MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brian Keith Gipson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 15, 2021

Court of Appeals Case No. 20A-CR-1656

Appeal from the Delaware Circuit Court

The Honorable Marianne L. Vorhees, Judge

Trial Court Cause No. 18C01-1301-FC-5

Bradford, Chief Judge.

Case Summary

[1] As part of his guilty plea for Class C felony robbery, Brian Keith Gipson was sentenced to eight years of incarceration in the Department of Correction ("DOC"). Gipson's sentence was stayed, pending his successful completion of a drug-court program. Gipson, however, failed to successfully complete the drug-court program. Gipson appeals from the trial court's order revoking his placement in the drug-court program and ordering that he serve the remainder of his previously-stayed eight-year sentence in the DOC. We affirm.

Facts and Procedural History

[2] On January 18, 2013, Gipson was charged with Class C felony robbery after he took Fentanyl patches and Oxycodone from a CVS manager and pharmacist. Gipson subsequently pled guilty, agreeing to a plea agreement that called for a fixed eight-year executed sentence. Pursuant to the terms of Gipson's plea agreement, Gipson's sentence was stayed pending his successful completion of the Delaware County Forensic Diversion Drug Court Program ("the drug-court program").

[3] As part of his participation in the drug-court program, Gipson was advised that any major violation, including absconding from the program, committing new crimes, three or more positive drug screens, failure to report, or failure to participate in the substance-abuse treatment plan, could result in revocation of his drug-court placement and the execution of his full eight-year sentence in the

DOC. Between 2014 and 2020, Defendant committed several violations, including multiple failures to report and several positive drug screens, and was sanctioned at various times with incarceration.

[4] On February 13, 2020, the State filed a petition in which it asked the trial court to revoke Gipson's placement in the drug-court program and to order him to serve the remainder of his previously-stayed eight-year sentence in the DOC. In its petition, the State alleged that Gipson had committed the following violations of the terms of his placement:

> a) Admitting to use of MARIJUANA on May 22, 2017. Violation of Rule #39, Conditions of Forensic Diversion Drug Court.
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> b) Failing to report to Case Manager from July 7, 2017 through July 31, 2017. Violation of Rule #35, Conditions of Forensic Diversion Drug Court.
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> c) Testing positive on November 21, 2017 on a random urine drug screen for MARIJUANA. Violation of Rule #39, Conditions of Forensic Diversion Drug Court.
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> d) Testing positive on November 28, 2017 on a random urine drug screen for MARIJUANA (at a higher level). Violation of Rule #39, Conditions of Forensic Diversion Drug Court.
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> e) Testing positive on December 19, 2017 on a random urine drug screen for COCAINE and MARIJUANA. Violation of Rule #39, Conditions of Forensic Diversion Drug Court.
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> f) Testing positive on January 16, 2018 on a random urine drug screen for MARIJUANA. Violation of Rule #39, Conditions of Forensic Diversion Drug Court.

g) Testing positive on July 27, 2018 on a random urine drug screen for MARIJUANA. Violation of Rule #39, Conditions of Forensic Diversion Drug Court.

h) Testing positive on August 30, 2018 on a random urine drug screen for OPIATES and MARIJUANA. Violation of Rule #39, Conditions of Forensic Diversion Drug Court.

i) Testing positive on March 12, 2019 on a random urine drug screen for OPIATES and MARIJUANA. Violation of Rule #39, Conditions of Forensic Diversion Drug Court.

j) Failing to report to Case Manager from March 12, 2019 through April 22, 2019. This includes failing to show for his drug screens and review hearings. Violation of Rules #37, #36, and #35, Conditions of Forensic Diversion Drug Court.

k) Testing positive on May 29, 2019 on a random urine drug screen for OPIATES (admits to Fentanyl). Violation of Rule #39, Conditions of Forensic Diversion Drug Court. **Defendant was placed in jail and referred to House of Hope in Anderson, Indiana. He went to House of Hope on July 2, 2019.

l) Being unsuccessfully discharged from House of Hope on August 2, 2019. Discharge report indicates he was "obnoxious and aggressive" and "very argumentative with staff on several occasions." Violation of Rule #33, Conditions of Forensic Diversion Drug Court.

m) Failing to report from August 29, 2019 through September 5, 2019. Violation of Rule #35, Conditions of Forensic Diversion Drug Court. It was brought to staff's attention that defendant had overdosed on Heroin after leaving his reporting with Case Manager on August 29, 2019. He was picked up on a warrant that was issued on September 5, 2019. At that time, he was referred to Meridian Services Addiction and Recovery Center.

> He went to ARC on October 17, 2019.
> **During a Review Hearing on September 16, 2019, Judge orders defendant[']s time on Drug Court be extended for six (6) months in order for him to complete ARC and have a supervision time after completion.
>
> n) Failing to report to Case Manager from December 26, 2019 through February 3, 2020. Violation of Rule #35, Conditions of Forensic Diversion Drug Court.

Appellant's App. Vol. II pp. 88–89. Although the drug-court program was typically completed in three years, Gipson was enrolled in the program for six years before the State ultimately sought to have his participation unsuccessfully terminated and his placement in the program revoked.

[5] The trial court conducted a fact-finding hearing on the State's petition on June 8, 2020, at the conclusion of which the trial court found as follows:

> I will make the finding that the defendant has violated the terms of his Forensic Diversion Drug Court agreement and the rules, specifically that upon the release from the Addiction Recovery Center in Richmond, Indiana, he did not return to the program. He failed to appear, and the program DCCC did file the petition at that point, alleging failure to report from December 26, 2019, through February 3, 2020. Did then file the petition, requested a warrant, and he was picked up on the warrant, so I do find as to allegation N that defendant did commit that Violation, that he has not previously been sanctioned for that violation, so that does form the basis for the revocation from Drug Court and also for further proceedings.

Tr. Vol. II p. 17.

[6] At a dispositional hearing on July 28, 2020, Gipson requested that the trial court impose an alternate sentence, *i.e.*, order him to participate in a faith-based program with a recovery home located in Connersville. For its part, the State requested that the trial court order Gipson to serve the remainder of his previously-stayed eight-year sentence in the DOC. In finding that the alternative sentence requested by Gipson would be inappropriate and ordering Gipson to serve the remainder of his previously-stayed eight-year sentence in the DOC, the trial court stated as follows:

> I do find that the underlying offense was a serious matter. It was a CVS Pharmacy robbery, which does involve danger to the pharmacy employees and the public at large. You did receive a great benefit from the Forensic Diversion Drug Court Program.… You have been given over six years to participate in a drug court program to seek rehabilitation and did not take advantage. I mean, I understand your position is that you need rehabilitation. You need treatment, that prison won't do you any good. I mean, at this point, I think the Court system has done everything we can to give you the supervision, the opportunities to have substance abuse treatment, and I just don't see that it -- at this time that there are any other alternatives for us.… So as to Count I, robbery, Class C felony, defendant is committed to the custody of the Department of Corrections for a period of eight years. That is executed. I will give you the 705 actual days served in the Delaware County Jail[.]

Tr. Vol. II p. 30.

Discussion and Decision

[7] Gipson appeals the revocation of his placement in the drug-court program and the order that he serve the remainder of his previously-stayed eight-year sentence in the DOC. "The Drug Court program is a forensic diversion program akin to community corrections, and we will review the termination of placement in a Drug Court program as we do a revocation of placement in community corrections." *Withers v. State*, 15 N.E.3d 660, 663 (Ind. Ct. App. 2014).

> For purposes of appellate review, we treat a hearing on a petition to revoke a placement in a community corrections program the same as we do a hearing on a petition to revoke probation. *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999). The similarities between the two dictate this approach. *Id.* Both probation and community corrections programs serve as alternatives to commitment to the DOC and both are made at the sole discretion of the trial court. *Id.* A defendant is not entitled to serve a sentence in either probation or a community corrections program. *Id.* Rather, placement in either is a "matter of grace" and a "conditional liberty that is a favor, not a right." *Id.* (quoting *Million v. State*, 646 N.E.2d 998, 1002 (Ind. Ct. App. 1995) (internal quotation omitted)).
>
> While a community corrections placement revocation hearing has certain due process requirements, it is not to be equated with an adversarial criminal proceeding. *Id.* at 549–50. Rather, it is a narrow inquiry, and its procedures are to be more flexible. *Id.* This is necessary to permit the court to exercise its inherent power to enforce obedience to its lawful orders. *Id.* Accordingly, the Indiana Rules of Evidence in general and the rules against hearsay in particular do not apply in community corrections placement revocation hearings. *See id.* at 550–51; *see also* Ind. Evidence Rule 101(c) (providing that the rules do not apply in proceedings relating to sentencing, probation, or parole). In

> probation and community corrections placement revocation hearings, therefore, judges may consider any relevant evidence bearing some substantial indicia of reliability. *Cox*, 706 N.E.2d at 551. This includes reliable hearsay. *Id.* The absence of strict evidentiary rules places particular importance on the fact-finding role of judges in assessing the weight, sufficiency and reliability of proffered evidence. *Id.* This assessment, then, carries with it a special level of judicial responsibility and is subject to appellate review. *Id.* Nevertheless, it is not subject to the Rules of Evidence nor to the common law rules of evidence in effect prior to the Rules of Evidence. *Id.*
>
> Our standard of review of an appeal from the revocation of a community corrections placement mirrors that for revocation of probation. *Id.* A probation hearing is civil in nature and the State need only prove the alleged violations by a preponderance of the evidence. *Id.* We will consider all the evidence most favorable to supporting the judgment of the trial court without reweighing that evidence or judging the credibility of the witnesses. *Id.* 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.*

Monroe v. State, 899 N.E.2d 688, 691 (Ind. Ct. App. 2009).

I. Admission of Evidence

[8] Gipson contends that the trial court abused its discretion in admitting certain drug-test results into evidence.

> Generally, we review the trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. *Roche v. State*, 690 N.E.2d 1115, 1134 (Ind. 1997), *reh'g denied*. We reverse only where the decision is clearly against the logic and effect of the

> facts and circumstances before the court. *Joyner v. State*, 678 N.E.2d 386, 390 (Ind. 1997), *reh'g denied*. Even if the trial court's decision was an abuse of discretion, we will not reverse if the admission constituted harmless error. *Fox v. State*, 717 N.E.2d 957, 966 (Ind. Ct. App. 1999), *reh'g denied*, *trans. denied*.

Williams v. State, 937 N.E.2d 930, 933 (Ind. Ct. App. 2010). In challenging the admission of the test results, Gipson argues that the challenged evidence was hearsay as the State failed to make a proper foundation for the test results. However, as we noted above, the rules of evidence do not apply to revocation hearings and the trial court may consider "*any* relevant evidence bearing some substantial indica of reliability," including "reliable hearsay." *Monroe*, 899 N.E.2d at 691 (emphasis added).

[9] Gipson's drug-court case manager, Tracy Blankenship, provided a foundational background for the challenged test results, testifying as follows:

> Q: Are you familiar with the process for collecting any urine samples or drug testing?
>
> A: Yes.
>
> Q: What test would you use for drug testing?
>
> A: We do urine drug samples. Each client that comes in that is required to do a screen, that individual is taken back with a staff member. If it's a male, he is taken back with a male staff. If it's female, they are taken back with a female staff. Those screens are completely supervised, where a staff person will go into the bathroom with that individual. There is a chain of custody form that we sign and the client also signs. The client then will provide the urine sample and then we put that in the

bag in the proper bags that then go back to the lab. Those are kept in a locked bathroom and then they are provided to a FedEx driver in a sealed package and then they are taken to the lab and then we get the results from the lab.

Q: Which lab do you use?

A: It is Forensic Fluids -- Cordant Forensic Solutions through Flagstaff, Arizona.

Q: And you -- Delaware County Community Corrections has used this company for many years?

A: Several years, yes.

Q: And you have had a chance to monitor the results that you receive from this company?

A: Correct.

Q: Do they oftentimes mimic or mirror what individual's report they have used?

A: Yes.

Q: Also, do they always come back positive?

A: No.

Q: Sometimes they show clean; is that correct?

A: Correct.

Tr. Vol. II pp. 6–7. The trial court found that the State had provided a substantial indica of reliability and admitted Blankenship's testimony regarding the challenged test results.

[10] We have previously concluded that "[t]he absence of an affidavit from a toxicologist or laboratory employee does not render drug test results inadmissible in probation revocation proceedings where there is otherwise a substantial guarantee of trustworthiness." *Bass v. State*, 974 N.E.2d 482, 487 (Ind. Ct. App. 2012). In *Bass*, we noted that

> the substantial guarantee of trustworthiness was provided by a case manager's testimony. She was familiar with and described the urinalysis collection and chain of custody procedures; she testified that the laboratory which had generated Bass's urinalysis report was the laboratory used to generate twenty to sixty reports per week for Vigo County Community Corrections. The reports identify the collecting and processing individuals, and contain detailed information about the testing time. Each report is accompanied by a document signed by Bass and by the collecting officer, acknowledging that the sample was sealed and secured in Bass's presence.

Id. at 487–88.

[11] Similarly here, Blankenship's testimony provided a substantial guarantee of trustworthiness with regard to the test results. Blankenship testified that (1) she was familiar with and described the urinalysis collection and chain of custody procedures; (2) the laboratory that generated the urinalysis reports had been used by Delaware County Community Corrections for several years; and (3)

she has had the opportunity to monitor the accuracy of the results received from the laboratory. In light of our conclusion in *Bass*, we cannot say that the trial court abused its discretion in admitting the test results during the revocation hearing.

[12] Furthermore, regardless of whether the challenged evidence amounted to reliable hearsay, any potential abuse of discretion by the trial court in admitting the test results was, at most, harmless as the trial court did not rely on the evidence in revoking Gipson's drug-court placement. In finding that Gipson had violated the terms of and revoking his placement, the trial court stated as follows:

> I will make the finding that the defendant has violated the terms of his Forensic Diversion Drug Court agreement and the rules, specifically that upon the release from the Addiction Recovery Center in Richmond, Indiana, he did not return to the program. He failed to appear, and the program DCCC did file the petition at that point, alleging failure to report from December 26, 2019, through February 3, 2020. Did then file the petition, requested a warrant, and he was picked up on the warrant, so I do find as to allegation N that defendant did commit that Violation, that he has not previously been sanctioned for that violation, so that does form the basis for the revocation from Drug Court and also for further proceedings.

Tr. Vol. II p. 17. "It is well settled 'that a claim of error in the admission or exclusion of evidence will not prevail on appeal unless a substantial right of the party is affected.'" *Caesar v. State*, 139 N.E.3d 289, 292 (Ind. Ct. App. 2020) (quoting *Troutner v. State*, 951 N.E.2d 603, 612 (Ind. Ct. App. 2011)), *trans.*

denied. Given that the trial court did not rely on the challenged test results in revoking Gipson's drug-court placement, the admission of the test results was harmless because the probable impact of the results did not affect Gipson's substantial rights. *See id.* ("An error in the admission of evidence is harmless where the probable impact of the erroneously admitted evidence, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the defendant.").

II. Sanction

[13] Gipson also contends that the trial court abused its discretion in ordering him to serve the remainder of his previously-stayed eight-year sentence in the DOC. Again, "[a] defendant is not entitled to serve a sentence in either probation or a community corrections program. Rather, placement in either is a 'matter of grace' and a 'conditional liberty that is a favor, not a right.'" *Cox*, 706 N.E.2d at 549 (quoting *Million*, 646 N.E.2d at 1002). "A trial court's decision for imposing sanctions for probation violations is reviewable using the abuse of discretion standard." *Castillo v. State*, 67 N.E.3d 661, 664 (Ind. Ct. App. 2017) (citing *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007); *Sanders v. State*, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005) (providing that a trial court's sentencing decision in probation revocation proceeding is reviewed for abuse of discretion)), *trans denied*. "'An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances.'" *Id.* (quoting *Prewitt*, 878 N.E.2d at 188).

[14] Indiana Code section 35-38-2-3(h) provides, with respect to a probation violation, that

> [i]f the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may impose one (1) or more of the following sanctions:
>
> > (1) Continue the person on probation, with or without modifying or enlarging the conditions.
> >
> > (2) Extend the person's probationary period for not more than one (1) year beyond the original probationary period.
> >
> > (3) Order execution of all or part of the sentence that was suspended at the time of initial sentencing.

The same sanctions apply to a violation of the terms of placement in community corrections or a drug-court program. *See Cox*, 706 N.E.2d at 549; *Withers*, 15 N.E.3d at 663.

[15] Gipson asserts that the trial court abused its discretion in ordering him to serve his entire previously-stayed eight-year sentence because he "had already been sanctioned for the vast majority of the allegations contained in the Petition for Revocation and the evidenced at the hearing." Appellant's Br. p. 16. However, contrary to Gipson's assertion that the trial court considered acts for which he had already been sanctioned, the record reveals that the trial court did not base either its revocation or sanction on any alleged violation for which Gipson had

previously been sanctioned, but rather only on Gipson's fourth absconsion from the drug-court program.

[16] Again, in ordering Gipson to serve the remainder of his previously-stayed eight-year sentence in the DOC, the trial court stated as follows:

> I do find that the underlying offense was a serious matter. It was a CVS Pharmacy robbery, which does involve danger to the pharmacy employees and the public at large. You did receive a great benefit from the Forensic Diversion Drug Court Program.… You have been given over six years to participate in a drug court program to seek rehabilitation and did not take advantage. I mean, I understand your position is that you need rehabilitation. You need treatment, that prison won't do you any good. I mean, at this point, I think the Court system has done everything we can to give you the supervision, the opportunities to have substance abuse treatment, and I just don't see that it -- at this time that there are any other alternatives for us.… So as to Count I, robbery, Class C felony, defendant is committed to the custody of the Department of Corrections for a period of eight years. That is executed. I will give you the 705 actual days served in the Delaware County Jail[.]

Tr. Vol. II p. 30. Given the record before the trial court, we cannot say that the trial court abused its discretion in this regard.

[17] The judgment of the trial court is affirmed.

Kirsch, J., and May, J., concur.