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# IN THE
# COURT OF APPEALS OF INDIANA

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| STEPHANIE R. TWILLEY, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 18A05-0811-CR-651 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
Cause No. 18C01-0611-FD-160

**May 29, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Stephanie R. Twilley ("Twilley") appeals the revocation of her probation and raises three issues for our review. We consolidate and restate her issues as follows: whether the trial court abused its discretion in revoking Twilley's probation and ordering her one-and-a-half year suspended sentence to be executed.

We affirm.

## FACTS AND PROCEDURAL HISTORY

On November 30, 2006, the State charged Twilley with operating a vehicle as an habitual traffic violator,[1] a Class D felony, and operating a motor vehicle without ever receiving a license,[2] a Class C misdemeanor. On April 5, 2007, Twilley pleaded guilty to both charges pursuant to a plea agreement that called for a three-year sentence, with one-and-a-half years executed and the remainder suspended to supervised probation. At the time of sentencing, the trial court informed Twilley, "When you are released from jail then you . . . need to meet with your probation officer . . . . You need to do that as soon as you are released. Do you understand that?" *Tr*. at 12. Twilley answered that she did. *Id*.

Twilley's probation began on August 24, 2007, and was scheduled to expire on February 24, 2009. *Appellant's Supp. App.* at 143. After her release from jail, Twilley received a form called "Conditions of Supervised Probation," which explained the rules of probation and the financial obligation of her sentence. *Id*. at 143-46. Twilley's rules of probation provided, in pertinent part, that she was prohibited from using narcotic

[1] *See* Ind. Code § 9-30-10-16(a)(1).

[2] *See* Ind. Code § 9-24-18-1.

drugs, was required to report to her probation officer, and was required to participate in substance abuse treatment. *Id*. at 144. On August 31, 2007, Twilley signed the "Conditions of Supervised Probation" under the following language:

> I have read, or had read to me, the conditions of my probation contained herein. Any questions that I have concerning these conditions have been explained by the Probation Officer.
>
> I understand all of these conditions, and agree to comply with each of them. I acknowledge that I have received a copy of this agreement.

*Id*. at 145-46.

The State filed a petition to revoke probation on March 13, 2008, alleging that Twilley had violated the terms of her probation when she: (1) did not report to her probation officer; (2) tested positive for cocaine; (3) failed to complete her substance abuse program; and (4) failed to pay her probation user fees and court costs. *Id*. at 142. On September 29, 2008, the trial court held a fact-finding hearing on the petition to revoke probation, during which Twilley and Alison Licht ("Licht"),[3] Twilley's probation officer, testified.

Licht testified that she "went over the rules, terms and conditions of probation . . . [and Twilley] read and signed them." *Tr*. at 25. Licht further testified that Twilley failed to report to probation after January 9, 2008. *Id*. Over Twilley's hearsay objection, Licht also testified that, while on probation, Twilley had twice tested positive for cocaine and had failed to complete substance abuse treatment. *Id*. at 25-28.

[3] While Twilley refers to the probation officer as "Alison Goul," her name is now "Alison Licht." During the probation revocation hearing, the probation officer was asked, "You are Alison Goul the probation officer for this court?" *Tr*. at 23. The probation officer answered, "Formerly Alison Goul now I'm Alison Licht." *Id*.

Twilley testified in her own defense. When asked why she tested positive for cocaine use, Twilley admitted that she had been using cocaine for twenty-three years—since the age of thirteen. *Id*. at 34. She also stated, "I did let [my probation officer] know I wasn't gonna be able to make it out there like that . . . . You know, I live in a crack house . . . .they had tried me so many times before for my drug habit and I couldn't kick it out there." *Id*. at 33.

At the end of the hearing, the trial court stated:

> Well the court finds that she has certainly violated her terms and conditions of probation. That she failed to report to her probation officer as directed. In essence she admits to absenting herself from the state without permission. That uh, she has been tested while on probation and that's [sic] been determined to have been using cocaine. That she failed to complete her substance abuse treatment program that had been set up. I note that she hadn't paid her probation users fees or court costs but the court is not going to utilize that at this particular time with regard to determining uh, whether or not to modify the sentence. At this particular time the court does modify the sentence as follows. The one and a half years that had been suspended are now ordered executed.

*Id*. at 36. Twilley now appeals.

## DISCUSSION AND DECISION

Twilley contends that the trial court abused its discretion when it revoked her probation and ordered executed her one-and-a-half year suspended sentence. Specifically, she argues: (1) that the trial court erred in admitting lab test results that Twilley tested positive for cocaine over her objection that the hearsay testimony was not

substantially trustworthy;[4] and (2) that there was insufficient evidence to sustain her probation revocation because the trial court failed at sentencing to provide her with the terms and conditions of her probation. We address each argument in turn.

We review a trial court's decision to revoke probation under an abuse of discretion standard. *Williams v. State*, 883 N.E.2d 192, 195 (Ind. Ct. App. 2008). A probation revocation 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). Our court considers only the evidence most favorable to the judgment and does not reweigh the evidence presented or judge the credibility of the witnesses. *Williams*, 883 N.E.2d at 195. The violation of a single condition of probation is sufficient to revoke probation. *Wilson v. State*, 708 N.E.2d 32, 34 (Ind. Ct. App. 1999). 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. *Cox*, 706 N.E.2d at 551.

## I. Substantial Trustworthiness of Hearsay

Twilley first contends that Licht's testimony concerning Twilley's use of cocaine was hearsay, and, as such, should not have been admitted over her objection. While conceding that hearsay is admissible in a probation revocation hearing if it is

[4] In the record before us, counsel uses the term "reliable" hearsay. *Tr*. at 84, 85; *Appellant's Br*. at 6-7; *Appellee's Br.* at 4-5. In *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999), our Supreme Court held that "judges may consider any relevant evidence bearing some substantial indicia of reliability[,]" including reliable hearsay. More recently, in *Reyes v. State*, 868 N.E.2d 438, 441 (Ind. 2007), the Court adopted the substantial trustworthiness test as the approach to be used to determine the reliability of hearsay evidence in probation revocation proceedings. As such, we refer to the substantial trustworthiness test.

substantially trustworthy, Twilley contends that Licht's testimony regarding her drug use did not meet this test. Specifically, she contends, "[T]he only evidence presented in the present case concerning the Defendant's use of cocaine was the testimony of the Court's probation officer that she had received a report from AIT Laboratories indicating that the Defendant had tested positive for cocaine. The report itself was never actually submitted into evidence." *Appellant's Br*. at 7. Likewise, "there was no affidavit from an employee of AIT Laboratories describing the procedures used to handle and test what was supposedly a urine sample from the Defendant." *Id*. (citing *Reyes v. State*, 868 N.E.2d 438, 442 (Ind. 2007) (affidavit regarding drug use considered substantially trustworthy hearsay where affidavit set forth affiant's credentials and experience in drug testing)). Finally, Twilley asserts that the State made no attempt to present testimony from the person who actually took her urine sample. *Id*.

The State counters that Twilley's own admissions caused Licht's testimony of drug use to be substantially trustworthy. We agree. In 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." *Reyes*, 868 N.E.2d at 441. "[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 (quoting *United States v. Kelley*, 446 F.3d 688, 693 (7th Cir. 2006)).

Although the State set forth a foundation for admitting Licht's testimony,[5] the trial court did not explicitly provide on the record why the hearsay evidence, i.e., Licht's testimony regarding Twilley's drug use, was substantially reliable. While the preference is for the trial court to make a determination of substantial trustworthiness on the record, this failure to do so is not fatal where the record supports such a determination. *See Id.* (affirming trial court's admission of affidavits in probation revocation despite trial court's failure to provide detailed explanation on record because evidence supported substantial trustworthiness of affidavits).

On direct examination, Twilley and her attorney had the following exchange:

> Q. . . . it is alleged that you tested positive for cocaine twice. Is that correct?
>
> A. Yes sir.
>
> Q. Is there a reason for that?
>
> A. Yes sir.
>
> Q. What is that?
>
> A. I've had a (unintelligible) for cocaine ever since I was thirteen years old. And I did tell my probation officer about that. And I did let her know I wasn't gonna be able to make it out there like that cause (unintelligible) drugs. You know, I live in a crack house, (unintelligible) admission cause they had tried me so many times before for my drug habit and I couldn't kick it out there. . . . I did let my probation officer know the time, more than once that I really did want (unintelligible). That I was having problems with drugs. It was more or less just my surroundings. . . .

[5] Licht testified that: Twilley had submitted to urine analysis; the analysis was done by AIT Laboratories; AIT's reports showed Twilley had twice tested positive for cocaine; Licht had used AIT Laboratories for two years; Licht had found AIT's reports to be reliable; and from these reports Licht believed that Twilley tested positive for cocaine in November and December 2007. *Tr*. at 26-27.

*Tr*. at 33. Even if these statements did not amount to a confession of Twilley having used cocaine during her probation, the statements made Licht's hearsay statements substantially trustworthy. The trial court did not abuse its discretion in using Licht's testimony of Twilley's drug use as a basis for finding that she had used cocaine during her probation.

## II. Advisement of Probation Terms

Twilley next argues that there was insufficient evidence to sustain her probation revocation. Specifically she asserts that the trial court abused its discretion in revoking her probation because she was not advised at her sentencing hearing regarding the terms of her probation. Citing to Indiana Code section 35-38-2-2.3(b),[6] Twilley contends that a person placed on probation must be given a written statement of the conditions of probation at the sentencing hearing. She acknowledges that our courts have found a sentencing court's failure to provide a probationer with a written statement is harmless error where the record reflects that the court orally advised the probationer of the probation conditions and the defendant acknowledged her understanding. *White v. State*, 560 N.E.2d 45, 48 (Ind. 1990) (oral advisement by sentencing court satisfies conditions of Ind. Code § 35-38-2-2.3(b)); *Seals v. State*, 700 N.E.2d 1189, 1190 (Ind. Ct. App.

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[6] Indiana Code section 35-38-2-2.3(b) provides:

(b) When a person is placed on probation, the person shall be given a written statement specifying:

(1) the conditions of probation; and

(2) that if the person violates a condition of probation during the probationary period, a petition to revoke probation may be filed before the earlier of the following:

(A) One (1) year after the termination of probation.

(B) Forty-five (45) days after the state receives notice of the violation.

1998) (defendant orally advised of conditions of probation, without receiving written copy, could not challenge revocation when understanding of conditions was indicated in open court). Here, where the trial court gave her no written or oral notification of the terms of probation, Twilley insists that the trial court abused its discretion when it revoked her probation. *Appellant's Br*. at 10.

The intent behind Indiana Code section 35-38-2-2.3 is "to provide a defendant with prospective notice of the standard of conduct required of him or her while on probation and to prohibit the imposition of additional conditions after sentencing." *Kerrigan v. State*, 540 N.E.2d 1251, 1252 (Ind. Ct. App. 1989) (analyzing the predecessor to I.C. § 35-38-2-2.3). While it is true that the trial court failed to inform Twilley as to the conditions of her probation, on the facts of this case, that oversight is of no moment. "The law of this state is well established that although a trial court must specify the conditions of probation in the record, it is always a condition of probation that a probationer not commit an additional crime." *Braxton v. State*, 651 N.E.2d 268, 270 (Ind. 1995) (citing Ind. Code § 35-38-2-1; *Atkins v. State*, 546 N.E.2d 863, 865 (Ind. Ct. App. 1989); *Jaynes v. State*, 437 N.E.2d 137, 139 (Ind. Ct. App. 1982)).

Here, the petition to revoke Twilley's probation was, in part, based upon evidence that she tested positive for cocaine on two occasions. The positive drug tests suggested that Twilley had committed the crime of cocaine possession. Ind. Code § 35-48-4-6. A probation hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. *Cox*, 706 N.E.2d at 551. The testimony of Licht and Twilley were sufficient to prove by a preponderance of the evidence that Twilley had

possessed cocaine during her probation. As such, it was within the trial court's discretion to revoke her probation. *See Rowe v. State*, 704 N.E.2d 1104, 1109 (Ind. Ct. App. 1999) (citing *Jaynes*, 437 N.E.2d at 139-40) (the commission of any criminal offense is sufficient to warrant the revocation of probation), *trans. denied*.

Affirmed.

RILEY, J., and MATHIAS, J., concur.