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IN THE
COURT OF APPEALS OF INDIANA

ERIC M. SCHULER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-1009-CR-1063
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0510-FC-284

June 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Eric M. Schuler ("Schuler") appeals from the trial court's order revoking his probation and imposing four years of his previously-suspended sentence. Schuler presents the following restated issue for our review: whether the trial court abused its discretion and committed fundamental error by admitting hearsay evidence of the identity of pills found in Schuler's possession and by taking judicial notice that the pills were a controlled substance and judicial notice of the trial court's own records in this case.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 7, 2010, Anderson Police Officers Travis Thompson ("Officer Thompson") and Mark Naselroad ("Officer Naselroad") initiated a traffic stop of a car driven by Schuler, because Schuler had not used a turn signal prior to turning right. After obtaining Schuler's driver's license, Officer Thompson returned to his patrol car to check Schuler's license and perform a warrant search, while Officer Naselroad remained outside Schuler's vehicle. Officer Naselroad observed Schuler making furtive movements as though he were trying to conceal something in his left hand. Based on that observation, the officers called a K-9 unit for assistance in conducting a canine sniff of the exterior of Schuler's vehicle.

Schuler requested to be placed in the back seat of the patrol car during the canine sniff because of the heat. The service dog indicated the presence of a controlled substance in Schuler's car, and a blunt, presumed to be a marijuana cigarette, was found. That blunt, however, field tested negative for marijuana and was determined to be a K2, or Spice, blunt, which is a legal substance. Schuler was released from handcuffs and he walked away from

the patrol car, as he was free to leave.

Officer Thompson searched the back seat of the patrol car where Schuler had been sitting and found two white pills under the seat. Schuler had not yet left the premises when this discovery was made. The officers then handcuffed Schuler and took him to jail. After transporting Schuler to jail, the officers took the pills to a CVS pharmacy in Anderson, where the pharmacist identified the pills as Soma, a prescription muscle relaxant.

Schuler had previously pleaded guilty to Class C felony burglary,[1] and Class D felony theft,[2] and had been sentenced to six years executed in the Department of Correction, suspended to probation. On December 10, 2010, the State filed a notice of probation violation, to which Schuler later admitted. The trial court revoked Schuler's suspended six-year sentence, but referred Schuler to Drug Court and ordered the sanction stayed pending successful completion of Drug Court.

The State charged Schuler with Class D felony possession of a schedule IV controlled substance[3] based upon the events described above. On August 13, 2011 Schuler stopped participating in Drug Court. Later, the State filed a notice of probation violation/stayed sentence based upon the charge of Class D felony possession of a schedule IV controlled substance and Schuler's withdrawal from Drug Court. At a hearing on the probation

[1] *See* Ind. Code § 35-43-2-1.

[2] *See* Ind. Code § 35-43-4-2.

[3] *See* Ind. Code § 35-48-4-7.

violation, the trial court found Schuler in violation of the conditions of his probation by committing a new criminal offense and failing to successfully complete Drug Court. The trial court ordered four years of the previously-suspended sentence to be executed in the Department of Correction. Additional facts will be supplied below. Schuler now appeals.

DISCUSSION AND DECISION

Schuler appeals from the trial court's order revoking his probation and ordering him to serve four years of his previously-suspended sentence. A probation revocation hearing is in the nature of a civil proceeding and a violation only has to be proven by a preponderance of the evidence. *Whatley v. State*, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006). When reviewing an appeal from the revocation of probation, we consider only the evidence most favorable to the judgment, and we will not reweigh the evidence or judge the credibility of witnesses. *Sanders v. State*, 825 N.E.2d 952, 957 (Ind. Ct. App. 2005). "Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled." *Prewitt v. State*, 878 N.E.2d 184, 187 (Ind. 2007). The trial court imposes the conditions of probation and may revoke it if those conditions are violated. *Id*. Because probation revocation does not deprive a defendant of his absolute liberty, but only his conditional liberty, he is not entitled to the full due process rights afforded to a defendant in a criminal proceeding. *Piper v. State*, 770 N.E.2d 880, 882 (Ind. Ct. App. 2002).

Probation revocation is a two-step process. *Sanders*, 825 N.E.2d at 957. First, the trial court must make a factual determination that the probationer violated a condition of his or her probation. *Id.* If a violation is proven, then the trial court must determine if the

violation warrants revocation of the probation. *Id*.

Schuler takes issue with the first step of the probation revocation process. He argues that the trial court committed fundamental error and abused its discretion by taking judicial notice that the pills found by the officers under Schuler's seat were a controlled substance, by taking judicial notice of its own records in Schuler's case, in particular the CCS entry indicating that Schuler had not completed Drug Court because he withdrew from it, and by admitting Officer Thompson's testimony about what the pharmacist told him when identifying the pills.

The fundamental error doctrine is an exception to the general rule that the failure to object at trial constitutes a procedural default precluding consideration of an issue on appeal. *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002). For the error to be deemed fundamental, it must constitute a "blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." *Id*. (quoting *Wilson v. State*, 514 N.E.2d 282, 284 (Ind. 1987)).

A probation revocation hearing is not to be equated with an adversarial criminal proceeding, and its procedures are more flexible. *Isaac v. State*, 605 N.E.2d 144, 149 (Ind. 1992). This allows the trial court to exercise its inherent power to enforce obedience to its lawful orders. *Id*. The rules of evidence, in particular the rule against hearsay, its definitions, and exceptions, do not apply in proceedings relating to sentencing, probation, or parole. *See* Ind. Evidence Rule 101(c); *Cox v. State*, 706 N.E.2d 547, 550 (Ind. 1999).

In considering Schuler's argument in relation to the trial court's decision to take

judicial notice of its own records in Schuler's case, we note that trial courts are permitted to take judicial notice of court records in probation hearings. Indiana Evidence Rule 201 provides that a trial court may take judicial notice of law, which includes records of a court of this state, at any stage of the proceeding. Thus, even though the rules of evidence do not apply in this particular proceeding, the trial court did not abuse its discretion or commit fundamental error by taking judicial notice of the CCS entry that Schuler had voluntarily withdrawn from Drug Court and that Schuler's participation in Drug Court was a condition of his probation.

In probation revocation hearings, judges may consider relevant evidence bearing some substantial indicia of reliability. *Cox*, 706 N.E.2d at 551. We have held that it was proper for a trial court to take judicial notice of another trial court's documents, including certified copies of the court docket, police report, and charging information, as they were of obvious relevance, and the trial court's certification provided substantial indicia of their reliability. *Pitman v. State*, 749 N.E.2d 557, 559 (Ind. Ct. App. 2001). Here, Schuler does not challenge the reliability of the trial court's own records, which are of obvious relevance and bear substantial indicia of their reliability. We find no fundamental error here.

The trial court also took judicial notice of the fact that the Soma pills were a controlled substance. The trial court stated the following at Schuler's probation revocation hearing:

> Counsel I suspect it's appropriate for the Court to take judicial notice of the fact that Soma is a controlled substance, it's a muscle relaxant, and it requires a prescription. If you think otherwise you can speak up. I don't know that we're going to have anybody here to testify to that specifically.

* * *

> The reason I'm saying that, a Pharmacist isn't here to tell us those things. I think that information is readily available and pretty well known by those of us who spend any time in this business. But I would expect to take judicial notice of that and if you think that's not appropriate you need to be, speak up and be heard on that.

Tr. at 51-52.

Although the rules of evidence do not apply to probation revocation proceedings, they do provide that a trial court may also take judicial notice of a fact. Ind. Evidence Rule 201. The fact must be one not subject to reasonable dispute in that it is generally known within the territorial jurisdiction of the trial court, or capable of accurate and ready determination by sources whose accuracy cannot reasonably be questioned. *Id*. Here, the trial court explained its familiarity with the fact that Soma is a controlled substance based on experience handling criminal cases involving drugs. We find no abuse of discretion or fundamental error in the trial court's decision to take judicial notice of the fact that Soma is a controlled substance.

Schuler also challenges the trial court's admission of hearsay evidence introduced through Officer Thompson's testimony about the pharmacist's identification of the pills. Officer Thompson testified that he took the pills to a CVS pharmacy, asked the pharmacist to identify the pills, and the pharmacist responded by identifying the pills as Soma. Schuler claims that admission of this testimony amounted to fundamental error.

Although evidentiary standards are relaxed in probation revocation proceedings, a showing of reliability of the hearsay is required. In this case, no such showing was made. Our Supreme Court has adopted a substantial trustworthiness test requiring the trial court to

evaluate the reliability of the hearsay evidence. *Reyes v. State*, 868 N.E.2d 438, 442 (Ind. 2007). "[I]deally [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*. (citing *United States v. Kelley*, 446 F.3d 688, 693 (7th Cir. 2006)). If the trial court made such an evaluation, the record here is silent on that point. Even though this was error, it does not rise to the level of fundamental error, but rather was harmless. Schuler does not challenge the identity of the pills, and identification of those pills was established by other methods.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.