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IN THE
COURT OF APPEALS OF INDIANA

ROBERT G. ANDERSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0704-CR-192
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Robert J. Schmoll, Magistrate
Cause No. 02D04-0411-FC-206

December 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Robert G. Anderson challenges the trial court's revocation of his probation arguing that the evidence is insufficient to support the trial court's determination.

We affirm.

FACTS AND PROCEDURAL HISTORY

In August 2005, Anderson pled guilty to one count of escape[1] as a Class C felony and one count of operating a vehicle while intoxicated ("OWI") while having a prior OWI conviction[2] as a Class D felony. Pursuant to a plea agreement, the State dismissed two other felony counts. The trial court sentenced Anderson to six years in prison for escape with two years executed and four years suspended to probation, and to a concurrent two-year executed sentence for OWI. As part of the sentence, "Anderson was also placed on active adult probation for a period of two (2) years." *Amended Appellant's Br*. at 1.[3] Included in the terms of probation, the trial court ordered, "You shall behave well and report for supervision as instructed." *Appellant's App.* at 26.

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[1] *See* IC 35-44-3-5.

[2] *See* IC 9-30-5-1, IC 9-30-5-3. IC 9-30-5-1 ("section 1"), in pertinent part, prohibits a person from operating a vehicle with an alcohol concentration equivalent to or greater than "eight-hundredths (0.08) gram of alcohol" per one hundred milliliters of the person's blood. IC 9-30-5-3 provides:

> A person who violates section 1 or 2 of this chapter commits a Class D felony if:
>
> (1) the person has a previous conviction of operating while intoxicated that occurred within the five (5) years immediately preceding the occurrence of the violation of section 1 or 2 of this chapter; . . . .

[3] In Anderson's initial brief, his counsel failed to include an argument section or cite to authority as required by Ind. Appellate Rule 46(A)(8). Instead, he concluded, "Appellant counsel is unable to either make a good faith argument on the merit that the evidence was insufficient to support the revocation of Anderson's probation or make a good faith argument for an extension, modification or reversal of existing law." *Appellant's Br*. at 4. In an October 9, 2007 order, we struck Appellant's Brief and ordered counsel to file a new brief within thirty days. Appellant filed an amended brief on November 1, 2007. The State filed its amended brief on December 3, 2007.

On September 8, 2006, Anderson was arrested on new charges in Allen County. One week later, the State filed a Verified Petition for Revocation of Probation alleging that Anderson "[d]id not maintain good behavior" because he committed the following offenses: (1) OWI; (2) auto theft; and (3) battery by body waste. *Id*. at 28-29. Following the probation revocation hearing, the court concluded:

> Okay, we'll find that he was placed on probation September 26th, 2005. Supervision commenced on March 3rd, 2006. The State has shown by a preponderance of the evidence he has violated the terms of his probation by being arrested and probable cause found that he committed the offenses of Operating While Intoxicated and Battery by Body Waste. We'll order the probation be revoked. Order that he be committed to the Department of Correction[] for four years.

Tr. at 27. Anderson now appeals.

DISCUSSION AND DECISION

Anderson contends that there was insufficient evidence that he violated the terms of his probation. Specifically, he contends that the evidence was insufficient to prove that he "did not behave well and therefore violated his probation." *Amended Appellant's Br*. at 5. Probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment. *Brabandt v. State*, 797 N.E.2d 855, 860 (Ind. Ct. App. 2003); *Bonner v. State*, 776 N.E.2d 1244, 1247 (Ind. Ct. App. 2002), *trans. denied* (2003). These restrictions are designed to ensure that the probation serves as a period of genuine rehabilitation and that a probationer living within the community does not harm the public. *Brabandt*, 797 N.E.2d at 860.

We review a trial court's decision to revoke probation under an abuse of discretion standard. *Jones v. State*, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005). A probation revocation hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. *Brabandt*, 797 N.E.2d at 860. "Generally, 'violation of a single condition of probation is sufficient to revoke probation.'" *Id*. at 860-61 (quoting *Pitman v. State*, 749 N.E.2d 557, 559 (Ind. Ct. App. 2001), *trans. denied*). On review, our court considers only the evidence most favorable to the judgment without reweighing that evidence or judging the credibility of witnesses. *Id*. at 861. 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*.

The trial court revoked Anderson's probation based upon the finding that he had been "arrested and probable cause found that he committed the offenses of Operating While Intoxicated and Battery by Body Waste." *Amended Appellant's Br*. at 5. Anderson contends that the evidence supporting the revocation based on these charges is insufficient because it was based on hearsay. He further argues that the rules of evidence were conspicuously absent in this case.

Courts of this state follow the general approach that, "the rule against hearsay and the definitions and exceptions with respect thereto . . . do not apply in proceedings relating to sentencing, probation, or parole." *Cox v. State*, 706 N.E.2d 547, 550 (Ind. 1999); *see Lightcap v. State*, 863 N.E.2d 907, 910 (Ind. Ct. App. 2007); Ind. Evidence Rule 101(c). "This 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). Instead, judges may

consider any relevant evidence bearing some substantial indicia of reliability. *Cox*, 706 N.E.2d at 551. While courts have addressed the manner by which this reliability should be determined, our Supreme Court recently held that courts should evaluate the "substantial trustworthiness" of the hearsay. *Reyes*, 868 N.E.2d at 441.

At the hearing on the petition to revoke Anderson's probation, Detective Andrew Irick of the Fort Wayne Police Department testified that he was on duty on September 8, 2006, and had cause to stop Anderson due to erratic driving. *Tr*. at 14-15. Detective Irick's investigation was triggered by the report of a fellow officer who had seen Anderson weaving over the centerline, considerably changing speed, and failing to maintain his lane of travel. *Tr*. at 18. Without objection, the State introduced an affidavit for probable cause on the OWI count. State's Ex. 10. Included in this affidavit were Detective Irick's observations of Anderson at the time he was stopped, including that Anderson: was unsteady, needed support, was swaying, looked flush, had a strong smell of alcohol on his breath, appeared soiled, had unzipped trousers, and had urinated in his pants. *Id*. Detective Irick also testified that he made a blood draw following the traffic stop, which revealed that Anderson had a blood alcohol level of "point one nine [.19]." *Tr*. at 16.

Officer Petri Septonen of the Allen County Police Department testified that he was at the Allen County Jail while Anderson was being processed. *Id*. at 20. He further testified that Anderson spit on a penal facility employee during a booking procedure struggle. *Id*.

When, as here, the alleged probation violation is bad behavior based on the commission of a new crime, the State does not need to show that the probationer was convicted of a new crime. *Whatley v. State*, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006).

Instead, the trial court only needs to find that there was probable cause to believe that the defendant violated a criminal law. *Id*.

Testimony revealed that Detective Irick's investigation was triggered by the report of a fellow officer who had seen Anderson weaving over the centerline, changing speeds considerably, and failing to maintain his lane of travel." *Tr*. at 18. The probable cause affidavit noted that, when stopped, Anderson had the appearance and odor of one who had been drinking, and, when tested, Anderson's blood alcohol level was .19—twice the limit set forth for the crime of OWI. Further, an officer testified that Anderson spit on a penal facility employee. This evidence, even if hearsay, was admitted without objection and had the indicia of "substantial trustworthiness." *See Reyes*, 868 N.E.2d at 441. There was probable cause to believe that Anderson committed the crimes of OWI and battery by body waste, and substantial evidence that he violated the term of his probation to "maintain good behavior." *Appellant's App.* at 28-29.

"A defendant is not entitled to serve a sentence in a probation program; rather, such placement is a 'matter of grace' and a 'conditional liberty that is a favor, not a right.'" *Brabandt*, 797 N.E.2d at 860 (quoting *Cox*, 706 N.E.2d at 549). Therefore, upon finding that a probationer has violated a condition of probation, a court may either continue probation, with or without modifying or enlarging the conditions, extend probation for not more than one year beyond the original probationary period, or revoke probation and order execution of the initial sentence that was suspended. *Id*. (citing IC 35-38-2-3(g)). We affirm the trial court's revocation of Anderson's probation.

Affirmed.

ROBB, J., and BARNES, J., concur.