

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<sup>1</sup> Almost as a side note, White disputes the sufficiency of the evidence determining that he had violated the terms of his probation. We disagree. We find Officer Franklin's testimony sufficient to establish by a preponderance of the evidence that White possessed a controlled substance, and consequently, that he violated the terms of his probation.