

RENDERED: March 26, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2003-CA-000570-MR

CHARLES WAYNE "CHUCKY" ASHER

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT  
HONORABLE R. CLETUS MARICLE, JUDGE  
ACTION NO. 01-CR-00131

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: COMBS, DYCHE, AND KNOPF, JUDGES.

KNOPF, JUDGE: In September 2002, Charles Asher was convicted, based on his guilty plea, of two counts of illegal possession of controlled substances in violation of KRS 218A.1415. The Clay Circuit Court sentenced him to two concurrent five-year terms of imprisonment, then probated that sentence for five years.

Although the parties have not included the order in the record,

apparently as a condition of his probation Asher was not to use or possess illegal drugs.

In January 2003, Asher was arrested on allegations that he had violated that condition of his probation. At the revocation hearing on February 6, 2003, Asher's probation officer testified that during his meeting with Asher in December 2002 he had asked Asher for a urine sample for drug testing, but Asher had told him that he would fail the test because he had recently consumed marijuana and pain pills. The officer agreed to postpone the test for a month. He took a sample during his January meeting with Asher and submitted it for analysis to an out-of-state laboratory. The lab reported the presence in the sample of marijuana and cocaine. It was soon after the officer's receipt of this report that he initiated the revocation proceedings.

Asher objected to the officer's hearsay testimony regarding the test results and argued that the printed lab report on which the officer relied did not meet the standards of admissibility enunciated by this Court in Byerly v. Ashley.<sup>1</sup> Although the trial court overruled Asher's objection, its order revoking his probation, entered February 12, 2003, indicates that it based its decision not on the lab report, but on the officer's testimony that in December 2002 Asher had admitted

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<sup>1</sup> Ky. App., 825 S.W.2d 286 (1991).

using marijuana and pain pills. It is from that order that Asher appeals.

Asher argues that the trial court erred by admitting testimony concerning the lab report and that without that testimony the evidence was insufficient to justify revocation. It is well established, however, that a probationer's statements to his probation officer may be used against him at a revocation hearing.<sup>2</sup> The officer's testimony that Asher admitted having violated the terms of his probation by using marijuana and pain pills was sufficient evidence to support the trial court's exercise of its discretion in this case. Thus, even if we agreed with Asher that the Commonwealth failed to justify its use of the hearsay lab report,<sup>3</sup> he would not be entitled to relief. Accordingly, we affirm the February 12, 2003, order of the Clay Circuit Court.

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<sup>2</sup> Childers v. Commonwealth, Ky. App., 593 S.W.2d 80 (1979).

<sup>3</sup> "The minimal due process right to confront and cross-examine witnesses is not absolute. Courts have limited the right to confrontation afforded during revocation proceedings by admitting substitutes for live testimony, such as reports, affidavits and documentary evidence. . . . However, hearsay evidence should be considered only if there is good cause to forgo live testimony. . . . Good cause is defined in terms of 'difficulty and expense of procuring witnesses in combination with 'demonstrably reliable or 'clearly reliable' evidence.'" State v. Dahl, 990 P.2d 396, 401 (Wash. 1999) (citations omitted). See also State v. Graham, 30 P.3d 310 (Kan. 2001); State v. Portis, 929 P.2d 687 (Ariz. App. 1996). Under Byerly v. Ashley, it is doubtful whether a lab report completely devoid of chain-of-custody information could be deemed "clearly reliable."

ALL CONCUR.

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