

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KIRT A. LUSARDI	§	
	§	No.190, 2006
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
	§	for New Castle County
v.	§	
	§	
STATE OF DELAWARE	§	ID#0503014333
	§	
Plaintiff-Below,	§	
Appellee.	§	
	§	

Submitted: August 30, 2006
Decided: November 1, 2006

Before **HOLLAND, BERGER, and RIDGELY**, Justices.

ORDER

(1) Appellant Kirt A. Lusardi appeals the revocation of his probation by the Superior Court after he tested positive for marijuana, cocaine and methadone on three occasions. Lusardi argues that the evidence introduced at the violation of probation hearing was insufficient to support the trial judge's finding of a violation because it was uncorroborated hearsay evidence. We find no merit in his argument and affirm.

(2) Lusardi pled guilty in July 2005 to Reckless Burning or Exploding and was placed on probation for one year. As a condition of his probation, Lusardi was required to submit to random drug testing. Urine samples were taken from

Lusardi on November 3, 2005, December 7, 2005 and January 4, 2006. On each occasion, the tests indicated the presence of marijuana, cocaine and methadone.

(3) Lusardi's probation officer filed a violation of probation report on February 2, 2006. A violation of probation hearing was held on April 7, 2006. Both Lusardi and his probation officer testified at the hearing. The probation officer testified that she completed the "necessary paperwork and then Lusardi was escorted to the restroom in which the urine specimen was given. And at that time [Lusardi was] supervised by a male probation officer at the time he [gave] the specimen." She also produced the lab report showing the positive results to the trial judge. Lusardi denied taking any illegal drugs. He explained he had been injured and was taking percocet, endocet and oxycontin as prescribed. Based on the testimony presented and the lab reports, the trial judge found Lusardi in violation of his probation.

(4) Because probation is an "act of grace," a "VOP judge has broad discretionary power when deciding whether or not to revoke probation."¹ Thus, we review violations of probation for abuse of discretion.²

(5) It is well settled that a probationer does not have the panoply of rights that are afforded to a defendant at trial. For example, proof beyond a reasonable

¹ *Kurzmann v. State*, 903 A.2d 702, 716 (Del. 2006).

² *Id.*

doubt is not necessary to find a probationer in violation.³ Instead, the State need only show by a preponderance of the evidence that a violation occurred by presenting “some competent evidence to prove the violation asserted” such that it “reasonably satisf[ies] the judge that the conduct of the probationer has not been as good as required by the conditions of probation.”⁴ Additionally, hearsay is admissible at violation of probation hearings.⁵ Probation cannot be revoked, however “solely upon the basis of testimony of a witness with ‘no first-hand knowledge of the events constituting the violations.’”⁶

(6) Lusardi argues that the trial judge abused his discretion by finding him in violation “based upon what can properly be characterized as ‘rank’ hearsay.”⁷ He argues that *Collins v. State*⁸ requires a reversal in this case. It does not.

(7) In *Collins*, the defendant was charged with violating his probation by committing burglary, criminal mischief and terroristic threatening.⁹ The only evidence presented at the violation hearing was the testimony of a police officer.¹⁰

³ *Id.*

⁴ *Collins v. State*, 897 A.2d 159, 160 (Del. 2006).

⁵ *Id.*

⁶ *Id.* at 160-61.

⁷ Appellant’s Opening Br., at 6.

⁸ 897 A.2d 159 (Del. 2006)

⁹ *Id.* at 160.

¹⁰ *Id.*

The officer testified that he interviewed the defendant's ex-girlfriend who told him that Collins had come to her home and committed various acts of destruction.¹¹ He also testified that another tenant in the apartment complex told him that she saw Collins throw a beer can down the steps and heard him threaten his ex-girlfriend before leaving the building.¹² This Court reversed the revocation of Collins' probation, holding that "probation cannot be revoked solely upon the basis of testimony of a witness with 'no first-hand knowledge of the events constituting the violations.'" ¹³

(8) Here, the probation officer who oversaw the testing of Lusardi explained in detail about how the urine specimens were taken. Specifically, she filled out the paperwork while a male probation officer went into the bathroom with Lusardi to take the sample. In *Collins*, the officer testified about physical damage to an apartment that did not connect Collins to the crime. Here, the probation officer oversaw the testing of Lusardi which resulted in a positive drug test report. In *Collins* the State relied upon *Hester v. State*.¹⁴ We distinguished *Hester* on its facts but also reiterated the essential holding of that case which is directly applicable here. "In *Hester* the defendant's positive drug test report in the

¹¹ *Id.*

¹² *Collins*, 897 A.2d at 160

¹³ *Id.* at 160-61.

¹⁴ 2002 WL 243323 (Del. Feb. 13, 2002).

record and the case manager's testimony that she oversaw the administration of the test were sufficient competent evidence to revoke probation".¹⁵ Consistent with *Hester*, we conclude that there was competent evidence to support a finding that Lusardi violated the conditions of his probation.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

¹⁵ *Collins*, 897 A.2d at 161 fn. 11.