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IN THE
COURT OF APPEALS OF INDIANA

DOUGLAS N. WHITE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A05-1004-CR-317
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Rudolph R. Pyle III, Judge
Cause Nos. 48C01-0206-FC-175
48C01-0301-FD-34
48C01-0306-FC-187

DECEMBER 21, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Douglas White appeals the revocation of his probation and imposition of his entire suspended sentence.

We affirm.

ISSUES

White presents two issues for our review, which we restate as:

I. Whether there was sufficient evidence to prove White violated his probation.

II. Whether the trial court abused its discretion in ordering White to serve his entire suspended sentence.

FACTS AND PROCEDURAL HISTORY

On March 3, 2004, White pleaded guilty to three charges in three different cases. In Cause No. 48C01-0206-FC-175 ("FC-175"), he pleaded guilty to nonsupport of a dependent child, a Class C felony, and he was sentenced to eight years with two years executed on home detention and six years suspended to probation. In Cause No. 48C01-0301-FD-34 ("FD-34"), White pleaded guilty to resisting law enforcement, a Class D felony, and was sentenced to eighteen months with six months to be served on home detention and one year suspended to probation. Finally, in Cause No. 48C01-0306-FC-187 ("FC-187"), White pleaded guilty to forgery, a Class C felony. He was sentenced to

four years with two years to be served on home detention and two years suspended to probation. All three sentences were to be served consecutively.

On February 23, 2010, the State filed a notice of violation of probation in all three causes. The trial court held a hearing on the alleged violations and found that White had violated his probation in all three causes. The trial court revoked White's entire suspended sentence in each of the three causes (i.e., six years in FC-175, one year in FD-34 and two years in FC-187) and ordered them to be served consecutively for an aggregate sentence of nine years. It is from the trial court's revocation of his probation and imposition of his entire suspended sentence that White now appeals.

DISCUSSION AND DECISION

I. SUFFICIENCY OF THE EVIDENCE

White first contends that the State failed to present evidence sufficient to support the revocation of his probation. Specifically, he asserts that the State did not prove that he committed resisting law enforcement and that the probation officer's testimony was inadmissible hearsay.

A revocation hearing is in the nature of a civil proceeding, and the State must prove an alleged violation only by a preponderance of the evidence. Ind. Code § 35-38-2-3(e) (2008); *Kincaid v. State*, 736 N.E.2d 1257, 1259 (Ind. Ct. App. 2000). 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*. 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*. The decision to revoke a defendant's probation is a matter within the sound discretion of the trial court. *Woods v. State*, 892 N.E.2d 637, 639 (Ind. 2008). Thus, on appeal, we review the trial court's decision for an abuse of that discretion. *Id*.

Here, the State filed notices alleging that White had violated his probation by committing additional criminal offenses, by failing to keep the probation department informed of his address, by failing to report to the probation department, and by failing to pay court costs, probation fees, and child support. After hearing evidence, the trial court determined that White had violated his probation with regard to the first three alleged violations.

On appeal, White claims that the trial court erred by finding a violation based upon his commission of additional criminal offenses because there was not sufficient evidence to prove the new charge of resisting law enforcement. White's new charges stem from an incident in a store when White put two bottles of whiskey down his pants and walked out of the store without paying for the items. He was brought back into the store where he was detained in an office. He attempted to escape from the office, but he was caught and returned. White avers that the State did not present sufficient evidence to prove the elements of the offense of resisting law enforcement because the store security

officer does not constitute a law enforcement officer as that term is used in the statute setting forth the offense of resisting law enforcement. *See* Ind. Code § 35-44-3-3 (2006).

However, we need not determine that issue. The State did not have to prove that White committed the offense of resisting law enforcement. Rather, it merely had to prove by a preponderance of the evidence that White committed a new criminal offense while he was on probation. Here, the court found White took the bottles of whiskey without paying for them while he was on probation. Neither at the revocation hearing nor on appeal, did White challenge the finding that he committed this act while on probation. It was not necessary that the court also find that White resisted the officer. Violation of a single condition of probation is sufficient to revoke probation. *Baxter*, 774 N.E.2d at 1044. There was substantial evidence of probative value to support the trial court's determination that White violated his probation.

In addition, White challenges the sufficiency of the court's findings that he failed to keep the probation department informed of his address and failed to report to the probation department because the probation officer that testified at the revocation hearing was not his probation officer. He argues that this hearsay testimony is insufficient to sustain the court's findings of violations.

The State observes, and White concedes, that he did not object to this testimony. White's failure to object contemporaneously to the testimony results in waiver of the issue on appeal. *See Wilkerson v. State*, 918 N.E.2d 458, 462 n.1 (Ind. Ct. App. 2009) (noting that failure to object to hearsay testimony at probation revocation hearing waives

issue for appeal). Seeking to avoid procedural default, White claims that the trial court's admission of the testimony constitutes fundamental error. The fundamental error doctrine is extremely narrow and applies only when the error amounts to a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. *Lehman v. State*, 926 N.E.2d 35, 38 (Ind. Ct. App. 2010), *trans. denied*.

Indiana Evidence Rule 101(c)(2) allows for the admission of evidence during probation revocation hearings that would not be permitted in a full-blown criminal trial. Yet, "[t]his does not mean that hearsay evidence may be admitted willy-nilly in a probation revocation hearing." *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007). In *Reyes*, our Supreme Court adopted the substantial trustworthiness test as the means for determining whether hearsay evidence should be admitted at a probation revocation hearing. In applying the 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 (citing *United States v. Kelley*, 446 F.3d 688, 693 (7th Cir. 2006)).

In the instant case, White's failure to object deprived the trial court of the opportunity to make a substantial trustworthiness determination. Nevertheless, the transcript of the revocation hearing discloses that the evidence would support a determination that the probation officer's testimony was substantially trustworthy. The probation officer testified that White's probation officer informed him that White, when

arrested on the most recent charges, gave an address different from the one on file with the probation office. The probation officer also testified that White's probation officer informed him that although White was required to report monthly to the probation office, he had not reported since September 2009. The testifying probation officer simply testified to the information as relayed to him by White's probation officer, and he did so under oath and subject to cross-examination. Therefore, we find no error, fundamental or otherwise.

II. SENTENCING

White claims that the trial court abused its discretion when, upon revoking his probation, it ordered him to serve his entire suspended sentence. He points out that the instant violation is his third violation, not his sixth as he admitted at the revocation hearing, and he asserts that the trial court should have referred him to drug court rather than incarcerate him.

Pursuant to Indiana Code section 35-38-2-3(g), if the court finds a violation of a condition of probation, it may continue the person on probation, with or without modifying the conditions; extend the person's probationary period for not more than one year; and/or order execution of all or part of the sentence that was suspended at the time of initial sentencing. A trial court's sentencing decisions for probation violations are reviewed for an abuse of discretion. *Wilkerson*, 918 N.E.2d at 464. An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007).

It does appear from the documents on appeal that the number of prior violations in the present cases was incorrectly stated by both White and the State at the revocation hearing. Regardless, White has had at least two prior violations in the causes that are involved here. He argues in his brief that the sanction of revocation (i.e., no return to probation) "removes any incentive for [him] to behave properly." Appellant's Brief p. 10. However, the fact that the current violations are White's third violation in these causes, alone, is indicative of his failure to correct his behavior. In addition, White is facing new charges stemming from his attempt to take whiskey from a local store without paying.

White also claims that he should have been referred to drug court so that he could "deal with his problems." Appellant's Brief p. 10. Again, we note that White has been given several chances at home detention and probation, but he has failed to take advantage of these opportunities. Furthermore, the trial court was under no requirement to sentence White to drug court merely because he requested it. On the contrary, the trial court had broad discretion in sentencing him. *See Wilkerson*, 918 N.E.2d at 464.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that there was sufficient evidence to prove White violated his probation. Additionally, given White's repeated violations and new criminal charges, we cannot say that the trial court abused its discretion in ordering him to serve his full sentence at the Department of Correction.

Affirmed.

VAIDIK, J., and CRONE, J., concur.