

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Christopher Owens,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 19, 2021

Court of Appeals Case No.
20A-CR-1358

Appeal from the
Marion Superior Court

The Honorable
Sheila A. Carlisle, Judge
The Honorable
Stanley E. Kroh, Magistrate

Trial Court Cause No.
49G03-1611-F3-44628

Kirsch, Judge.

[1] The trial court revoked Christopher Owens’s (“Owens”) participation in community corrections and imposed a new sentence because it concluded Owens violated community corrections rules by violating an Indiana statute that prohibited the use or possession of a synthetic drug. Owens raises two issues on appeal, which we restate as:

I. Whether the trial court abused its discretion in revoking Owens’s participation in the community corrections program because the statute that prohibited the use or possession of a synthetic drug had already been repealed before Owens allegedly smoked a synthetic drug; or, in the alternative,

II. Whether the trial court abused its discretion in finding sufficient evidence that Owens possessed or used a synthetic drug.

[2] We affirm.

Facts and Procedural History

[3] On November 15, 2016, the State charged Owens with three counts: Count I, robbery, a Level 3 felony; Count II, criminal confinement while armed with a deadly weapon, a Level 3 felony; and Count III, carrying a handgun with a prior felony conviction, a Level 5 felony. *Appellant’s App. Vol. II* at 6. On April 4, 2017, the parties entered into a plea agreement whereby Owens pleaded guilty to Counts I and II. *Id.* at 69-71. On April 18, 2017, the trial court sentenced Owens to concurrent twelve-year sentences on each count, with three years in the Indiana Department of Correction (“DOC”), four years in Marion

County Community Corrections (“MCCC”), and five years suspended with two years on probation. *Id.* at 25-26.

[4] In February 2020, Owens resided at the Duvall Center, an MCCC facility. *Tr. Vol. 2* at 8. At that time, MCCC officers Cardell Gates (“Officer Gates”) and Johnathan Smith (“Officer Smith”) worked at the Duvall Center. *Id.* at 23, 40-41. Officer Gates had received training on identifying controlled substances, including “K2” -- also known as “spice” or “synthetic marijuana” -- cocaine, marijuana, and methamphetamine.¹ *Id.* at 21, 29, 30, 36-37. Officer Gates encountered many controlled substances at the Duvall Center but most often encountered synthetic marijuana, which he had encountered between thirty and fifty times. *Id.* at 21. Officer Gates could recognize synthetic marijuana by sight. *Id.* He described synthetic marijuana as a green, leafy substance. *Id.* at 22. He explained that residents of the Duvall Center commonly ingested synthetic marijuana by smoking it by rolling it into a page torn from the Bible, often called “Bible paper.” *Id.* at 22, 31. Officer Gates testified that the effects from smoking synthetic marijuana included sluggishness, vomiting, yelling, and red, bloodshot eyes. *Id.* at 23.

[5] Officer Smith had also been trained on controlled substances by a narcotics detective from the Indianapolis Metropolitan Police Department. *Id.* at 42. The training included visual identification of substances. *Id.* Officer Smith had

¹ Henceforth, we will use the term “synthetic marijuana.”

encountered many substances at the Duvall Center, including synthetic marijuana, which he had encountered between fifty and one hundred times. *Id.* at 42-43. Officer Smith explained the difference in appearance between synthetic marijuana and marijuana: synthetic marijuana was a greenish-brown, leafy substance while marijuana was a lighter shade of green. *Id.* at 43. Officer Smith described the same effects of synthetic marijuana that Officer Gates had described. *Id.* at 44.

[6] On February 26, 2020, Officer Gates and Officer Smith were conducting a routine review of activity at the Duvall Center when they encountered Owens smoking a cigarette. *Id.* at 20-24. Officer Gates asked Owens to hand over the cigarette, but Owens refused. *Id.* at 24, 45. Officer Smith could smell a “strong funk stench,” a smell associated with synthetic marijuana. *Id.* at 21-22, 45. Officer Smith also asked Owens to hand over the cigarette, but Owens again refused. *Id.* at 24. After the officers called for assistance, Owens surrendered the cigarette to Officer Gates. *Id.*

[7] The cigarette contained a “green leafy brownish” substance, which resembled the normal appearance of synthetic marijuana. *Id.* at 47. The substance was wrapped in Bible paper. *Id.* at 22, 31. Officer Gates observed that Owens was sluggish and that his eyes were red and “big,” all of which were signs that Owens had been smoking synthetic marijuana. *Id.* at 23. Officer Gates photographed the substance and placed it into an evidence bag. *Id.* at 31; *Ex.*

Vol. at 21. The next day, Owens tested positive for a “synthetic drug.”² *Id.* at 17.

[8] On February 28, 2020, the State filed a notice of community corrections violation, alleging that Owens “violated the rules and regulations of [Duvall Center] regarding offense B-202[,], Possession or use of Controlled Substance, which prohibited: ‘Possession or use of any unauthorized substance controlled pursuant to the laws of the State of Indiana or the United States Code, possession of drug paraphernalia, possession/use of a synthetic drug, or drug lookalike.’” *Appellant’s App. Vol. II* at 148. On March 2, 2020, the State filed a notice of probation violation, alleging that Owens failed to comply with MCCC rules. *Id.* at 152. On July 17, 2020, the trial court held a hearing on the alleged violation. *Tr. Vol. 2* at 5-67. At the conclusion of the hearing, the trial court found that Owens violated MCCC rules. *Id.* at 62. It revoked Owens’s community corrections placement, but it did not revoke his probation. *Id.* The trial court sentenced Owens to nine years, five years suspended, and four years executed at the DOC. *Id.* at 65. Owens now appeals.

Discussion and Decision

[9] We review Owens’s appeal as follows:

When reviewing a community corrections revocation, the standard of review is the same as the standard of review for a

² The State acknowledged during closing argument that after this initial test, a “confirmatory test” was not conducted. *Tr. Vol. 2* at 52.

hearing on a probation revocation. A probation revocation proceeding is civil in nature and a probationer is not entitled to all of the rights afforded to a criminal defendant. The due process requirements for probation revocation hearings are more flexible than in a criminal prosecution. This flexibility allows courts to enforce lawful orders, address an offender's personal circumstances, and protect public safety. Therefore, we review such revocation decisions under an abuse of discretion standard. A decision is an abuse of discretion when it is clearly against the logic and effect of the facts and circumstances.

Morgan v. State, 87 N.E.3d 506, 510-11 (Ind. Ct. App. 2017) (internal citations and quotations marks omitted), *trans. denied*.

[10] Owens first argues that even if he did possess or use a synthetic drug, it was not illegal for him to do so on the date of his alleged offense, February 26, 2020. In support, Owens correctly observes that Indiana Code section 35-48-4-11.5(c), the statute that had criminalized the possession of a synthetic drug, was repealed on July 1, 2019, more than seven months before the incident at issue here. *See* P.L. 80-2019, SEC.30, eff. July 1, 2019.³

[11] Nonetheless, the trial court did not abuse its discretion in revoking Owens's participation in community corrections because Rule B-202, the Duvall Center

³ Before its repeal, Indiana Code section 35-48-4-11.5(c) provided: "A person who knowingly or intentionally possesses a synthetic drug or synthetic drug lookalike substance commits possession of a synthetic drug or synthetic drug lookalike substance, a Class A misdemeanor. However, the offense is a Level 6 felony if the person has a prior unrelated conviction under this section or under section 10.5 of this chapter."

rule that Owens allegedly violated, did not require that possession or use of a synthetic drug to be a crime under Indiana law. Rule B-202 prohibited:

“Possession or use of any unauthorized substance controlled pursuant to the laws of the State of Indiana or the United States Code, possession of drug paraphernalia, possession/use of a synthetic drug, or drug lookalike.”

Appellant’s App. Vol. II at 148. Under this language, the only substances that were prohibited based on their illegal status were substances that were

“controlled” under Indiana or federal law. Because Rule B-202 is written in the disjunctive and because the phrase “possession/use of a synthetic drug” is set off by commas, the phrase “unauthorized substance” at the beginning of Rule B-202 does not modify the phrase “possession/use of a synthetic drug.” Thus, possession of a synthetic drug constituted a violation of Owens’s community corrections placement, regardless of whether such possession would violate Indiana law.

- [12] In the alternative, Owens argues that the State failed to present sufficient evidence that he violated Rule B-202. As in other contexts, when reviewing a claim of sufficiency of evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Wilson v. State*, 708 N.E.2d 32, 34 (Ind. Ct. App. 1999). We look to the evidence and the reasonable inferences therefrom that support the judgment. *Id.* Because a revocation proceeding is civil in nature, and is not a criminal trial, the State only needed to prove its case by a preponderance of the evidence. *Holmes v. State*, 923 N.E.2d 479, 485 (Ind. Ct. App. 2010).

[13] Owens’s sufficiency challenge questions the ability of Officer Gates and Officer Smith to identify the substance that Owens was smoking as synthetic marijuana. An officer’s training and experience may give an officer sufficient expertise to identify a drug by sight or smell. *See Shorter v. State*, 144 N.E.3d 829, 839 (Ind. Ct. App. 2020) (“[I]n light of his training and experience, [the officer] was qualified to identify the smell of burnt synthetic drugs.”), *trans. denied*. Owens acknowledges that the identity of a controlled substance may be established through witness testimony. *See Yoakum v. State*, 95 N.E.3d 169, 175 (Ind. Ct. App. 2018), *trans. denied*. However, Owens contends that the training Officer Smith and Officer Gates received was insufficient for them to reliably identify the substance that Owens was smoking as synthetic marijuana. For instance, Owens notes that Officer Smith admitted during cross-examination that his training session lasted only two hours and that he was not trained to identify synthetic marijuana by smell. *See Tr. Vol. 2* at 48.

[14] We reject Owens’s sufficiency argument. First, his argument ignores the well-settled principle that an officer’s testimony about the identify of a controlled substance can also be deemed competent by an officer’s experience. Here, Officer Smith testified that he had encountered synthetic marijuana between fifty and one hundred times during his tenure at the Duvall Center, and Officer Gates testified that he had encountered synthetic marijuana between thirty and fifty times during his employment at the Duvall Center. *Tr. Vol. 2* at 21, 43. Thus, given both the training and experience of both officers, we reject Owens’s

argument that the substance could be identified as synthetic marijuana only through a chemical test.

[15] To the extent that Owens asks us to conclude that the training received by Officer Gates and Officer Smith was insufficient to make them reliable witnesses as to the identity of the substance that he smoked, Owens impermissibly asks us to reweigh the evidence. *See Wilson*, 708 N.E.2d at 34. This was a matter for the trial court to decide. Accordingly, we affirm the trial court's revocation of Owens's participation in the community corrections program.

[16] Affirmed.

Bradford, C.J., and May, J., concur.