

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000830-MR

KEVIN T. SCHINDLER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 92-CR-2372

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUIDUGLI, HUDDLESTON AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. This is an appeal from an order of the Jefferson Circuit Court entered March 17, 1998, revoking Kevin T. Schindler's (Schindler) probation and reinstating the sentence imposed by that court on December 3, 1993, for possession of marijuana with intent to sell, over five pounds. We affirm.

On May 18, 1993, Schindler pled guilty to possession of marijuana with intent to sell, over five pounds. At that time Schindler also admitted to being a marijuana user. On July 26, 1993, the trial court sentenced Schindler to eight (8) years in prison. After approximately four months in prison, the trial court granted Schindler shock probation and he was released on

December 2, 1993. As a condition of probation, Schindler was ordered to refrain from further violation of the law and to submit to random drug testing. Schindler's probation was scheduled to end in December, 1998.

During the years following Schindler's release, he broke the conditions of his probation on several occasions. Not only was he involved in a domestic dispute with his girlfriend in December of 1996, which resulted in an assault and terroristic threatening conviction, but he also tested positive for marijuana use in June and August of 1997. On October 28, 1997, the trial court conducted a hearing to determine whether Schindler's probation should be revoked. The trial court exercised restraint and chose not to revoke his probation. Instead, the trial court sentenced Schindler to four months in the county jail with work release. While incarcerated, Schindler again tested positive for marijuana. At that time the Commonwealth moved to have Schindler's probation revoked.

On March 16, 1998, the trial court conducted a hearing on the issue of whether to revoke Schindler's probation. Schindler's probation officer testified at the hearing regarding the results of the drug test conducted while Schindler was incarcerated. The trial court revoked Schindler's probation citing in addition to the current violation the fact that, while on probation, Schindler had twice tested positive for marijuana and that he had been convicted for assault.

Schindler argues on appeal that the trial court erred in admitting the probation officer's testimony regarding the

results of the drug test performed while he was incarcerated. The thrust of Schindler's argument is that the probation officer's testimony constitutes double hearsay and is not admissible during a probation revocation hearing. Initially it should be noted that Schindler properly preserved his arguments on appeal. However, the trial court's decision will not be reversed unless it constitutes a clear abuse of discretion. Tirying v. Commonwealth, Ky. App., 717 S.W.2d 503 (1986).

A probation revocation hearing is an informal proceeding where the due process accorded the defendant does not include the "full panoply of rights accorded to one not yet convicted." Id. at 504 (citing Childers v. Commonwealth, Ky. App., 593 S.W.2d 80 (1980) and Morrissey v. Brewer, 408 U.S. 471 (1972)). In fact, this Court has held that hearsay testimony is admissible during probation revocation hearings stating that "there is no absolute right to confront witnesses [at probation revocation hearings], especially when the reliability of the witnesses, here trained personnel in an organized drug abuse program, can be easily ascertained." Marshall v. Commonwealth, Ky. App., 638 S.W.2d 288, 289 (1982). Furthermore, KRE 1101(d)(5) specifically exempts probation revocation hearings from the dictates of the Rules of Evidence.

Based on the foregoing, Schindler did not have the right to confront each and every witness involved with the collection and testing of his urine sample while he was incarcerated. The reliability of these witnesses is easily ascertainable. In fact, Schindler had every opportunity to call

these individuals as witnesses himself and chose not to subpoena them to testify at the hearing. Thus, we must conclude that Schindler did not feel that these witnesses had any substantial information to offer the trial court on his behalf.

What Schindler fails to realize is that probation is a privilege rather than a right. Brown v. Commonwealth, Ky. App., 564 S.W.2d 21 (1977). The trial court gave him several chances to retain his probationary status and he abused each and every opportunity. Despite Schindler's attorney's extensive argument to the contrary, we cannot say that the trial court abused its discretion by allowing Schindler's probation officer to announce "dirty urine" to the court.

For the foregoing reasons, the order of the trial court is affirmed.

ALL CONCUR.

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