

RENDERED: February 6, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-001743-MR

MICHAEL KERNS

APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 94-CR-0019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, EMBERTON and GUIDUGLI, Judges.

EMBERTON, JUDGE. The appellant, Michael Kerns, appeals from an order revoking his probation and the trial court's denial of his motion to vacate and set aside the revocation.

Appellant was convicted of cultivating marijuana for the purpose of sale on March 16, 1995, and sentenced to a period of one year incarceration, sixty days to be served, and the balance probated for two years. One of the conditions of his probation was his submission to random drug and alcohol testing.

On June 28, 1995, after appellant's transfer to another county, he came under the supervision of probation officer Mikki Flowers. Pursuant to the order of probation, he reported twice per month for the purpose of drug and alcohol testing. On January 2, 1996, he gave a urine sample. An in-house test, known as a "verdict kit," was performed and the specimen was also sent to Smith, Kline & Beecham Laboratory in Lexington, Kentucky. Officer Flowers testified that, upon receiving the sample, the vial was sealed and initialed by her and the appellant. The vial was then placed in a locked box and stored in the refrigerator until collected by the courier from Smith, Kline & Beecham the same day. Two days later, Flowers received the results which detected marijuana metabolites in the appellant's urine. Appellant's probation was not immediately revoked. Instead, Flowers recommended that he attend alcohol and drug counseling. Prior to his completion of the program, however, appellant requested a transfer to Campbellsville and was given a new supervisor, Kathy Arnold. Arnold informed appellant that she would reject the transfer request if his urine test was positive for drugs.

On March 25, 1996, appellant gave Arnold a urine specimen. Arnold testified that appellant went to the rest room and gave the specimen. The vial was sealed in appellant's presence, initialed, and placed in an insulated container until collected by Smith, Kline & Beecham later that day. The results

received on April 1, 1996, were positive for marijuana metabolites.

The trial court sustained appellant's objection to the April 1, 1996, report on the basis that the Commonwealth failed to amend its motion to revoke to state that the sample was given on March 25, 1996, rather than its original statement that the test was administered on March 29, 1996. The basis for the revocation was that appellant failed to refrain from the use of marijuana on January 2, 1996.

Appellant objects to the admission of the test results because there was not a representative from Smith, Kline & Beecham available to testify as to the procedures used, the chain of custody, and the meaning of the word "metabolites." Probation revocation hearings are informal procedures and a defendant is not entitled to the same due process consideration as he is in a criminal trial. Hearsay testimony, although inadmissible at a criminal trial, is admissible especially where, as here, trained personnel are available to testify. Marshall v. Commonwealth, Ky. App., 638 S.W.2d 288, 289 (1982). The trial court was aware of Smith, Kline & Beecham's reputation as a reliable laboratory and the testimony of Flowers established the chain of custody from the time the specimen was given until retrieved by the courier. The report issued by Smith, Kline & Beecham established the internal chain of custody and the tests administered.

Flowers testified that she did not take the temperature of the sample prior to it being shipped to Smith, Kline & Beecham. Appellant has not offered any information regarding the significance of this fact. Although the temperature of the sample soon after it is received by Flowers could have some relevance if there was a dispute as to its origins, we see no relevance as to the results of the test.

Appellant emphasizes that the verdict test kit administered was negative which contradicts the Smith, Kline & Beecham results. The standard of proof necessary to revoke probation is whether there is probable cause to believe that a condition of probation is violated. Murphy v. Commonwealth, Ky. App., 551 S.W.2d 838 (1977). Despite the contradiction in the test results there was sufficient evidence to affirm the trial court's finding.

Appellant complains that the term metabolites was never defined for the trial court and suggests that metabolites can be present in the system from exposure to marijuana prior to the date of probation or in some manner other than direct use of the drug. He alleges that if his counsel would have permitted him to testify, he could have explained the presence of metabolites in his urine. We do not believe the court, nor appellant's counsel, was required to speculate as to how the metabolites entered appellant's system. The mere presence of marijuana metabolites is sufficient to sustain a probation revocation. Murphy, supra.

In view of the test results, we do not find that counsel's representation was so deficient as to require reversal.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The order of the Russell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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