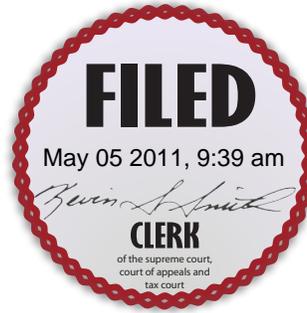


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

MATTHEW D. ANGLEMEYER
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

JOBY D. JERRELLS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

WILLIE DUMES,)

Appellant-Defendant,)

vs.)

No. 49A02-1008-CR-910

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol J. Orbison, Judge
The Honorable Amy Barbar, Magistrate
Cause No. 49G22-0805-FC-110158, 49G22-1001-FC-2659

May 5, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

In this consolidated appeal, Willie Dumes appeals his conviction for operating a motor vehicle after his license was forfeited for life as a Class C felony and the trial court's revocation of his probation. We affirm.

Issues

Dumes raises two issues, which we restate as:

- I. whether the trial court abused its discretion by admitting evidence obtained as a result of the traffic stop; and
- II. whether the trial court failed to conduct an evidentiary hearing regarding his probation revocation, resulting in fundamental error.

Facts

In 2008, Dumes pled guilty to operating a vehicle after his license was forfeited for life as a Class C felony, and he was sentenced to six years with four years suspended and one year of probation. Dumes started his probation on September 22, 2009, and a notice of probation violation was filed on January 7, 2010, alleging that Dumes had failed to submit a urine screen, submitted a diluted screen, tested positive for alcohol, and failed to comply with his community service commitment.

In the early morning hours of January 13, 2010, Officer Shawn Cook of the Indianapolis Metropolitan Police Department was patrolling near the intersection of Tibbs Avenue and 10th Street in Indianapolis. Officer Cook saw a gray vehicle driven by Dumes make a right turn from northbound Tibbs Avenue onto eastbound 10th Street. At

that location, 10th Street is a four-lane road. When Dumes made the turn, he drove onto the passing lane of eastbound 10th Street rather than the lane on the right side. Officer Cook initiated a traffic stop of Dumes's vehicle, learned that Dumes was an habitual traffic violator, and arrested him.

On January 14, 2010, the State again charged Dumes with operating a vehicle after his license was forfeited for life as a Class C felony, and an amended notice of probation violation was issued alleging that Dumes had committed a new criminal offense. The probation violation case was transferred to the trial court handling his new criminal offense, and the chronological case summary indicates that the cases were consolidated.

Officer Cook and Dumes testified at the bench trial on the new offense. Dumes testified that he could not use the right lane of eastbound 10th Street because traffic was backed up in that lane from the White Castle drive-through. Officer Cook testified that, although traffic does sometimes back up in that lane as a result of the White Castle drive-through, the traffic was not backed up on this occasion. After evidence was presented, Dumes made a motion to suppress the evidence obtained as a result of the traffic stop. The trial court denied the motion to suppress and found Dumes guilty as charged.

A consolidated sentencing and probation revocation hearing was held on July 21, 2010. During Dumes's testimony, the trial court asked Dumes's counsel, "And we do have to address the probation violation that was sent here from Court Five. Is there anything you want to add in regard to his probation violation?" Tr. p. 70. Dumes's counsel then questioned Dumes about the presentence investigation report ("PSI"), and Dumes did not dispute the contents of the PSI, except for the amount of community

service hours he had performed. The PSI contained information regarding his new conviction and his probationary term. During closing arguments, the State addressed its recommended sentence for both the new offense and the probation violation.

The trial court sentenced Dumes to four years in community corrections for his new offense. The trial court then addressed the probation revocation and found that Dumes had violated his probation by the commission and conviction of the new offense. The trial court revoked Dumes's probation and ordered that he serve two years executed as a direct commitment to community corrections work release. Dumes now appeals.

Analysis

I. Evidence Obtained From Traffic Stop

Dumes argues that the trial court abused its discretion by admitting evidence obtained during the traffic stop. "In reviewing the trial court's ruling on the admissibility of evidence from an allegedly illegal search, an appellate court does not reweigh the evidence but defers to the trial court's factual determinations unless clearly erroneous, views conflicting evidence most favorably to the ruling, and considers afresh any legal question of the constitutionality of a search or seizure." Meredith v. State, 906 N.E.2d 867, 869 (Ind. 2009).

Because a traffic stop is a seizure under the Fourth Amendment, police may not initiate a stop for any conceivable reason, but they must possess at least reasonable suspicion that a traffic law has been violated or that other criminal activity is taking place. Id. A police officer may briefly detain someone whom the officer believes has committed a traffic infraction. State v. Harris, 702 N.E.2d 722, 726 (Ind. Ct. App. 1998);

see Ind. Code § 34-28-5-3 (a police officer may stop a vehicle for minor traffic violations). “An officer’s decision to stop a vehicle is valid so long as his on-the-spot evaluation reasonably suggests that lawbreaking occurred.” Meredith, 906 N.E.2d at 870.

Officer Cook stopped Dumes for violating Indiana Code Section 9-21-8-21(a)(1), which provides: “A person who drives a vehicle intending to turn at an intersection must . . . [m]ake both the approach for a right turn and a right turn as close as practical to the right-hand curb or edge of the roadway.” According to Dumes, the trial court’s explanations for finding the traffic stop valid are not supported by the evidence, but Dumes misconstrues the trial court’s statement. In explaining its verdict, the trial court discussed Dumes’s testimony that traffic was backed up as a result of the White Castle drive-through and was blocking the right lane and Officer Cook’s testimony that traffic was not backed up or blocking the right lane. The trial court found Officer Cook’s testimony more credible. Dumes is merely asking that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. The trial court did not err by finding that the traffic stop was valid and admitting evidence discovered as a result of the traffic stop.

II. Probation Revocation

Next, Dumes argues that fundamental error occurred because the trial court failed to conduct an evidentiary hearing regarding his probation revocation. Indiana Code section 35-38-2-3 governs probation violations and requires the trial court to “conduct a hearing concerning the alleged violation.” I.C. § 35-38-2-3(d). Additionally, “[t]he state must prove the violation by a preponderance of the evidence. The evidence shall be

presented in open court. The person is entitled to confrontation, cross-examination, and representation by counsel.” I.C. § 35-38-2-3(e). Although probationers are not entitled to the full array of constitutional rights afforded defendants at trial, there are procedural and substantive limits on the revocation of probation imposed by the Due Process Clause of the Fourteenth Amendment. 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 can be revoked upon a showing by a preponderance of the evidence that the probationer committed an additional crime. I.C. § 35-38-2-1(b).

Dumes did not object to the consolidation procedure used by the trial court. To avoid waiver, he argues the trial court committed fundamental error. The fundamental error exception is “extremely narrow, and 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.” Delarosa v. State, 938 N.E.2d 690, 694-95 (Ind. 2010). The error claimed must either “make a fair trial impossible” or constitute “clearly blatant violations of basic and elementary principles of due process.” Id. This exception is available only in “egregious circumstances.” Id.

According to Dumes, the State presented no evidence regarding his new offense, when his probation started, or whether he was on probation at the time of his new

offense. Dumes argues that the State could not take judicial notice of the verdict regarding his new offense.

We disagree with Dumes's characterization of the hearing at issue. The trial court here consolidated Dumes's new offense and the probation revocation matter. It held a hearing regarding both the sentencing for the new offense and the probation revocation. During the testimony, the trial court specifically mentioned the probation revocation matter and invited Dumes to address it. Additionally, the term of Dumes's probationary period was mentioned in the PSI, and Dumes did not dispute the term. Moreover, both parties overlook Indiana Evidence Rule 201, which governs judicial notice. Indiana Evidence Rule 201 was amended in 2009 and went into effect on January 1, 2010. Pursuant to the amendment, a court may now take judicial notice of "records of a court of this state." Ind. Evidence Rule 201(b)(5). Before this amendment, a court could not take judicial notice of its own records in another case previously before it, even on a related subject with related parties. See, e.g., Whatley v. State, 847 N.E.2d 1007, 1009 (Ind. Ct. App. 2006). Now, "[a] court may take judicial notice, whether requested or not," Ind. Evidence Rule 201(c), and "[j]udicial notice may be taken at any stage of the proceeding." Ind. Evidence Rule 201(f). "[A] party does not have to be notified before a court takes judicial notice." In re Paternity of P.R., 940 N.E.2d 346, 349-350 (Ind. Ct. App. 2010). Indiana Evidence Rule 201(e) provides: "A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made

after judicial notice has been taken.” Consequently, the trial court could take judicial notice of Dumes’s new conviction.

Moreover, Dumes relies on Eckes v. State, 562 N.E.2d 443 (Ind. Ct. App. 1990), which we find distinguishable. In Eckes, the trial court also conducted a consolidated sentencing and probation violation hearing after the defendant pled guilty to a new offense. At the start of the hearing, prior to the presentation of any evidence, the trial court took judicial notice of the defendant’s conviction, determined the defendant had violated his probation, and stated the case was ready for disposition. The State presented no evidence about the alleged violation but called witnesses who testified regarding their sentencing recommendations. Noting that the trial court found the defendant in violation of the terms of his probation prior to the State introducing its first witness or offering the defendant an opportunity to present evidence, we held that the trial court’s failure to hold a proper evidentiary hearing constituted fundamental error.

We find this case more like Bane v. State, 579 N.E.2d 1339 (Ind. Ct. App. 1991), trans. denied, where the defendant was found guilty of murder and the sentencing hearing for the murder conviction was consolidated with a probation revocation hearing for a robbery conviction. During the sentencing phase of the consolidated hearing, the trial court listed the violation of probation as one of many aggravating factors and sentenced the defendant. After completing the sentencing phase, the trial court held the probation revocation hearing. The State presented two witnesses, the arresting officer in the robbery case and the defendant’s probation officer. The trial court revoked the defendant’s probation “based on the evidence [the trial court] heard that day.” Id. at 1340. The

defendant appealed, contending the evidence was lacking because the State had not introduced any evidence during the probation revocation phase regarding his murder conviction.

On appeal, we noted the consolidated proceeding allowed a “joint hearing and joint evidence,” and the evidence taken in the sentencing phase was also applicable to the probation revocation phase. Id. at 1341. We also held the defendant did not suffer any prejudice to his due process rights by the consolidated hearing. Due process was satisfied by the State presenting evidence over the course of the consolidated hearing that the defendant was convicted of murder and was on probation for robbery at the time he committed the crime and by giving the defendant a full and fair opportunity to cross-examine witnesses and present his own case.

Here, unlike in Eckes, the trial court did not make a determination regarding Dumes’s violation of probation until after evidence was presented. As in Bane, evidence was presented during the consolidated hearing regarding Dumes’s new conviction and the fact that he was on probation at the time he committed the new offense. The procedure used at this hearing was sufficient to comport with due process, and Dumes has failed to show fundamental error.

Conclusion

The trial court did not err by finding that the traffic stop was valid and admitting evidence discovered as a result of the traffic stop. Further, the consolidated sentencing and probation revocation hearing did not result in fundamental error. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.