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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-18-0253

Raymond Lee Pope

v.

State of Alabama

Appeal from DeKalb Circuit Court
(CC-10-812.70; CC-10-813.70; CC-10-826.70)

McCOOL, Judge.

Raymond Lee Pope appeals the circuit court's judgment revoking his community-corrections sentence and ordering him to serve his sentence in incarceration. For the reasons set forth herein, we affirm.

Facts and Procedural History

As best we can determine from the limited record before us, it appears that Pope pleaded guilty in April 2013 to second-degree unlawful manufacture of a controlled substance, a violation of § 13A-12-217, Ala. Code 1975; unlawful possession of a controlled substance, a violation of § 13A-12-212, Ala. Code 1975; and unlawful possession of drug paraphernalia, a violation of § 13A-12-260, Ala. Code 1975. The circuit court sentenced Pope to 20 years' imprisonment for the manufacturing conviction, 20 years' imprisonment for the possession-of-a-controlled-substance conviction, and 12 months in the county jail for the possession-of-drug-paraphernalia conviction, the sentences to be served concurrently. The circuit court ordered Pope to serve his sentences in the DeKalb County community-corrections program, and, as a condition of his participation in the community-corrections program, Pope was required to "[t]otally abstain from the consumption of alcoholic beverages and controlled substances" and to "[s]ubmit to substance abuse tests [at the court-referral office ('the CRO')] when ordered to do so." (C. 35.)

The following procedural history is undisputed. In September 2013 and November 2014, Pope's urine sample tested positive for amphetamines, and Pope was sanctioned with jail time for each failed test. In April 2015, Pope's urine sample tested positive for alcohol, which Pope admitted to consuming, and the circuit court ordered Pope to serve 60 days in jail.

Between July 2015 and June 2016, Pope's urine sample tested positive for amphetamines on four separate occasions. On each occasion, Pope denied using amphetamines and requested a confirmation test from Laboratory Corporation of America ("LabCorp"), and each time the test results were "sent out for confirmation" and "came back negative." (C. 8.)

In January 2017, Pope's urine sample tested positive for amphetamines, and Pope again denied using amphetamines and requested a confirmation test from LabCorp, which "returned [positive] for Meth." (C. 9.) Although Pope's community-corrections sentence was set for revocation at that time because he had failed four urine screens, the State agreed to allow Pope to enter a substance-abuse program instead of revoking his community-corrections sentence. Pope attended the substance-abuse program and subsequently returned to the

community-corrections program, but between July 2017 and February 2018, Pope's urine sample tested positive for amphetamines on three separate occasions. However, on each occasion Pope denied using amphetamines and requested a confirmation test from LabCorp, and each time the confirmation test was negative. According to Pope, "[i]n a meeting on March 9, 2018, to discuss this series of false-positive results, the 'drug court team' decided to perform a hair follicle test if [Pope] provided another positive urine sample." (Pope's brief, at 8.) (C. 10.)

In June 2018, Pope's urine sample tested positive for amphetamines, and, once again, Pope denied using amphetamines and requested a confirmation test from LabCorp. Pursuant to the March 2018 agreement, both Pope's urine sample and a sample of Pope's hair were "sen[t] out for confirmation," and although the confirmation test of the urine sample was negative, the sample of Pope's hair "returned [positive] for Meth." (C. 10.) On July 16, 2018, the State filed a petition to revoke Pope's community-corrections sentence.

At the revocation hearing, Michael Roebuck, a lab technician at the CRO, testified as to the procedure for

conducting a urine screen at the CRO and testified that he had been "certified on our analyzers," i.e., the instruments that analyze the urine samples. (R. 20.) Although Roebuck was not questioned specifically about Pope's September 2013, November 2014, April 2015, and January 2017 failed urine screens, he testified that he had personally conducted Pope's urine screens since 2012, and he testified that Pope's urine sample had tested positive for amphetamines at the CRO in June 2018. After Roebuck testified, Suzanne Sowash, the drug-court coordinator, testified that Pope's urine sample tested positive for amphetamines at the CRO in September 2013, November 2014, January 2017, and June 2018. Sowash also testified that Pope's urine sample tested positive for alcohol at the CRO in April 2015 and that Pope admitted he had consumed alcohol on that occasion. Thus, Sowash testified, Pope's urine sample had tested positive for either amphetamines or alcohol at the CRO on five separate occasions from September 2013 through June 2018.

The State also introduced, over Pope's objection, the result of the hair-follicle test, which indicated that Pope's hair sample tested positive for methamphetamine in June 2018.

However, the State did not call a witness from LabCorp, which had performed the test on the hair sample, to testify. Rather, the State questioned Roebuck, the lab technician at the CRO, about the result of the hair-follicle test, and Roebuck merely testified that it was he who had collected the sample of Pope's hair, who had packaged the sample to send to LabCorp, and who had received the test result from LabCorp, which he then recorded and reported to Sowash.

On October 17, 2018, the circuit court entered a judgment revoking Pope's community-corrections sentence and ordering Pope "into active incarceration." (C. 21.) In its judgment, the circuit court noted that Pope had argued "that the Court cannot revoke his Community Corrections Program sentence because to do so would amount to the Court relying solely on hearsay evidence, i.e., the hair follicle test performed by [LabCorp]." (C. 20.) However, the circuit court stated:

> "As non-hearsay items of evidence, the Court considers the urine drug screens taken by [Pope] at the [CRO] on September 16, 2013, November 3, 2014, April 24, 2015, January 3, 2017, and June 27, 2018, as those were testified to by the Community Corrections Program lab technician[, i.e., Roebuck]. The Court also considers, as non-hearsay, the testimony relative to [Pope's] admission of alcohol use that resulted in his positive urine screen on April 24, 2015.

> "The Court further considers the confirmation urine drug screen (from the urine sample collected on June 27, 2018) that was 'negative' and the hair follicle drug screen (from the sample collected on June 27, 2018) that was 'positive' for methamphetamines.
>
> "....
>
> "Given this evidence, the Court is reasonably satisfied that [Pope] violated the terms of his Community Corrections Program sentence."

(C. 20-21.) Pope filed a timely notice of appeal.

Standard of Review

"[T]he revocation of a sentence served under a community-corrections program is treated the same as a probation revocation." Ex parte Hill, 71 So. 3d 3, 8 (Ala. 2009). Just as in a probation-revocation hearing, in a hearing to revoke a community-corrections sentence, "the trial court need 'only be reasonably satisfied from the evidence that the probationer has violated the conditions'" of his sentence, and, "[a]bsent a clear abuse of discretion, a reviewing court will not disturb the trial court's conclusions." Ex parte J.J.D., 778 So. 2d 240, 242 (Ala. 2000) (quoting Armstrong v. State, 294 Ala. 100, 103, 312 So. 2d 620, 623 (1975)).

Discussion

On appeal, Pope argues that the circuit court erred by revoking his community-corrections sentence because, he says, (1) the result of the hair-follicle test constituted hearsay and was the sole evidence supporting the revocation of his community-corrections sentence, and (2) the admission of the result of the hair-follicle test violated his right to confront the witnesses against him. We address each argument in turn.

I.

We first address Pope's argument that the circuit court relied solely on hearsay evidence, i.e., the result of the hair-follicle test, in revoking his community-corrections sentence.

> "It is well settled that
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> > "'"'[p]robation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime. A proceeding to revoke probation is not a criminal prosecution, and we have no statute requiring a formal trial. Upon a hearing of this character, the court is not bound by strict rules of evidence, and the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt.'"

> "'Martin v. State, 46 Ala. App. 310, 312, 241 So. 2d 339, 341 (Ala. Crim. App. 1970) (quoting State v. Duncan, 270 N.C. 241, 154 S.E.2d 53 (1967)(citation omitted)). ...'

"Ex parte J.J.D., 778 So. 2d 240, 242 (Ala. 2000). In Alabama, '"[t]he law is clear that the formality and evidentiary standards of a criminal trial are not required in parole revocation hearings."' Puckett v. State, 680 So. 2d 980, 981 (Ala. Crim. App. 1996) (quoting Ex parte Belcher, 556 So. 2d 366, 368 (Ala. 1989)). ...

"With regard to the admissibility of hearsay evidence at a probation-revocation hearing, this Court has previously stated that such evidence may be admitted at the discretion of the circuit court. See Puckett, 680 So. 2d at 981-82. It is well settled, however, that

> "'hearsay evidence may not form the sole basis for revoking an individual's probation. See Clayton v. State, 669 So. 2d 220, 222 (Ala. Cr. App. 1995); Chasteen v. State, 652 So. 2d 319, 320 (Ala. Cr. App. 1994); and Mallette v. State, 572 So. 2d 1316, 1317 (Ala. Cr. App. 1990). "The use of hearsay as the sole means of proving a violation of a condition of probation denies a probationer the right to confront and to cross-examine the persons originating information that forms the basis of the revocation." Clayton, 669 So. 2d at 222.'

"Goodgain v. State, 755 So. 2d 591, 592 (Ala. Crim. App. 1999)."

Mead v. State, [Ms. CR-17-0592, August 10, 2018] ___ So. 3d ___, ___ (Ala. Crim. App. 2018) (emphasis added). See also

Askew v. State, 197 So. 3d 547, 548 (Ala. Crim. App. 2015) ("This Court has consistently held that, '[w]hile hearsay evidence is admissible in a revocation proceeding[,] it may not serve as the sole basis of the revocation.'" (quoting Beckham v. State, 872 So. 2d 208, 211 (Ala. Crim. App. 2003))); and Sams v. State, 48 So. 3d 665, 666 (Ala. 2010) (noting the "well settled caselaw holding that a circuit court may consider both hearsay and nonhearsay evidence in determining whether a probationer violated the terms of his or her probation" (emphasis added)).

Contrary to Pope's allegation, although the circuit court considered the result of the hair-follicle test, the circuit court did not rely solely on that evidence in determining that Pope had violated the conditions of his community-corrections sentence. Rather, as noted in its judgment, the circuit court also considered nonhearsay evidence, i.e., Roebuck's and Sowash's testimony, indicating that Pope failed a urine screen at the CRO in September 2013, November 2014, April 2015, January 2017, and June 2018, and that evidence in and of itself provided a sufficient basis upon which to revoke Pope's community-corrections sentence. See Chenault v. State, 777

So. 2d 314 (Ala. Crim. App. 2000) (holding that a failed drug screen was sufficient to revoke the appellant's probation where the probation officer who administered the drug screen testified regarding his training to conduct the drug screen and testified that the appellant had failed the drug screen); and Taylor v. State, 229 So. 3d 269 (Ala. Crim. App. 2015) (affirming the circuit court's finding that the appellant's failed drug screen constituted a violation of the conditions of his probation where the director of the drug-testing laboratory, even though he did not conduct the appellant's drug screen, testified that the appellant had failed the drug screen). Thus, although the circuit court considered the result of the hair-follicle test in determining that Pope had violated the conditions of his community-corrections sentence, it considered that evidence in conjunction with nonhearsay evidence, which it was authorized to do. Sams, supra.

Nevertheless, Pope argues that "[t]here is no doubt that the State's petition to revoke Pope's participation in [a community-corrections program] was based solely on the positive hair follicle test" and that "it is the hair follicle test result that the [circuit court] relied on in making its

decision to revoke [Pope's community-corrections-program] status." (Pope's brief, at 28, 29.) Thus, Pope essentially argues that it is irrelevant that the State presented evidence of his September 2013, November 2014, April 2015, and January 2017 violations of the conditions of his community-corrections sentence because, he says, the circuit court based its judgment solely on the June 2018 violation, which, Pope argues, was supported only by the result of the hair-follicle test. Pope is incorrect for two reasons.

First, as already noted, although the State initiated the revocation proceeding after Pope's June 2018 violation of the conditions of his community-correction sentence, the State presented nonhearsay evidence establishing Pope's September 2013, November 2014, April 2015, and January 2017 violations, and the circuit court found that each of those violations, as well as the June 2018 violation, had occurred. See Sams, 48 So. 3d at 668 (noting that "at a probation-revocation hearing a circuit court must examine the facts and circumstances supporting each alleged violation of probation" (emphasis added)). Thus, contrary to Pope's contention, it is clear from the circuit court's judgment that the circuit court did

not base the revocation of Pope's community-corrections sentence solely on Pope's June 2018 violation of his community-corrections sentence but, instead, based its judgment on Pope's five failed urine screens between September 2013 and June 2018.

Secondly, even if the circuit court had based the revocation of Pope's community-corrections sentence solely on the June 2018 violation, the circuit court considered both the result of the hair-follicle test and nonhearsay evidence, i.e., Roebuck's and Sowash's testimony, in finding that the June 2018 violation had occurred. Specifically, the circuit court considered Roebuck's testimony that Pope's June 2018 urine sample tested positive for amphetamines at the CRO. Although LabCorp's negative confirmation test of that urine sample arguably impacts the weight to be afforded the positive test result from the CRO, it does not negate the fact that there was nonhearsay evidence tending to establish that the June 2018 violation had occurred, and it was the circuit court's role, as the trier of fact, to determine the weight to afford the conflicting results. See Mead, ___ So. 3d at ___ ("A revocation proceeding is 'a bench trial and the trial

court is the sole fact-finder.'" (quoting Ex parte Abrams, 3 So. 3d 819, 823 (Ala. 2008))); and Dotch v. State, 67 So. 3d 936, 963 (Ala. Crim. App. 2010) (noting that the weight of the evidence is a question for the trier of fact).

As evidenced by the foregoing, although Pope argues that the circuit court relied solely on hearsay evidence in revoking his community-corrections sentence, the circuit court considered both hearsay and nonhearsay evidence in finding that Pope had violated the conditions of his community-corrections sentence on five separate occasions from September 2013 through June 2018. Thus, because it is well settled "that a circuit court may consider both hearsay and nonhearsay evidence in determining whether a probationer violated the terms of his or her probation," Sams, 48 So. 3d at 666, this claim does not entitle Pope to relief.

II.

Pope also argues that the admission of the result of the hair-follicle test violated his right to confront the witnesses against him because the State failed to present any witness from LabCorp who was involved in the testing procedure. This argument is without merit.

To be sure, although participation in a community-corrections program is a privilege and not a right, this Court has held that certain minimum due-process safeguards, including the right to confront and cross-examine adverse witnesses, are required in a revocation proceeding. See Morris v. Alabama Bd. of Pardons & Paroles, 176 So. 3d 872, 874 (Ala. Crim. App. 2015). However, as noted previously, this Court has also repeatedly held that hearsay evidence, which precludes an opportunity to confront and cross-examine the declarant, is admissible in a revocation proceeding, Mead, supra, "because strict rules of evidence are not applicable in revocation hearings." Taylor, 229 So. 3d at 274. Thus, it is not the mere admission of hearsay evidence that deprives a community-corrections participant of the minimum due process required in a revocation proceeding. Rather, it is "[t]he use of hearsay as the sole means of proving a violation of a condition of probation [that] denies a probationer the right to confront and to cross-examine the persons originating information that forms the basis of the revocation." Sams, 48 So. 3d at 668 (emphasis added). See also O.M. v. State, 595 So. 2d 514, 518 (Ala. Crim. App. 1991) (noting that "a

probationer has lost some constitutional rights as a consequence of being convicted of a criminal offense" and that, as a result, "at a probation revocation hearing, hearsay evidence, which denies the probationer the ability to confront the declarant, may be admitted and considered by the court, but it may not constitute the sole basis for probation revocation" (emphasis added)). Accordingly, this Court has consistently reversed the revocation of probation that was based solely on hearsay evidence and has consistently affirmed the revocation of probation that was based on both hearsay and nonhearsay evidence. Compare Morris, 176 So. 3d at 876 (reversing the revocation of probation because "the State failed to present any non-hearsay testimony that [the appellant] had violated the terms and conditions of his parole"), with Johnson v. State, 100 So. 3d 627 (Ala. Crim. App. 2012) (affirming the revocation of probation based on an incident of domestic abuse, despite the admission of an out-of-court statement by the victim, who did not testify and was thus not subject to cross-examination, because there was also nonhearsay evidence establishing that the domestic abuse had occurred).

Given the foregoing, the admission of the result of the hair-follicle test without testimony from a witness from LabCorp did not deprive Pope of the minimum due process to which he was entitled if the State also presented nonhearsay evidence establishing that Pope had violated the conditions of his community-corrections sentence. As we have already concluded, the State presented nonhearsay evidence from Roebuck and Sowash indicating that Pope violated the conditions of his community-corrections sentence in September 2013, November 2014, April 2015, January 2017, and June 2018, and Pope was given the opportunity to confront and cross-examine those witnesses. Thus, because the revocation of Pope's community-corrections sentence was supported by nonhearsay evidence, Pope was not denied the minimum due process to which he was entitled despite the fact he did not have the opportunity to confront the individual or individuals from LabCorp who had conducted the hair-follicle test. Sams, supra; O.M., supra; Johnson, supra. Pope's contention that the result of the hair-follicle test was "the 'star' witness against him" does not change this conclusion. (Pope's brief, at 24.) Even if we assume, which we do not, that the result

of the hair-follicle test was the State's "star witness," Pope cites no authority, nor are we aware of any authority, providing that a threshold inquiry in resolving a confrontation claim in a revocation proceeding is whether the hearsay evidence was the State's "star witness" or a witness of lesser importance. Rather, as we have already noted, the relevant inquiry is simply whether there was nonhearsay evidence from which the circuit court could have been reasonably satisfied, Ex parte J.D.D., supra, that Pope had violated the conditions of his community-corrections sentence. Because there was such evidence in this case, this claim does not entitle Pope to relief.

Conclusion

Pope has failed to demonstrate that the circuit court abused its discretion in revoking his community-corrections sentence. Ex parte J.D.D., supra. Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum and Cole, JJ., concur. Minor, J., recuses himself.