



## STATEMENT OF THE CASE

Marlinda Nunley (“Nunley”) appeals the trial court’s finding that she violated the terms of her probation, and the trial court’s order that she serve two (2) years of her previously suspended sentence to the Indiana Department of Correction (“DOC”).

We affirm.

## ISSUES

1. Whether sufficient evidence supports the trial court’s finding that Nunley violated the terms of her probation.
2. Whether the trial court abused its discretion by ordering Nunley to serve the previously suspended sentence.

## FACTS

On August 20, 2008, the State charged Nunley with count 1, trafficking with an inmate, a class C felony; count 2, trafficking with an inmate, a class A misdemeanor; and count 3, possession of marijuana, a class A misdemeanor. On October 6, 2008, Nunley pled guilty to all three counts. On November 3, 2008, the trial court sentenced Nunley to the DOC for five years, with four years suspended, and one year to be executed.

On April 22, 2009, Angela Chaillaux (“Angela”) filed a crime report with the Indianapolis Metropolitan Police Department’s Detective Charles Denny (“Denny”). She told Detective Denny that her credit card had been stolen from her wallet. The next day, April 23, 2009, her credit card was used at a CVS Pharmacy store for a \$166.24

transaction. Denny retrieved a video tape of the transaction from the store and showed it to Angela. After viewing the video, Angela told the detective that she recognized the woman using her credit card in the video. Although she was uncertain of the woman's name, she identified the woman as a frequent patron of Ladies Footlocker.

A few weeks later, Angela contacted Denny and named Nunley as the person in the video. She reported recently that while Nunley was shopping at Ladies Footlocker, she was able to retrieve her name from her identification card. After receiving this information, Denny created a photo array with six photographs, including one of Nunley. Upon viewing the array, Angela immediately identified Nunley as the perpetrator.

On August 17, 2009, Probation Officer Sharon Adams filed a Notice of Violation of Probation, stating that Nunley violated her probation by (1) failing to report to the Probation Department within 48 hours of her recent arrest (2) committing the new criminal offenses of theft/receiving stolen property and fraud; (3) failing to pay probation fees in the amount of \$75.00 as of 8/11/09; (4) failing to pay court costs in the amount of \$164.00; (5) failing to pay the \$200.00 drug interdiction fee; (6) failing to pay the Public Defender fee; and (7) failing to pay the administrative fee of \$100.00 as of 9/11/09. Subsequently, the State filed a Petition for Violation of Probation, and the trial court held evidentiary hearings on October 6<sup>th</sup>, 13<sup>th</sup>, and 28<sup>th</sup>, 2009.

At the evidentiary hearings, Angela did not testify. However, the court heard the testimony of Detective Denny. Denny testified that Angela came to the police department and reported her credit card stolen. He attested that he spoke with the manager of her bank, Harvest Financial Bank, who verified the unauthorized transaction from CVS. He also, testified that he received information via video tape of the person who made the unauthorized charges at CVS. Furthermore, the trial court viewed the photo array prepared by Denny and the video tape of the person making the unauthorized purchase at CVS. Although there was not a direct face shot, the trial court found, after viewing the video tape and photo arrays, that it was more likely than not that Angela was correct in her identification of Nunley as the person seen in the video using her credit card. The court further explained that the person in the video, making the transaction at CVS, could be Nunley based upon her size, ethnicity, and frame. Also, the court heard evidence that Angela had, on several occasions, the opportunity to view Nunley before the theft and that she was a regular customer of Ladies Footlocker. Furthermore, when Nunley visited the store within a few weeks of the theft, Angela immediately recognized her and obtained particularized identifiers from Nunley's identification card. Thus the credibility and trustworthiness of the alleged victim was proven to be highly accurate. On October 28, 2009, the trial court found that Nunley had violated her probation, and ordered her to serve two years of the previously suspended sentence at the DOC.

## DECISION

### 1. Sufficiency

Nunley argues that the evidence to support the revocation of her probation was insufficient because the “State’s only evidence linking Nunley to the crime of Theft/Receiving Stolen Property and Fraud were hearsay statements that were not substantially trustworthy and should not have been admitted into evidence.” (Nunley’s Br. 6). In response, the State argues that because the trial court found that Angela’s hearsay statements were trustworthy and admissible, the evidence was sufficient to support the trial court’s finding that Nunley committed theft and fraud and violated other terms of her probation. We agree with the State.

A probation revocation proceeding is civil in nature, and the State’s burden is to prove the alleged violations by a preponderance of the evidence. *Figures v. State*, 920 N.E.2d 267, 272 (Ind. 2010). When reviewing the sufficiency of the evidence to support a probation revocation, we consider only the evidence most favorable to the judgment without reweighing the evidence or judging witnesses’ credibility. *Id.* (quoting *Woods v. State*, 992 N.E.2d 637,639 (Ind. 2008)).

Pursuant to Indiana Evidence Rule 101(c)(2), the Rules of Evidence do not apply in probation proceedings. Thus, the general rule against hearsay is inapplicable. *Figures*, 920 N.E.2d at 271. However, due process principles applicable in probation revocation

hearings afford the probationer “the right to confront and cross-examine adverse witnesses.” *Id.* The right to confrontation and cross-examination in probation revocation hearings is narrower than in a criminal trial. *Id.* (quoting *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007)).

In *Reyes*, the Indiana Supreme Court adopted the “substantial trustworthiness test” as a method for determining the admissibility of hearsay evidence in probation revocation hearings. *Id.* at 441. Thus, the general rule is that hearsay evidence may be admitted without violating a probationer’s right to confrontation if the trial court finds the hearsay is “substantially trust-worthy.” *Id.*

In *Figures*, the defendant was convicted, following a guilty plea, of carrying a handgun without a license, a class C felony, and sentenced to four years with two years suspended to probation. While on probation, he allegedly committed domestic battery and battery as class D felonies. The trial court held a probation revocation hearing, where it admitted into evidence over *Figures*’ objection, certified copies of the case chronology and probable cause affidavit regarding the battery charges. We held that the trial court erred in admitting the evidence absent any foundation to establish reliability. *Id.* We further held that the trial court erred in admitting the evidence because it did not explain, on the record, why it considered the evidence to be substantially trustworthy. *Id.*

Ideally, the trial court should explain, on the record, why the hearsay is substantially trustworthy, or sufficiently “reliable” to be admissible. *Id.*

Unlike *Figures*, here, the trial court, after hearing testimony, reviewing evidence, including the video tape, explained on the record why it was prepared to trust the statements introduced through Detective Denny’s testimony, by stating the following:

...while we cannot say for sure that the person in this video is Ms. Nunley, I’m not prepared to say that, but the person in the video certainly could be Ms. Nunley by size, by ethnicity, by frame and also by the transaction because there is a person who makes such a transaction that is responsible for the victimization of [Angela]. All of that leads me to say I’m prepared to trust [Angela], what would otherwise be hearsay out of Court statement, which we hear through the Detective. (Tr. 50-51)

The trial court found the detective testimony admissible, consistent with *Figures*. Given this evidence, Nunley insufficiency argument must fail.<sup>1</sup>

## 2. Abuse of Discretion

Nunley argues that the trial court abused its discretion by ordering two years of her previously suspended sentence executed as the sanction for her probation violation because “the State failed to introduce any evidence that she recklessly, knowingly, or intentionally failed to pay various financial obligations imposed on her by the Court.”

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<sup>1</sup> Moreover, the trial court’s decision to revoke Nunley’s probation was based, in part, upon its findings that Nunley failed to pay court costs and various fees, and report to the Probation department within 48 hours of her arrest. Although the court only needs to find one violation to support a probation revocation, *see* I.C. § 35-38-2-3(g), the court found six.

(Nunley's Br. 6). Nunley further argues that the trial court failed to take into account that this is her first probation violation; that the violations are minor in nature (notwithstanding the commission of the new crimes of Theft/Receiving Stolen Property and Fraud); and that her incarceration would impose a burden on her mother, who will have to care for Nunley's five children.

In response, the State argues that the trial court did not abuse its discretion and properly revoked Nunley's probation because of the seriousness of the new crimes she had committed and her failure to follow the terms of her probation. The State further argues that although Nunley's imprisonment may be considered a hardship on her children and could be considered a mitigator absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship. We agree with the State.

There is no right to probation, and the trial court has the discretion to grant or to revoke it if conditions are violated. *Reyes*, 868 N.E.2d at 440. Indiana law provides that a trial court may revoke a person's probation if the person has violated a condition of probation during the probationary period. Ind. Code § 35-38-2-3(a)(1). The standard of review used in determining whether a defendant's probation revocation sentence is unreasonable is abuse of discretion. *Sanders v. State*, 825 N.E.2d 952 (Ind. 2005). An abuse of discretion occurs when the trial court's decision is clearly against the logic and

effect of the facts and circumstances before it. *Figures*, 920 N.E.2d at 271. Under Indiana Code section 35-38-2-3(g), if the trial court finds that the defendant has violated any terms of probation; the trial court may (1) continue the defendant on probation; (2) extend the defendant's probationary period by up to one year; or (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing.

In *Figures*, the defendant was ordered to serve the entire two years of his previously suspended sentence for violating his probation. He argued that the trial court abused its discretion by ordering him to serve the entire two years of his suspended sentence. He further argued that the trial court had other options besides revoking his probation. We held that 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. *Id* at 272. We further held that, although the trial court had other options besides ordering full execution, we could not say that the trial court acted outside the bounds of its discretion when it ordered *Figures* to serve the entire two years of his previously suspended sentence. *Id* at 273.

Like *Figures*, Nunley contends that the trial court abused its discretion by ordering her to execute two years of her four-year suspended sentence. However, unlike *Figures*, Nunley was not ordered to execute the entire suspended sentence. Despite the

considerable amount of grace the trial court had given her,<sup>2</sup> Nunley chose to violate multiple conditions of her probation. Arguably, despite these multiple violations, she was shown a substantial amount of lenity in being ordered to execute only two years of her suspended sentence.

As for Nunley's claim that the trial court failed to consider that incarceration would cause a burden on her mother who is caring for her five children, Nunley fails to demonstrate that such hardship would have been "undue" or that the hardship would be worse than that suffered by any other family, in particularly children, whose parent or family member is incarcerated. In *Williams v. State*, 883 N.E.2d 192, 197 (Ind. 2008), our Supreme Court concluded that the trial court did not abuse its discretion when it declined to view undue hardship on his dependents as a mitigating factor at sentencing, finding "[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Id.* (quoting *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999)). Pursuant to *Williams*, we find no abuse of discretion.

Affirmed.

BAKER, C.J., and CRONE, J., concur.

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<sup>2</sup> Nunley had initially received a five year sentence, with one year executed and four years suspended to probation.