

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000356-MR

JAMES L. REEVES

APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLS, JUDGE
INDICTMENT NO. 96-CR-00050

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: HUDDLESTON, KNOFF and MILLER, Judges.

HUDDLESTON, Judge: James L. Reeves appeals from an order revoking his probation. The circuit court concluded that Reeves had violated his probation by using marijuana.

A Lewis County Grand Jury returned a three-count indictment against Reeves charging him with one count of Promoting Contraband in the First Degree (marijuana)¹ and one count of Promoting Contraband (Xanax and marijuana).² Reeves was also charged with being a Persistent Felony Offender in the Second

¹ See Ky. Rev. Stat. (KRS) 520.050.

² Id.

Degree.³ Reeves eventually pled guilty to one count of Promoting Contraband (Xanax and marijuana)⁴ and was sentenced to five years in prison. Some three months after sentencing, the circuit court granted Reeves's motion for shock probation and he was placed on supervised probation for five years.

On December 17, 1999, almost eighteen months after being released on shock probation, the court entered a revocation hearing order in which Reeves was notified that he had allegedly violated the conditions of his probation by testing positive for marijuana on October 21, 1999. On January 21, 2000, the court conducted a probation revocation hearing and concluded that Reeves had violated the conditions of his probation by using marijuana. On February 4, 2000, the court revoked Reeves's probation and reinstated his sentence.

Reeves makes a five-pronged attack on the order revoking his probation. First, Reeves contends, the court abused its discretion by summarily rejecting his explanation that he had tested positive for marijuana due to exposure to second-hand marijuana smoke. Reeves asserts that in doing so the court violated his due process rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 2 and 11 of the Kentucky Constitution.

³ See KRS 532.080. Reeves had previously been convicted in Lewis Circuit Court, Indictment No. 92-CR-00037, of Cultivating Marijuana for Purposes of Sale and was sentenced one year's imprisonment.

⁴ The other two counts of the indictment were dismissed.

Second, Reeves argues that revoking his probation for reasons beyond his control was fundamentally unfair.

Third, Reeves asserts that the court could not have found that a preponderance of the evidence offered by the Commonwealth supported revocation since a blood test revealed only a small amount of marijuana in his system.

Fourth, Reeves contends that the court erred in allowing the Commonwealth to introduce the drug test laboratory report without laying a proper foundation. Reeves frames this attack as an impermissible admission of hearsay evidence and, therefore, a denial of his right to confront and cross-examine witnesses in violation of his due process rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 2 and 11 of the Kentucky Constitution.

Finally, Reeves contends that the court deprived him of his right to due process of law when it refused to grant a continuance when his counsel requested time to review the drug test laboratory report.

Credibility

The circuit court found that Reeves's statement about second-hand smoke was not credible and said that it did not believe that second-hand marijuana smoke was the cause of Reeves's positive marijuana test. Reeves argues that this was an abuse of discretion. We disagree. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the

witnesses.”⁵ This is merely a question of credibility; and it is the function of the circuit court to assess credibility.

Reeves’s testimony was not the only evidence before the court. The court relied on the field and laboratory test results confirming that Reeves’s urine had tested positive for marijuana. Findings of fact are not clearly erroneous if supported by substantial evidence.⁶ There was substantial evidence to support a finding that Reeves had violated the terms of his probation. Thus, there was no violation of Reeves’s due process rights as guaranteed by the Kentucky or United States constitutions.

Revocation for Reasons Beyond His Control

Reeves’s second argument is that it was fundamentally unfair for the court to revoke his probation for reasons beyond his control. We do not find in the record any evidence that supports this argument. According to Reeves’s testimony, a woman gave Reeves a ride to his sister’s house. According to Reeves, the woman smoked marijuana in the car while driving Reeves to Vanceburg from Tollesboro, Kentucky.⁷

Reeves directs our attention to the case of Keith v. Commonwealth⁸ in which the probationer, as a condition of probation, was to voluntarily commit himself to Eastern State

⁵ Ky. R. Civ. P. (CR) 52.01.

⁶ Janakakis-Kostun v. Janakakis, Ky. App., 6 S.W.3d 843 (1999).

⁷ The same woman who drove Reeves to Vanceburg on about October 15, 1999, was indicted with Reeves following their arrest in July 1999 in Hamilton County, Ohio, for possession of cocaine.

⁸ Ky. App., 689 S.W.2d 613 (1985).

Hospital for a term of treatment for as long as the hospital authorities believed he needed to stay. While the court, the parties and their attorneys anticipated Keith would be hospitalized for several months, the admitting psychiatrist determined that hospitalization was not appropriate for the probationer. Subsequently, the court revoked Keith's probation. In reversing the circuit court, this Court said that it was "clear that Keith did everything he possibly could to comply with the requirement that he admit himself to the mental hospital."⁹ We also said that "having conferred the status [of probationer] on the appellant it is fundamentally unfair to deprive him of his liberty for reasons beyond the appellant's control[.]"¹⁰

Keith is not an appropriate analogue for the case under consideration. If Reeves is to be believed, he accepted a ride with a woman he knew to be associated with illegal drug activity. When she decided to smoke marijuana in his presence, Reeves chose to remain in the vehicle. Unlike Keith, Reeves's exposure to a probation violation risk was voluntary - his future was not in the hands of another. Reeves was responsible for putting himself in jeopardy.¹¹ Reeves will not be heard to complain that the revocation of his probation was unfair under these circumstances.

Amount of Marijuana

⁹ Id. at 615.

¹⁰ Id.

¹¹ See also Temple v. Helton, Ky. App., 571 S.W.2d 647, 650 (1978) (Park, J., concurring) (a reasonably prudent person would not ride with a driver who was smoking marijuana).

Reeves argues that the small amount of marijuana found in his system cannot support revocation. In making this argument, Reeves correctly states that the standard for revocation hearings is that the court must find a violation of the conditions of probation by a preponderance of the evidence.¹²

We have found no Kentucky case that supports the proposition that a drug test that is positive for a controlled substance must reveal a minimum level of the substance to justify a finding of exposure to the substance. Admittedly, a federal court in Massachusetts recognized that one who was exposed to second-hand marijuana smoke could show a distinguishable level of marijuana in his blood as compared with exposure by inhaling.¹³ However, Reeves presented no scientific evidence that would assist the fact-finder in determining whether the level of marijuana found in his system was consistent with second-hand smoke exposure. Once the Commonwealth established that Reeves had tested positive for marijuana, the burden of going forward with the evidence shifted to Reeves and it was up to him to show that his story about exposure to second-hand smoke was credible. In light of the drug test findings, sufficient evidence of Reeve's violation of the conditions of his probation is present in the record. The court was not required to believe Reeves's version of how the marijuana got in his system.

¹² See Rasdon v. Commonwealth, Ky. App., 701 S.W.2d 716, 719 (1986); Murphy v. Commonwealth, Ky. App., 587 S.W.2d 838, 840 (1977).

¹³ See United States v. Rivera, 104 F.Supp. 2d 159 (D. Mass. 2000).

Laboratory Report

Reeves argues that the court erred in allowing the Commonwealth to introduce through the testimony of a person who did not conduct the test the drug test laboratory report without laying a proper foundation. Reeves contends that this ruling admitting hearsay testimony deprived him of the opportunity to confront and cross-examine the laboratory technician.

"Hearsay is not admissible except as provided by [the Kentucky Rules of Evidence] or by rules of the Supreme Court of Kentucky."¹⁴ However, the Rules of Evidence, while applicable to most proceedings in the courts of the Commonwealth, do not apply in probation revocation hearings.¹⁵ A probation revocation hearing is an informal process.¹⁶ "[T]he full panoply of rights due the defendant in criminal prosecutions do not apply to parole [or probation] revocations."¹⁷ "There is no absolute right to confront witnesses, especially when the reliability of witnesses . . . can be easily ascertained."¹⁸ Here, the chain of custody and reliability of the urine test are apparent on the face of the report and are confirmed by the field test. Therefore, we find no error in the admission of the report; nor do we find a violation of

¹⁴ Ky. R. Evid. (KRE) 802.

¹⁵ KRE 1101(d)(5); see also Rasdon, supra, n. 12; Marshall v. Commonwealth, Ky. App., 638 S.W.2d 288 (1982).

¹⁶ Marshall, supra, n. 15 at 289.

¹⁷ Id.

¹⁸ Id.

Reeves' s due process rights as guaranteed by the Kentucky or United States Constitutions.

Failure to Grant Continuance

Reeves moved for a continuance for the purpose of reviewing the drug test laboratory report which he says he received on the day of the revocation hearing. "A trial court has broad discretion in granting or refusing to grant a continuance and that ruling will not be disturbed absent an abuse of discretion."¹⁹

Reeves was on notice that his probation was subject to revocation because he had tested positive for marijuana on October 21, 1999. The laboratory test results, obtained at Reeves' s request, confirmed the alleged violation. The motion to revoke Reeves' s probation was filed in mid-December 1999, and the order scheduling a revocation hearing for January 21, 2000, was entered on December 17, 1999. Reeves had ample time to employ an expert to review the evidence contained in the laboratory report. This would not necessarily have required a continuance. The only prejudice Reeves suffered is due to his lack of diligence. We find no abuse of discretion on the part of the circuit court in refusing to grant a continuance under these circumstances.

Conclusion

"One may retain his status as a probationer only as long as the trial court is satisfied that he has not violated the terms of his probation. ~~There is no condition of the probation that Reeves~~²⁰ had violated a condition of his

¹⁹ Walker v. Farmer, Ky., 428 S.W.2d 26, 28 (1968).

²⁰ Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503, 504 (1986) (citations omitted).

probation and properly revoked his probation. Its order revoking Reeves's probation is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
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