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IN THE
COURT OF APPEALS OF INDIANA

NORMAN ANDERSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0812-CR-1103
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman Jr., Judge
Cause No. 48D03-0710-FD-285 and
48D03-0512-FD-580

June 5, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Norman Anderson appeals the trial court's revocation of probation and order that he serve his suspended sentences.

We affirm.

ISSUE

Whether the trial court erred when it found Anderson violated probation and ordered him to serve the suspended sentences.

FACTS

On November 26, 2007, Anderson tendered to the trial court a plea agreement with respect to charges pending against him in two separate cases.[1] The trial court accepted Anderson's plea of guilty in 48D03-0512-FD-580 (#580) for the December 2005 offenses of theft and resisting arrest, class D felonies[2]; and in 48D03-0710-FD-285 (#285) for the October 2007 offenses of possession of cocaine, a class D felony; resisting law enforcement and driving while suspended, class A misdemeanors; and driving while suspended, a class A infraction.

On June 23, 2008, the trial court sentenced Anderson to an aggregate term of twelve years in the two cases, with six years served on in-home detention and six years suspended to probation. The conditions of his probation included that he "not consume illicit drugs," and submit to urine screens. (App. 5). On June 25, 2008, Anderson

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[1] Although the Pre-Sentence Investigation Report states that the "written and signed plea agreement" is "attached" thereto, (App. 2 at p. 12), we did not find it therein.

[2] The CCS reflects that pursuant to Anderson's plea agreement, an habitual offender count in #580 was dismissed.

reported to his probation officer, Tony Neu. Anderson was subjected to a urine screen, which was positive for cocaine. On July 10, 2008, notices of violation were filed in #285 and #580, alleging that Anderson had failed to abstain from the use of illicit drugs, as required by his probation terms.

The trial court held an evidentiary hearing on August 18, 2008. Neu testified that at the time of Anderson's June 25th urine screen, Anderson "admitted . . . that he had been using but . . . didn't specify a time frame in which he stopped using." (Tr. 50). Anderson's counsel stipulated that Anderson was "not disputing that [he] tested positive for cocaine." (Tr. 48). The trial court admitted, without objection, the Witham Memorial Hospital Toxicology Laboratory test results that indicated the presence of cocaine in Anderson's urine, and reporting that the test evidenced Anderson's use of cocaine within 72 hours of the sample collection. Neu testified that the sample had been collected at approximately 3:15 p.m. Anderson testified that when tested on June 25th, he had last used cocaine between 3:30 and 4:00 a.m. on the day of sentencing, June 23rd.

The trial court took the matter under advisement, and on September 3rd, it heard additional evidence. Jeffrey Retz, scientific director of the Witham Toxicology Laboratory, testified that the test report entered into evidence reflected that Anderson's urine tested positive for cocaine because its level exceeded the 150 nanograms per milliliter "cutoff" level. (Tr. 67). Retz further testified that the "actual level" shown in Anderson's urine was 104,606 nanograms per milliliter. (Tr. 68). This was "a high level," according to Retz, and at "this level," the cocaine would have been ingested "much less than" 72 hours before the sample collection, "probably within twenty-four

hours." (Tr. 69). Retz testified that in his expert opinion, Anderson had ingested cocaine within twenty-four hours of when the sample was taken.

The trial court found "by a preponderance of the evidence" that

> based on Mr. Retz's expertise and [h]is scientific analysis of the testing and the level of cocaine found to be in . . . Anderson on June the 25th when the sample was taken, . . . [Anderson] did use cocaine after he was sentenced and placed on probation on June the 23rd . . . .

(Tr. 75). It then expressly found that Anderson "violated conditions of his probation," "revoke[d]" the suspended and home detention sentences, and ordered him to serve the sentences for #580 and #285 "at the Department of Correction." (App. 13).

DECISION

The violation of probation is a matter established by a preponderance of the evidence. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999). In reviewing the trial court's decision to revoke probation, we consider only the evidence most favorable to the judgment – "without reweighing that evidence or judging the credibility of witnesses." *Id.* "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" the trial court's decision to revoke probation. *Id.*

Anderson argues that the trial court's revocation of his probation was not supported by substantial probative evidence. We cannot agree.

A defendant's probationary period begins immediately after sentencing. *Rosa v. State*, 832 N.E.2d 1119, (Ind. Ct. App. 2005); *Kopkey v. State*, 743 N.E.2d 331, 339 (Ind.

Ct. App. 2001), *trans. denied*; *Crump v. State*, 740 N.E.2d 564, 568 (Ind. Ct. App. 2001). Thus, Anderson's probationary period began on June 23rd.[3]

Retz, the scientific director of the laboratory that "has performed thousands of 'drug screens' (toxicology tests) over the years for numerous county probation departments," (Ex. 1), testified that the report of Anderson's "positive" cocaine test result reflected that the sample tested contained a level of cocaine greater than the cut-off level of 150 nanograms per milliliter. Retz further testified at the September 3rd hearing that since the August 18th hearing he had reviewed Anderson's test result and found that the "actual level" of cocaine shown by the test of Anderson's sample was 104,606 nanograms per milliliter. (Tr. 68). Based on this actual level, it was the expert opinion of Retz – with a Bachelor of Science degree in chemistry, employed fifteen years as laboratory supervisor at the Indiana Department of Toxicology and then for the previous sixteen years as certifying scientist at the Witham Toxicology Laboratory (Ex. 1) – that Anderson had used cocaine within twenty-four hours of providing the urine sample on the afternoon of June 25th. Such constitutes substantial probative evidence to support the trial court's conclusion that Anderson "did use cocaine after he was sentenced and placed on probation" on June 23, 2008. (Tr. 75).

Affirmed.

BAILEY, J., and ROBB, J., concur.

[3] The CCS reflects that the hearing was scheduled for 9:30 a.m. on that date.