

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-16-00265-CR

MICHAEL REED CANION, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 12-03-03502-CR**

MEMORANDUM OPINION

Appellant Michael Reed Canion appeals from the trial court's judgment revoking his deferred adjudication community supervision for the offense of injury to a child and sentencing him to five years of confinement. In his sole appellate issue, Canion complains that the trial court erred by admitting evidence relating to the SoberLink portable breath alcohol device over defense counsel's objection at the hearing on the State's motion to adjudicate. We affirm the trial court's judgment.

Canion pleaded guilty to injury to a child, a third-degree felony offense.¹ *See* Tex. Penal Code Ann. § 22.04(f) (West Supp. 2016).² The trial court found the evidence sufficient to find Canion guilty, but deferred further proceedings and placed Canion on community supervision for three years. The State subsequently filed a motion to adjudicate, in which it alleged sixteen violations of the terms of Canion’s community supervision. The allegations included failure to report, a positive cocaine test in a random urinalysis, three positive tests for amphetamines, a positive test for alcohol in a random urinalysis, test results of dilute in random urinalyses on five dates, three instances when the SoberLink device indicated a high breath alcohol concentration reading, failure to perform “community service restitution” as required, and failure to timely pay supervisory fees for two months.

At the hearing on its motion to adjudicate, the State abandoned two of the allegations regarding positive test results for amphetamines, the allegation regarding testing positive for cocaine, two allegations of testing dilute, and one of the allegations regarding a high breath alcohol concentration reading on the SoberLink

¹Canion was charged with aggravated sexual assault of a child, but the State elected to proceed on the lesser-included offense of injury to a child, a third-degree felony. *See* Tex. Penal Code Ann. § 22.04(f) (West Supp. 2016).

²Because the amendments to section 22.04 of the Texas Penal Code do not affect the outcome of this appeal, we cite to the current version of the statute.

device. Canion pleaded “not true” to the ten alleged violations that remained, and the trial court conducted an evidentiary hearing.

Steve Harris, the lab director of One Source Toxicology, a forensic drug testing lab, testified that Canion’s urine sample testified positive for ethanol or ethyl alcohol on October 1, 2014, and tested negative but dilute on October 28, 2014, March 18, 2015, and June 30, 2015. Harris also testified that on August 11, 2015, Canion tested positive for amphetamine.

The State next called Clay Baldwin to testify. Before Baldwin’s testimony began, defense counsel stated, “I would like to address a threshold issue and take this witness on voir[]dire. I want to potentially raise a 702 objection. . . . I do want to challenge overall the SoberLink evidence.” The trial judge stated, “I am going to go ahead and let the State ask some questions of this witness, and then I will let the Defense take him on voir[]dire.” Baldwin, the electronic monitoring manager at Recovery Health Care (“RHC”), testified that his company offers SoberLink. According to Baldwin, when someone blows into the device, the device measures the level of alcohol, if any, in the person’s breath, and sends the data to RHC’s server. Baldwin explained that “[i]f there is a violation, it is sent instantly to probation.” Baldwin testified that RHC compiled data regarding Canion, and he

explained that Canion tested positive for alcohol consumption on May 29, 2015, and June 11, 2015.

After defense counsel cross-examined Baldwin and the trial judge released Baldwin, defense counsel stated, “[I]n an abundance of caution . . . , I would like for the record to raise an objection under 702 that the previous evidence admitted . . . not be considered by the Court . . . because it doesn’t meet the requirements under 702 or Daubert or Kelly.” The State responded that Baldwin was not offered as an expert witness, but was offered to authenticate the SoberLink records, and that defense counsel’s objection “goes to the weight, not the admissibility of the evidence.” The trial court overruled defense counsel’s objection.

Probation officer Ann James testified that Canion had violated the conditions of his community supervision by failing to report in December 2013, as well as by failing to perform his required community service hours during September 2013, November 2013, and February 2014. James also testified that Canion had failed to pay his monthly supervision fees in April 2013 and October 2014, and she also testified regarding the violations reported by SoberLink. Canion then testified on his own behalf, and Canion also called his father as a witness. At the conclusion of the hearing, the trial court found that Canion violated the conditions of his community

supervision, found Canion guilty of injury to a child, and assessed punishment at five years of confinement.³

As previously discussed, in Canion’s sole appellate issue, he contends that the trial court erred by admitting the SoberLink evidence over defense counsel’s objection. We review a trial court’s order revoking probation for abuse of discretion. *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). At a revocation hearing, the State has the burden to establish the alleged violations by a preponderance of the evidence. *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). Proof of a violation of a single condition of community supervision is sufficient to support a trial court’s decision to revoke. *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. 1980). Because community supervision revocation hearings are judicial proceedings, they are governed by the Texas Rules of Evidence. *Ex parte Doan*, 369 S.W.3d 205, 210 (Tex. Crim. App. 2012). Accordingly, we address Canion’s evidentiary issue in the same manner as other judicial proceedings. *See id.* We review the trial court’s decision to admit or exclude evidence for abuse

³We note that the trial court’s judgment adjudicating guilt incorrectly recites the statute for the offense as section 22.021(a)(1)(B) of the Texas Penal Code, which sets forth the offense of aggravated sexual assault of a child, rather than section 22.04(F), which sets forth the offense of injury to a child. *See* Tex. Penal Code Ann. §§ 22.021(a)(1)(b), 22.04(f) (West Supp. 2016). We further note that the trial court’s judgment incorrectly recites that Canion pleaded “true” to the motion to adjudicate.

of discretion. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002). An erroneous evidentiary ruling is generally nonconstitutional error. *See Casey v. State*, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007).

Assuming without deciding that Canion properly preserved the issue and that the trial court erred by admitting the SoberLink evidence, we turn to the issue of harm. Because the allegedly erroneous admission of the SoberLink evidence was nonconstitutional error, we apply Rule 44.2(b) of the Texas Rules of Appellate Procedure in conducting our harm analysis. *See Tex. R. App. P. 44.2(b); Potier v. State*, 68 S.W.3d 657, 662-63 (Tex. Crim. App. 2002). Rule 44.2(b) requires that we disregard the alleged error unless it affected Canion's substantial rights. *See Tex. R. App. P. 44.2(b)*. A substantial right is affected when the alleged error had a substantial, injurious effect or influence on the outcome. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

Canion notes in his brief that proof of one non-financial violation of the terms of community supervision is sufficient to uphold a trial court's adjudication of guilt. However, citing the decision of our sister Court of Appeals in *Cox v. State*, 446 S.W.3d 605 (Tex. App.—Texarkana 2014, pet. ref'd), Canion argues that the trial court's allegedly erroneous consideration of the SoberLink data harmed him because the SoberLink data constituted the sole evidence offered to establish one of the

allegations used to revoke his community supervision and gave the trial court a basis for sentencing him to a longer term of incarceration.

In *Cox*, the State had alleged only one violation of community supervision other than the allegation involving SoberLink evidence, and the Court of Appeals had struck down that other allegation because of a due process violation. *Id.* at 609-610, 612-13. However, in the instant case, the State alleged and proved by a preponderance of the evidence other violations by Canion of the terms of his community supervision. The trial court heard testimony that Canion had violated the conditions of his community supervision by failing to report, as well as by failing to timely perform his required community service hours, failing to timely pay his monthly supervision fees, and testing positive for amphetamines on August 11, 2015. We also note that the trial judge sentenced Canion to five years of confinement, when the punishment range he faced was from two to ten years of confinement. *See* Tex. Penal Code Ann. §§ 12.34(a) (West 2011) (providing that the punishment range for a third-degree felony is from two to ten years of confinement), 22.04(f) (providing that injury to a child is a third-degree felony). For all of these reasons, we conclude that Canion's substantial rights were not affected by the trial court's consideration of the SoberLink evidence. *See King*, 953 S.W.2d at 271;

Moore, 605 S.W.2d at 926; *see also* Tex. R. App. P. 44.2(b). Accordingly, we overrule Canion's sole issue and affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on April 25, 2017
Opinion Delivered May 31, 2017
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.