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IN THE
COURT OF APPEALS OF INDIANA

KENT A. EASLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 73A04-0810-CR-580
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SHELBY SUPERIOR COURT
The Honorable Jack A. Tandy, Judge
The Honorable Norman D. Curry, Senior Judge
Cause No. 73D01-0004-CF-028

AUGUST 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Appellant-Defendant Kent Easley appeals the revocation of his probation.

We affirm in part, and reverse and remand in part.

Easley presents ten issues for our review, which we restate as:

I. Whether the trial court erred in its credibility determination with regard to the testimony of the victim of the underlying offense at Easley's probation revocation hearing.

II. Whether the State presented sufficient evidence to sustain the revocation of Easley's probation.

III. Whether the State engaged in prosecutorial misconduct.

IV. Whether the trial court abused its discretion in allowing the victim of the underlying offense to testify at Easley's probation revocation hearing.

V. Whether the trial court erred in denying credit time to Easley.

VI. Whether the trial court improperly denied Easley an opportunity for allocution at his dispositional hearing.

VII. Whether Easley was denied the effective assistance of counsel.

VIII. Whether the State's addendum to its petition to revoke Easley's probation is invalid.

IX. Whether Easley's constitutional rights were violated by delays of the trial court clerk's office.

X. Whether the State properly appeared in this case.

In 2000, Easley pleaded guilty to two counts of dealing cocaine, both as Class B felonies, and one Class A misdemeanor possession of marijuana. Pursuant to a plea agreement, he was sentenced to twenty years with ten years suspended on each of the two

Class B felonies and one year on the Class A misdemeanor, to be served concurrently, followed by ten years of probation. On June 14, 2007, the probation department filed a petition to revoke probation alleging that Easley had committed the offense of battery while on probation. Thereafter, on June 27, 2008, the probation department filed an addendum to its petition to revoke probation alleging that Easley had consumed alcohol while on probation. A fact-finding hearing was held on the State's petition to revoke probation, and addendum thereto, on August 8, 2008, and the court determined that Easley violated his probation. At the dispositional hearing on August 29, 2008, the court imposed three years of Easley's previously suspended sentence. It is from this determination that Easley now appeals.

Easley first contends that the trial court erred in its credibility determination of the victim of the underlying offense of battery because the victim's testimony at his fact-finding hearing was different from her testimony at his trial on the underlying battery charge. In support of his argument, Easley cites to Ind. Evidence Rule 608.

Initially, we note that the rules of evidence, other than those with respect to privileges, do not apply to proceedings involving probation. Ind. Evidence Rule 101(c)(2); *Cox v. State*, 706 N.E.2d 547, 550 (Ind. 1999). A probation revocation hearing is not to be equated with an adversarial criminal proceeding. *Cox*, 706 N.E.2d at 550. Rather, a probation revocation hearing is civil in nature, *J.J.C. v. State*, 792 N.E.2d 85, 88 (Ind. Ct. App. 2003), with more flexible procedures and a narrow area of inquiry. *Cox*, 706 N.E.2d at 550. Because these proceedings are more flexible, strict rules of evidence

do not apply. *See* Evid. R. 101(c)(2). Therefore, in probation proceedings, the trial court may consider any relevant evidence bearing some substantial indicia of reliability. *Cox*, 706 N.E.2d at 551.

Here, the victim of the battery, after qualifying her testimony by stating that she takes seizure medication and has memory loss, testified that Easley was throwing dresser drawers on her while she was in bed. She testified that the drawers hit her, which hurt her and caused injuries. The State also introduced a picture of marks on her stomach and wrist, which she stated were caused by Easley. On cross-examination, Easley's counsel questioned her about the dismissal of the underlying battery charge. She responded that the charge was dismissed because she told Easley's attorney that she could not remember what happened. She stated that she told Easley's attorney she remembered drawers being thrown, but she did not remember Easley punching or hitting her. In addition, the responding officer testified at the fact-finding hearing as to what he had found and what the victim had told him when he arrived on the scene. The victim's testimony was clearly relevant with regard to the battery, and we conclude that the trial court properly admitted the victim's testimony at the fact-finding hearing.

Next, Easley challenges the sufficiency of the evidence supporting the trial court's decision to revoke his probation. Specifically, Easley argues that because the trial court allegedly was not provided with a copy of the terms of his probation, the State failed to prove he violated his probation.

A probation revocation proceeding is in the nature of a civil proceeding, therefore, the alleged violation need be proved only by a preponderance of the evidence. *J.J.C.*, 792 N.E.2d at 88. As with other sufficiency questions, we neither reweigh the evidence nor judge the credibility of witnesses when reviewing a probation revocation. *Baxter v. State*, 774 N.E.2d 1037, 1044 (Ind. Ct. App. 2002), *trans. denied*, 783 N.E.2d 705. We look only to the evidence that supports the judgment and any reasonable inferences flowing therefrom. If there is substantial evidence of probative value to support the trial court's determination that the probationer committed a violation, revocation of probation is appropriate. *Id*.

Easley's plea agreement that was filed with the trial court states: "PROBATION: **** Defendant shall abstain completely from the use of alcohol and/or drugs except as prescribed by a physician, and shall submit to any and all screenings or tests requested by the Probation Department or any law enforcement officer, and must pay costs associated with such screenings …" Appellant's Appendix at 100. In addition, during Easley's sentencing hearing on December 27, 2000, the judge read the conditions of probation to Easley, including: "You're ordered not to commit another criminal offense; . . . . abstain from the use of alcohol and all non-prescribed drugs." Transcript of Sentencing Hearing, Appellant's App. at 95. Further, Easley admitted at the fact-finding hearing that refraining from committing any new criminal offenses and from consuming alcohol were conditions of his probation. (Transcript at 7). Moreover, the requirement that a probationer obey federal, state, and local laws is automatically a condition of probation

by operation of law. *Williams v. State*, 695 N.E.2d 1017, 1019 (Ind. Ct. App. 1998); Ind.Code § 35-38-2-1(b) ("If the person commits an additional crime, the court may revoke the probation."). All the parties and the trial court were aware of the conditions of Easley's probation; thus, his claim on this issue fails.

Easley's third claim of error is that the prosecutor committed misconduct. Upon review of a properly preserved claim of prosecutorial misconduct, we determine: (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. *Sobolewski v. State*, 889 N.E.2d 849, 856 (Ind. Ct. App. 2008), *trans. denied*, 898 N.E.2d 1223. However, where, as here, a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim. *Id*. That is, the defendant must establish not only the ground for the misconduct but also the additional grounds for fundamental error. *Id*. In order for a claim of prosecutorial misconduct to rise to the level of fundamental error, the defendant must demonstrate that the misconduct made a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process and presents an undeniable and substantial potential for harm. *Gregory v. State*, 885 N.E.2d 697, 706 (Ind. Ct. App. 2008), *trans. denied*, 902 N.E.2d 205 (2009).

Easley alleges three incidents of misconduct by the prosecutor. First, he maintains that the prosecutor engaged in misconduct by pursuing the probation revocation against

Easley even though the victim had given conflicting statements. The statements Easley refers to are the same statements we dealt with in the first issue and about which defense counsel questioned the victim. Our review of the transcript reveals that the evidence is not necessarily conflicting. Easley claims that the victim previously testified in the battery case that he "never hit or abused her." Appellant's Brief at 17. In the present case, she testified that she remembered drawers being thrown on her, (Tr. at 41); that Easley did not hit her, (Tr. at 44); that she didn't remember everything that happened, (Tr. at 47); and that she just remembers drawers being thrown but that she doesn't remember Easley physically punching or hitting her. (Tr. at 52).

Additionally, prosecutors are faced with conflicting evidence every day. Their pursuit of a case that involves conflicting testimony does not automatically mean they have engaged in misconduct. *See e.g., Menifee v. State*, 600 N.E.2d 967, 970 (Ind. Ct. App. 1992) (determining that evidence at hearing was sufficient to prove revocation of probation due to charge of new offense of domestic battery based upon officers' testimony and despite testimony of defendant's girlfriend that defendant did nothing violent on night in question). We end our inquiry here because we find no misconduct on the part of the prosecutor.

Easley's second allegation of prosecutorial misconduct involves the use of perjured testimony. While the knowing use of perjured testimony may constitute prosecutorial misconduct, contradictory or inconsistent testimony by a witness does not constitute perjury. *Timberlake v. State*, 690 N.E.2d 243, 253 (Ind. 1997).

Here, there is nothing in the documents on appeal, and Easley points to nothing, that suggests the prosecutor used perjured testimony. While the prosecutor presented the victim's testimony at the fact-finding hearing, which we determined was not necessarily conflicting, there is no evidence that the prosecutor knowingly used false testimony. Moreover, defense counsel had the opportunity and did in fact cross-examine the victim at Easley's fact-finding hearing about the dismissal of the underlying battery charge.

Finally, Easley maintains that the prosecutor withheld evidence from the defense. Particularly, Easley claims that the prosecutor failed to give to him a copy of an affidavit allegedly made in the battery case by the victim stating that Easley never hit or abused her. Easley acknowledges that he did not request a copy of the affidavit.

To establish this claim, Easley had to demonstrate: (1) the prosecutor suppressed evidence; (2) the evidence was favorable to the defense; and (3) the suppressed evidence was material. *Douglas v. State*, 800 N.E.2d 599, 606 (Ind. Ct. App. 2003). It appears that Easley was aware of the existence of this alleged affidavit but failed to request a copy in advance of his fact-finding hearing. On cross-examination of the victim at the fact-finding hearing, Easley's attorney alluded to a statement being made in the underlying battery case, and he questioned the victim as to why the case was dismissed. Evidence cannot be regarded as "suppressed," and the State will not be found to have suppressed material information, when the defendant had access to the evidence before trial by the exercise of reasonable diligence. *Prewitt v. State*, 819 N.E.2d 393, 402 (Ind.

Ct. App. 2004). We find no support in the materials on appeal for Easley's claims of prosecutorial misconduct.

Easley again challenges the victim's testimony but upon a different basis. This time he asserts that she should not have been allowed to testify because her alcohol and drug use impaired her mind and her ability to recall events.

We again note that a probation revocation hearing has more flexible procedures. *Cox*, 706 N.E.2d at 550. Because these proceedings are more flexible, strict rules of evidence do not apply. *See* Evid. R. 101(c)(2). Therefore, in probation proceedings, the trial court may consider any relevant evidence bearing some substantial indicia of reliability. *Cox*, 706 N.E.2d at 551.

At the fact-finding hearing, the victim candidly testified that she takes seizure medication, that she might have been drinking on the night of the incident, and that she has trouble with her memory, even with regard to the night of the incident. Easley's counsel cross-examined the victim regarding her medication, whether she was drinking, and particularly about her memory. The victim, in both her direct exam and her cross exam, consistently testified that she remembered dresser drawers being thrown at her but that she did not remember Easley punching or hitting her. The trial court did not err by allowing the victim to testify.

As his fifth claim of error, Easley avers that the trial court erred by denying him jail time credit. He claims he was arrested on June 7, 2007 on the battery charge, and on June 8, 2007, a probation hold was placed on him until he bonded out on July 7, 2007.

He contends the trial court should have given him credit for this time against the sentence he received for violating his probation.

Easley was arrested on the battery charge on June 7, 2007, and the charge was filed in Shelby County Superior Court II. The Chronological Case Summary (CCS) shows that on June 8, 2007, the court set bond at $1,000 and ordered a 15-day probation hold on Easley. Appellant's App. at 13. The battery case was dismissed on February 22, 2008. Appellant's App. at 14. At Easley's dispositional hearing in the present case on August 29, 2008, defense counsel mentioned the 15-day probation hold, and the State indicated its belief that Easley's time on the hold was to be applied to the battery case. The court agreed and gave Easley jail time credit from August 8, 2008, when he was taken into custody following the fact-finding hearing, a total of 22 days.

The determination of a defendant's pre-trial credit depends upon two criteria: (1) pre-trial confinement, and (2) the confinement is the result of the criminal charge for which the sentence is now imposed. Ind. Code § 35-50-6-3; *Bischoff v. State*, 704 N.E.2d 129, 130 (Ind. Ct. App. 1998). Credit is to be applied for time spent in confinement that is the result of the charge for which the defendant is being sentenced. *Bischoff*, 704 N.E.2d at 130.

Although the probation hold that was placed on Easley on June 8, 2007 occurred in the battery case, it would have caused the jail to retain custody of him even if no battery charge was pending. Therefore, Easley is entitled to credit for the time he was in the Shelby County Jail commencing June 8, 2007. *See Bischoff*, 704 N.E.2d at 130

(determining that defendant had not demonstrated that time spent confined after he was served out-of-county warrant was result of out-of-county charge because he provided no evidence to show warrant served as a "hold"); *see also Richeson v. State*, 648 N.E.2d 384, 390-91 (Ind. Ct. App. 1995) (holding that defendant was not entitled to jail time credit in Porter County for time served in Lake County where defendant provided no evidence that Porter County detainer served as "hold" which would cause Lake County to retain custody over him even if no Lake County charges were pending).

Having determined that Easley is entitled to jail time credit, we turn to the total amount of time to which Easley is entitled. However, the record is unclear as to when Easley was released from jail. In his brief, he alleges that he bonded out on July 7, 2007, but neither the CCS nor any other documents on appeal confirm this information. Therefore, we remand to the trial court to determine the total jail time credit to which Easley is entitled, commencing June 8, 2007 when the hold was placed. *See Bennett v. State*, 787 N.E.2d 938, 951 (Ind. Ct. App. 2003) (remand necessary for computation of total credit time where record unclear as to time period of defendant's incarceration).

Easley also contends that the trial court improperly denied him his right of allocution both at the fact-finding hearing and at the dispositional hearing. In 2004, our supreme court determined that the right of allocution applies to probation revocation proceedings. *Vicory v. State*, 802 N.E.2d 426 (Ind. 2004).

First, Easley maintains that the trial court erred by failing to ask him whether he wanted to make a statement of allocution at his fact-finding hearing. The judge is not

required to ask the defendant in probation revocation proceedings whether he wants to make a statement of allocution. *Id*. at 429. We find no error.

At his dispositional hearing, Easley asked the court for a right to be heard to give his side of the story. The court denied Easley's request and responded that Easley's counsel had presented evidence on his behalf and that Easley himself had testified. *See* Tr. at 76. The court should have granted Easley's specific request to make a statement. *See Vicory*, 802 N.E.2d at 430 (concluding that where defendant made specific request to make statement of allocution, court should have granted it).

However, when the defendant is given the opportunity to explain his view of the facts and circumstances, the purpose of the right of allocution has been accomplished. *Id*. In his brief, Easley acknowledges that prior to the dispositional hearing he filed with the court a written memorandum entitled "Defendant's Supportive Motion on Right to be Heard at Sentencing." *See* Appellant's App. at 19-22. The items Easley lists in his brief are those which were included in his written memorandum. Moreover, Easley testified both at his fact-finding hearing and his dispositional hearing. Because Easley testified at his fact-finding and dispositional hearings, submitted his memorandum to the court containing his side of the story, and failed to identify any further argument he would have made had the court permitted him to make a statement, the court's refusal to allow his statement does not require reversal. *See Vicory*, 802 N.E.2d at 430 (although court denied defendant's request to make statement of allocution, reversal not warranted

because defendant testified at hearing and failed to identify any statement or argument he would have made had court permitted his statement).

The seventh error alleged by Easley is that he was denied effective assistance of counsel. Easley alleges that his counsel refused to obtain a document from the State in the discovery process; and that counsel failed to object to statements by the victim at the fact-finding hearing, to statements of the arresting officer, to the trial court's denial of his right to allocution, to the lack of evidence that Easley was drinking alcohol on a daily basis, and to the victim's "truthfulness and credibility." Appellant's Brief at 28.

In general, claims of ineffective assistance of counsel are reviewed under a two-part test: (1) a demonstration that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) a showing that the deficient performance resulted in prejudice. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (*citing Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Prejudice occurs when the defendant demonstrates that there is a reasonable probability that, if not for counsel's unprofessional errors, the result of the proceeding would have been different. *Grinstead*, 845 N.E.2d at 1031. A reasonable probability occurs when there is a probability sufficient to undermine confidence in the outcome. *Id*. Further, when an ineffective assistance of counsel claim is based upon a failure to object, the defendant must first prove that an objection would have been sustained by the trial court had defense counsel objected at trial and second that he was prejudiced by the failure. *Mays v. State*, 719 N.E.2d 1263, 1265-66 (Ind. Ct. App. 1999).

Here, Easley has shown neither that counsel's performance was sub-standard nor that he suffered any prejudice as a result of counsel's representation. He has wholly failed to make any showing on either prong of the two-part test for determining the effectiveness of counsel. We find no error.

Easley's eighth claim of error is that the State's addendum to the petition to revoke probation is invalid. Easley's confusing and baseless argument is stated as follows:

> On 6-27-08 the State orally moved to [sic] an addendum for drinking while on probation. No motion was ever filed pursuant [to] I.C. 35-34-1-5(c)[ ], therefore no evidence exists. On 6-27-08 the Probation Dept. filed an invalid "Addendum to Petition to Revoke Probation" that stated in part "Petition to Revoke Probation was filed on the 27th day of Dec. 2000…on or about 6-7-07 defendant illegally consumed alcohol while on probation" (App. 18). The Petition to Revoke Probation was filed on 6-14-07 (App. 17). The Appellant was over the age 21 so "if" he did consume alcohol on 6-7-07 it wouldn't of [sic] been illegal for him to do so. This invalid Addendum is this court's only proof of an alleged drinking while on probation and should be struck from the records. The trial court had no authority to revoke Appellant's probation in this matter and this Court of Appeals should reverse.

Appellant's Brief at 29.

First, we note that Ind. Code § 35-34-1-5 does not apply to the revocation of probation; rather, this statute provides the procedure for amending an indictment or information. Ind. Code § 35-38-2-3, on the other hand, provides the procedure for revocation of probation and requires that the petition to revoke probation be filed during the probationary period or before the earlier of one year after the termination of probation or forty-five days after the state receives notice of the violation. Ind. Code § 35-38-2-3(a)(2). Easley has not alleged a failure by the State to follow these requirements, and we

find none. The CCS shows that at a hearing on June 27, 2008, the State informed the trial court and Easley that it would be filing an addendum to the petition to revoke probation. That same day, the addendum was filed with the court.

Additionally, the use of the word "illegal" in the addendum does not invalidate the addendum. Moreover, on August 8, 2008, prior to the commencement of the fact-finding hearing, the State moved to strike the word "illegally" from the addendum as surplusage. Defense counsel stated he had no objection, and the trial court allowed the State to strike the term from the addendum. Easley's muddled claims on this issue fail.

Easley also contends that his constitutional rights were violated by the trial court clerk's delay in providing him with documents and transcripts that he requested. Easley's argument on this issue fails to meet a minimum standard of cogency. He fails to explain how his constitutional rights were violated and, thus, we decline to address it further. *See* Ind. Appellate Rule 46(A)(8)(a); *see also Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005), *trans. denied* (holding that defendant waived issue of whether his rights to due process and confrontation under federal and state constitutions were violated because he failed to make cogent argument with citations to supporting authority).

Finally, Easley avers that the revocation of his probation should be reversed because the State and the probation department did not properly appear in this case. However, Easley cites to none and we know of no cases that hold that a probation revocation should be reversed due to the lack of an appearance form from the State.

Therefore, Easley has waived this issue for lack of cogent argument and citation to relevant authority. *See* App. R. 46(A)(8)(a); *see also Lyles*, 834 N.E.2d at 1050.

Waiver notwithstanding, Ind. Trial Rule 3.1(A) requires the initiating party, at the time an action is commenced, to file an appearance form with the clerk of the court. In the present case, the CCS reflects the State's filing of its appearance form on April 17, 2000 when it also filed the information and probable cause affidavit. *See* Appellant's App. at 2.

Based upon the foregoing discussion and authorities, we conclude that the trial court properly admitted the victim's testimony at the probation revocation hearing and that the State presented sufficient evidence to sustain the revocation of Easley's probation. In addition, we find no support for Easley's claims of prosecutorial misconduct, and we conclude that the trial court did not abuse its discretion in allowing the victim to testify at Easley's probation revocation hearing. Further, we found no error warranting reversal with regard to Easley's opportunity for allocution at his dispositional hearing, and we conclude that Easley failed to meet his burden of showing the ineffectiveness of his counsel. Moreover, we conclude that Easley's argument that the State's addendum to the petition to revoke was invalid is baseless, that he has waived any issue regarding the violation of his constitutional rights caused by the delays of the trial court clerk, and that his argument that the State's alleged failure to appear in this case required reversal of his probation revocation is completely unfounded.

Finally, we conclude that Easley is entitled to jail time credit for the time he was in the Shelby County Jail commencing June 8, 2007. We remand to the trial court to determine the total jail time credit to which Easley is entitled, commencing June 8, 2007 when the probation hold was placed with regard to the instant case.

Affirmed in part, and reversed and remanded in part.

RILEY, J., and ROBB, J., concur.