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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0597**

State of Minnesota,
Respondent,

vs.

Brittany Donielle Ellis,
Appellant.

**Filed July 31, 2017
Affirmed
Cleary, Chief Judge**

Pipestone County District Court
File No. 59-CR-13-368

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Scott R. Cutcher, Fifth District Public Defender, Virginia M. Barron, Assistant Public Defender, Westbrook, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Halbrooks, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

This is an appeal from an order denying appellant Brittany Donielle Ellis's ex parte application requesting funds for expert services under Minn. Stat. § 611.21(a) (2016).

Although the district court erred by failing to consider appellant's request ex parte, that error is harmless because the district court did not abuse its discretion in denying her request for funding. For this reason, we affirm.

FACTS

Appellant was charged with and pleaded guilty to felony fleeing a peace officer in a motor vehicle. The district court stayed adjudication and placed her on probation on the conditions that she abstain from using controlled substances and alcohol, and that she submit to random testing. The first probation-violation report was filed on July 14, 2015, alleging that appellant failed to abstain from using controlled substances based on a urine test that was positive for cannabinoid.¹ Appellant admitted the violation, her probation was reinstated, and she was ordered to serve ten days in jail as a consequence. A second probation-violation report was filed on January 13, 2016, alleging that appellant failed to abstain from using controlled substances based on a December 22, 2015 urine test that was positive for THC-COOH, a metabolite of marijuana. On January 21, 2016, an addendum to the probation-violation report was filed based on a January 14 urine test that was positive for THC-COOH. Premier Biotech conducted the testing of the December and January samples. Appellant denied the second probation violation and demanded disclosure of the entire probation file, which the district court granted. Appellant filed a supplemental

¹ This test was conducted by RSI Laboratories and is not at issue. Marijuana, tetrahydrocannabinols (THC), and cannabinoids are included in the list of Schedule I controlled substances. Minn. Stat. § 152.02, subd. 2(h) (2016).

demand for disclosure on February 22, 2016, seeking the entire file from Premier Biotech, along with documents establishing the reliability and accreditation of the lab.

On March 27, 2016, appellant filed an ex parte application for expert services under section 611.21(a), requesting \$250, the fee that Premier Biotech charged to produce documents for her counsel's inspection. On April 1, 2016, the district court granted the request for services and made the order public.²

On September 2, 2016, appellant filed a motion (1) to exclude the urine test results from Premier Biotech because the lab is not accredited and refuses to disclose records demonstrating that its results are scientifically valid and reliable, and (2) to dismiss the probation violation. In a December 20, 2016 order, the district court denied appellant's motion.³

On January 21, 2017, appellant filed a second ex parte application requesting funds for expert services. The second application is the subject of this appeal. The district court disclosed the application to the county attorney. Over appellant's objection, the district court permitted the county attorney to participate in a March 7, 2017 hearing on appellant's application, at which the county attorney opposed appellant's request for funds for expert services. In a March 24, 2017 order, the district court denied appellant's request for funds.

² The county attorney filed a motion to rescind the order but withdrew it after the funds were distributed.

³ The district court gave the following reasons for denying the motion: the rules of evidence do not apply to probation violation hearings; the lab is a private company and may not be subject to the same accreditation requirements as a Bureau of Criminal Apprehension (BCA) laboratory; and the lack of accreditation goes to the weight of the evidence and not its admissibility.

This appeal is taken from the March 24 order and was assigned to the special term panel. *See* Minn. Stat. § 611.21(c) (2016) (authorizing defendant to appeal immediately to the court of appeals from “an order denying counsel the authority to obtain services” and to request an expedited hearing).

D E C I S I O N

I. A Request for Expert Services Must Be Considered Ex Parte.

Appellant first argues that the district court should not have disclosed her application for funds for expert services to the county attorney and should not have permitted the county attorney to participate in the hearing. The state⁴ concedes that the district court erred by allowing the county attorney to participate in the proceedings.

The question of whether the district court erred in disclosing appellant’s application for funds for expert services to the county attorney requires this court to interpret Minn. Stat. § 611.21(a). This statute authorizes an indigent defendant’s counsel to apply to the district court for funds for “investigative, expert, or other services necessary to an adequate defense in the case.” Minn. Stat. § 611.21(a). Statutory interpretation is a question of law, which this court reviews de novo. *State v. Barrientos*, 837 N.W.2d 294, 298 (Minn. 2013). “When the text of the law is unambiguous, we apply the plain meaning of the statutory language without engaging in any further construction.” *Id.*; *see also* Minn. Stat. § 645.16 (2016).

⁴ The state is represented by the attorney general in this appeal.

Section 611.21(a) plainly states that an application for services other than counsel is to be handled by “an ex parte application.” “In discerning the plain and ordinary meaning of a word or phrase . . . we consider the common dictionary definition of the word or phrase.” *State v. Brown*, 792 N.W.2d 815, 822 (Minn. 2011). “Ex parte” is defined as: “Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest; of, relating to, or involving court action taken or received by one party without notice to the other.” *Black’s Law Dictionary*, at 697 (10th ed. 2014). Based on the plain language of section 611.21(a), the district court erred by allowing the county attorney to participate in the hearing on appellant’s application for funds for expert services.⁵

Appellant contends that the proper remedy is to reverse the district court’s order denying services, because the district court was “greatly influenced” by the county attorney’s involvement in the proceedings. We understand appellant’s request for reversal to mean that the district court must grant her request for funds. The state argues that, if this court affirms, “there is no need to consider further remedy.” Alternatively, the state argues that the appropriate remedy is a remand with directions for “the district court to conduct further proceedings on the application . . . without prior involvement of the county attorney.”

⁵ Because the language in the statute is clear and unambiguous, it is not necessary to consider the cases from other jurisdictions that appellant relies on in her brief.

Although the district court erred by failing to conduct the proceedings ex parte, that does not automatically mean that appellant is entitled to expert services. *See State v. Finch*, 865 N.W.2d 696, 703 (Minn. 2015) (applying harmless-error standard to district court's failure to follow proper procedure for disqualification motion). A defendant is not entitled to services unless the district court finds "that the services are necessary and that the defendant is financially unable to obtain them." Minn. Stat. § 611.21(a). As we conclude below, the district court did not abuse its discretion in denying appellant's request for funds for expert services as unnecessary. The error in conducting the proceedings in the presence of the county attorney was, therefore, harmless, and appellant is not entitled to any relief.

II. The District Court Did Not Abuse Its Discretion by Denying Appellant's Application for Funds for Expert Services that Were Unnecessary to Defend Against a Probation Violation.

Appellant requested funds under section 611.21 to obtain expert services for a probation-revocation hearing. The district court denied the motion on the grounds that expert services were not necessary because the district court judge could determine the validity of the test results based on the lab technician's testimony and cross-examination by defense counsel. The district court also determined that the request was "unnecessarily broad in scope." This court reviews an order denying section 611.21 funds for expert services under an abuse-of-discretion standard. *In re Application of Wilson*, 509 N.W.2d 568, 570 (Minn. App. 1993). For the following reasons, appellant has not demonstrated that the district court abused its discretion.

Appellant argues that an expert is necessary because Premier Biotech is not accredited. *See* Minn. Stat. § 299C.157, subd. 2(b) (2016) (requiring that laboratories conducting “forensic analysis in the disciplines of toxicology, identification of controlled substances, or trace evidence” be accredited by an accrediting body that requires conformance to forensic-specific requirements, or have begun the formal process of seeking accreditation and follow the standards necessary for accreditation); *see also* Minn. DOC Policy 205.231 (requiring that confirmation drug testing of offenders in the community be conducted “[b]y certified and/or accredited labs using GC/MS and/or LC/MS/MS technology”). It is not clear that the accreditation requirements in section 299C.157, subdivision 2(b), apply to probation-revocation proceedings. The urine test in this case is not being used as evidence in a criminal prosecution to prove that appellant was impaired by, or that she possessed, a controlled substance. The test is being offered to show by clear and convincing evidence that appellant violated a probation condition requiring that she abstain from using controlled substances. *See* Minn. R. Crim. P. 27.04, subd. 2(1)(c)b; *Gassler v. State*, 787 N.W.2d 575, 583 (Minn. 2010) (stating burden of proof for clear-and-convincing-evidence standard is lower than burden of proof for beyond-a-reasonable-doubt standard and requires only that the alleged facts be “highly probable”). Moreover, the record indicates that Premier Biotech is accredited by the College of American Pathologists (CAP), and that it uses tandem-mass-spectrometry (LC-MS-MS) technology. *See* <https://premierbiotech.com/innovation/lab-services/accreditations/> (last visited July 13, 2017).

Even assuming appellant is correct that Premier Biotech lacks the accreditation required by the legislature and the DOC, that does not mean that appellant can challenge the lab's test results in a probation-revocation proceeding.

Foundational reliability for expert opinion testimony is required by Minn. R. Evid. 702. *See State v. Hull*, 788 N.W.2d 91, 103 (Minn. 2010) (discussing second prong of *Frye-Mack* where admissibility of test result depends on whether lab conducting test complied with appropriate standards and controls). Foundational reliability for a particular test is a prerequisite to its admissibility in a criminal prosecution. *See State v. Jobe*, 486 N.W.2d 407, 419 (Minn. 1992). But this is a probation-revocation proceeding and not a criminal prosecution. The rules of evidence expressly state that they do not apply to probation-revocation hearings. Minn. R. Evid. 1101(b)(3); *State v. Willis*, ___ N.W.2d ___, ___, 2017 WL 2961122, at *5 (Minn. July 12, 2017) (stating “the Rules of Evidence apply to all cases and proceedings unless the rules provide otherwise”). Appellant does not provide any other authority to support her argument that the foundational reliability required for scientific evidence to be admitted in a criminal prosecution is a prerequisite to admissibility in probation-revocation proceedings.

Appellant relies on *Roberts v. State* to support her argument that a defendant can obtain expert services in a probation-revocation proceeding. 856 N.W.2d 287 (Minn. App. 2014), *review denied* (Minn. Jan. 28, 2015). But that case is inapposite. *Roberts* involved a postconviction challenge to a conviction based on newly discovered evidence that the testing procedures used by the St. Paul Police Department Crime Laboratory were flawed.

Id. at 289. Roberts was not challenging the reliability of testing procedures used to show that he violated probation. And the reference to requesting funds pursuant to section 611.21 is taken out of context. This court was explaining that Roberts could have sought funds for expert services at public expense to challenge the reliability of the test results at the time that he was facing criminal charges for possessing a controlled substance. *Id.* at 291. *Roberts* did not hold that a defendant can seek funds under the statute to challenge the reliability of test results after the criminal prosecution has concluded. *See id.*

Finally, appellant's arguments assume that the due process requirements for probation-revocation proceedings are the same as those in a trial on a criminal charge. The state must provide an indigent defendant with expert services necessary to assist in "evaluation, preparation, and presentation of the defense" at trial and sentencing. *See Ake v. Oklahoma*, 470 U.S. 68, 83-84, 105 S. Ct. 1087, 1096-97 (1985) (holding indigent defendant has constitutional right to psychiatric assistance at state expense to prepare effective defense where the defendant's mental condition is relevant to criminal culpability and punishment); *see also McWilliams v. Dunn*, 582 U.S. ___, 137 S. Ct. 1790 (2017) (concluding defendant was entitled to access to psychiatrist at state expense to assist in evaluating, preparing, and presenting defense in capital sentencing). But probation- and parole-revocation proceedings are "not part of a criminal prosecution" and the "full panoply of rights" do not apply because parole arises after the end of a criminal prosecution and sentencing. *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S. Ct. 2593, 2600 (1972);

Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756 (1973) (extending *Morrissey* to probation-revocation proceedings).⁶

Appellant has not shown that the district court abused its discretion in denying her motion for funds for expert services under section 611.21. She is not entitled to any relief, despite the fact that the district court erred in refusing to consider her application for funds *ex parte*.

Affirmed.

⁶ We note that the federal statute providing for expert services “necessary for adequate representation,” 18 U.S.C. § 3006A(e) (2012), is broader than Minn. Stat. § 611.21. “Representation” in the federal statute expressly includes counsel, as well as “investigative, expert, and other services,” and the proceedings in which representation shall be provided includes probation violations. 18 U.S.C. § 3006A(a)(1)(C) (2012). Minnesota Statutes provide for appointment of counsel in probation-revocation proceedings. Minn. Stat. § 611.14(3) (2016) (citing Minn. Stat. § 609.14, subd. 2 (2016)). But Minn. Stat. § 611.21(a), which provides for “investigative, expert, or other services necessary to an adequate defense in the case,” does not include all matters in which representation is required. We also note that, in unpublished decisions, this court has relied on *State v. Griffie*, 281 Minn. 569, 571, 161 N.W.2d 551, 552 (1968), to conclude that the statute only applies to pretrial services necessary to prepare a defense to the criminal charge.