AFFIRM; and Opinion Filed October 25, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01346-CR

DENNIE DEARTIS RUSSELL, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-81456-2009

MEMORANDUM OPINION

Before Justices Lang-Miers, Brown, and Boatright
Opinion by Justice Brown

Dennie Deartis Russell appeals the trial court's judgment revoking his community supervision. In a single issue, appellant contends the trial court erred because it revoked his community supervision for an inappropriate reason, namely, appellant's failure to admit he committed a new offense. We affirm the trial court's judgment.

Appellant was indicted for intentionally and knowingly possessing 3,4-methylenedioxy methamphetamine in an amount more than one gram, but less than four grams, on or about April 30, 2009. In January 2010, appellant pleaded guilty to the offense. In accordance with a plea agreement, the trial court found appellant guilty, sentenced him to eight years' confinement, suspended the sentence, and placed appellant on community supervision for eight years.

In 2013 and again in 2014, the State moved to revoke appellant's community supervision. Both times, the court continued appellant on community supervision. In September 2013, the

conditions of community supervision were amended to require appellant to participate in and successfully complete outpatient substance abuse treatment and all recommended aftercare.

In April 2016, the State filed a third motion to revoke in which it alleged appellant violated five conditions of his community supervision. Four of the alleged violations involved appellant's failure to meet various financial obligations. The fifth allegation was that appellant failed to participate in and successfully complete the outpatient substance abuse treatment. At an October 2016 hearing on the motion to revoke, the State abandoned the allegations involving financial obligations and proceeded only on appellant's failure to complete the required substance abuse treatment. Appellant pleaded not true to that allegation.

Sue Lawrence, a caseworker with the Collin County Community Supervision Department, testified that in July 2013, appellant tested positive for cocaine and marijuana and, as a result, was required to attend the outpatient treatment program. Lawrence testified appellant began the program in October 2015, but did not complete it. He was unsuccessfully discharged from the program in December 2015.

Kerry Cassell, appellant's probation officer, also testified that appellant enrolled in the treatment program but did not complete it successfully. Cassell received a discharge notice from the program, which indicated appellant was unsuccessfully discharged due to breach of the program guidelines. On December 10, appellant submitted a urinalysis with no temperature and was unable to provide a second urinalysis. Also, appellant missed group sessions on November 26, 2015, and December 17, 2015. Cassell had appellant come in for a urinalysis on December 14 and the results were negative for drugs. According to Cassell, appellant does not think he needs treatment.

On cross-examination, defense counsel asked Cassell about whether appellant could have reentered the program after being discharged. Cassell testified the discharge summary stated

appellant was "eligible for assessment for readmission no earlier than two weeks after the discharge date." When asked if as a condition for readmission appellant had to admit to a relapse or using drugs, Cassell indicated the discharge summary did not contain such a condition. Appellant had not gone back to the program.

Appellant testified that he had been enrolled in the program for a little over two months at the time he was discharged. He was supposed to go to class two times a week, which he did faithfully. One day he was selected for a random urinalysis. Appellant was told the temperature was "not right" on his urinalysis. They asked him to take another one, but he did not have to go to the bathroom at that time. Appellant testified that the next time he attended class, his teacher showed him an email from her supervisor. The email said appellant could stay in class and start over if he admitted he relapsed. Appellant testified he was not going to admit he relapsed. He admitted he had not successfully completed outpatient treatment, but he did not think it was his fault. He felt he was kicked out on a "bogus UA test."

In a brief closing argument, appellant asked that his community supervision not be revoked. He argued he was terminated from the treatment program through no fault of his own and for a "bogus UA." He further argued that his only option was to "admit wrong, which he wouldn't do." He argued he was inappropriately terminated from the program; it was inappropriate to force someone to admit to "something they weren't good for." The trial court found that appellant violated the terms and conditions of his probation by failing to successfully complete the treatment program. The court assessed appellant's punishment at five years' confinement.

In this appeal, appellant contends the trial court erred by revoking his community supervision for an inappropriate reason, specifically for invoking his right against self-incrimination. He asserts he could have reenrolled in the drug treatment program but would have

had to admit he had used, and therefore possessed, an illegal drug. Requiring him to admit to a new criminal offense violated his Fifth Amendment privilege.

A defendant's legitimate exercise of the Fifth Amendment privilege against self-incrimination cannot be the reason for the revocation of community supervision. *See Dansby v. State*, 398 S.W.3d 233, 240 (Tex. Crim. App. 2013). We review a trial court's decision to revoke community supervision for an abuse of discretion. *Dansby v. State*, 468 S.W.3d 225, 231 (Tex. App.—Dallas 2015, no pet.) (op. on remand). On a motion to revoke community supervision, the State has the burden to prove the allegations in its motion by a preponderance of the evidence. *Id.* This burden is met when the greater weight of the credible evidence would create a reasonable belief that the defendant has violated a condition of his community supervision. *Id.* If the State fails to meet its burden of proof, the trial court abuses its discretion by revoking the community supervision. *Id.* The trial judge is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013).

The State's witnesses testified that appellant was unsuccessfully discharged from the drug treatment program. Appellant himself testified he did not successfully complete the program. Cassell, appellant's probation officer, testified appellant was discharged for breach of the program guidelines. He submitted a urinalysis with no temperature and was unable to provide a second sample. Also, he missed two group sessions. Cassell indicated appellant was eligible for assessment for readmission to the program two weeks after discharge, and he had not gone back to the program. The only evidence that appellant could not reenter the program without admitting a new offense came from appellant. The trial judge was free to disbelieve appellant's testimony. Moreover, appellant was not discharged from the program because he invoked his Fifth Amendment privilege. The State's evidence showed appellant was discharged

because he submitted a urine sample with "no temperature" and missed two group sessions. *Cf. Dansby*, 398 S.W.3d at 240 (defendant discharged from sex offender treatment program due to invocation of Fifth Amendment privilege during required polygraph). We cannot conclude the trial court abused its discretion by revoking appellant's community supervision. We overrule appellant's sole issue.

We affirm the trial court's judgment.

/Ada Brown/
ADA BROWN
JUSTICE

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TEX. R. APP. P. 47.2(b).

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DENNIE DEARTIS RUSSELL, Appellant	On Appeal from the 380th Judicial District Court, Collin County, Texas
No. 05-16-01346-CR V.	Trial Court Cause No. 380-81456-2009.
	Opinion delivered by Justice Brown, Justices
THE STATE OF TEXAS, Appellee	Lang-Miers and Boatright participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 25th day of October, 2017.