

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-16-00805-CR**

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**Esmeralda Figueroa, Appellant**

**v.**

**The State of Texas, Appellee**

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**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 299TH JUDICIAL DISTRICT  
NO. D-1-DC-14-201933, HONORABLE KAREN SAGE, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

Esmeralda Figueroa pleaded guilty in 2015 to possession of a controlled substance (cocaine). *See* Tex. Health & Safety Code § 481.115(d). Punishment was assessed at 10 years' imprisonment, but the district court suspended imposition of the sentence and placed Figueroa on community supervision for 5 years in accordance with the terms of her plea agreement. Ten months later, the State moved to revoke Figueroa's community supervision. The district court held a hearing on the motion, found that Figueroa violated the terms and conditions of her community supervision, revoked her community supervision, and sentenced her to 10 years' imprisonment.

Figueroa appeals the district court's judgment in two issues, contending that the court denied her right to self-representation and that the court erred in admitting certain evidence. We will affirm the judgment revoking community supervision.

## **BACKGROUND**

Among the witnesses at the revocation hearing were Figueroa's probation officer Allison Breaux, Austin Police Department forensic scientist Christopher Kiyak, and Austin Police Department Officers Matthew Perritte, Dane O'Neill, Israel Pina, and Andrew Stotts.

Officers Perritte and O'Neill testified about an incident that occurred while Figueroa was on community supervision, leading to her arrest for possession of drug paraphernalia and heroin. Officer Perritte testified that he was on duty at 3:00 a.m. in an area where he had previously made several arrests when he discovered Figueroa unconscious or asleep in the driver's seat of a parked car, parking lights illuminated and engine running. Officer Perritte stated that he ran the car's license plate and learned that it belonged to a different vehicle. He testified that he called for backup, and after Officer O'Neill responded, they approached the car and tried to wake Figueroa by knocking on the window and shining a flashlight on her.

When she woke, Officer Perritte recognized her as Esmeralda Figueroa, whom he and his fellow officers had dealt with in the past. Officer Perritte said that he ordered Figueroa to open the window and unlock the car, but she ignored those commands. Officer Perritte testified that while looking straight down through the windshield of the car for weapons, he observed what appeared to be black tar heroin in the armrest cupholder of the driver's side door. He also testified that he saw Figueroa place the suspected heroin in her hand, clench her hand into a fist, move her hand toward the waistband of her pants, and then climb into the backseat of the car beneath a coat, making it difficult to see her hands or the suspected narcotics. At that point, Officer Perritte recalled that Officer O'Neill used a special tool to break the driver's side windows, then Officer Perritte removed

Figueroa from the car. Officer Perritte testified that as he removed her from the car, he smelled marijuana and saw the remnants of a marijuana cigarette in the ashtray. Officer Perritte said that Figueroa immediately requested EMS assistance.

Officer O'Neill, who corroborated Officer Perritte's testimony, testified that Figueroa said that she might be pregnant and complained about a headache. Officer O'Neill stated that EMS transported Figueroa to the hospital and that he rode along with her in the ambulance.

Officer Perritte testified that after Figueroa was released from the hospital and processed at the jail, he received a call from a nurse who reported finding heroin hidden in Figueroa's hospital bed. Officer Perritte said that he went to the hospital and seized the heroin, which looked exactly like what he had seen in the car door, and he submitted it to the Austin Police Department lab for testing. Officer Perritte testified that he conducted an inventory search of Figueroa's car and found two scales. He seized the scale that had a dark brown, sticky residue on it. The heroin and the scale were admitted into evidence as State's Exhibits 1 and 2 respectively, over defense counsel's objection to them as "fruits of a poisonous tree." Austin Police Department senior forensic scientist Christopher Kiyak testified that he tested State's Exhibit 1, which he determined was 20.14 grams of heroin, a controlled substance.

Officers Pina and Stotts testified about a separate incident in which Figueroa evaded arrest that also occurred while she was on community supervision. Officer Pina testified that he was asked to act on an active felony warrant for Figueroa, and he assembled a team to assist with surveillance and the arrest. Officer Pina testified that he approached Figueroa in the parking lot of a gas station as she returned to her car from the gas station's store. According to Officer Pina,

Figueroa opened the driver's side door of her car and got inside it, and he followed her into the car. Officer Pina testified that Figueroa then climbed over the center console, exited the passenger side of the car, and began running away, but Officer Stotts managed to catch her. The officers handcuffed Figueroa, and Officer Pina testified that he went to her car to look for her license or other identifying information. He further testified that while he was looking in Figueroa's purse, Figueroa managed to slip out of one of her handcuffs and began running, one handcuff still attached, toward a busy intersection. Officer Pina said he chased her, catching up to her within inches of the roadway, getting his arms around her, and falling backward with her, injuring his knees in the process. Officer Pina stated that Officer Stotts saw what had happened and helped him get Figueroa back into the handcuffs. Toward the end of Officer Pina's testimony, Figueroa stated, "I want to ask questions." The prosecutor objected, and the district court told Figueroa, "Ma'am, you don't get to ask questions." The hearing resumed with Officer Stotts's testimony about Figueroa's evading arrest, which corroborated Officer Pina's testimony.

Allison Breaux, Figueroa's probation officer, testified that she met Figueroa shortly after she was placed on community supervision. Breaux stated that when they met, she went over all the terms and conditions of community supervision with Figueroa, including meetings with Breaux, submitting to drug testing, and not violating any Texas laws. Breaux said that Figueroa agreed to comply with those terms and conditions. However, Breaux testified that during the community-supervision period Figueroa tested positive for THC, failed to report for urinalysis four times, failed to meet with Breaux more than three times, was arrested for possession of a controlled substance, and was arrested for evading arrest.

At the conclusion of the hearing, the district court found that Figueroa committed multiple violations of the terms and conditions of her community supervision, revoked her community supervision, and sentenced her to 10 years' imprisonment. This appeal followed.

## DISCUSSION

A trial court's decision to revoke community supervision must be supported by a preponderance of the evidence. *Hacker v. State*, 389 S.W.3d 860, 864-65 (Tex. Crim. App. 2013). We review the court's revocation decision for an abuse of discretion, mindful that the trial court is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Id.* at 865. Proof of a single violation of a condition of community supervision is sufficient to support revocation. *Smith v. State*, 286 S.W.3d 333, 342 (Tex. Crim. App. 2009); see *Parker v. State*, No. 05-13-01535-CR, 2014 Tex. App. LEXIS 13838, at \*4-5 (Tex. App.—Dallas Dec. 29, 2014, no pet.) (not designated for publication). Thus, to prevail on appeal, a defendant must successfully challenge all of the findings that support the court's revocation decision. *Silber v. State*, 371 S.W.3d 605, 611 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *Baxter v. State*, 936 S.W.2d 469, 472 (Tex. App.—Fort Worth 1996, pet. dismissed) (concluding that sufficient evidence supported revocation because defendant failed to challenge second ground for revocation).

### **No clear and unequivocal assertion of right to self-representation**

Figueroa contends that the district court denied her right to self-representation by refusing to allow her to question a witness during the revocation hearing. To invoke the right of self-representation, a defendant must clearly and unequivocally assert it. *Hathorn v. State*, 848 S.W.2d 101, 123 (Tex. Crim. App. 1992); see also *Brown v. State*, No. 08-11-00347-CR, 2013 Tex.

App. LEXIS 4063, at \*9 (Tex. App.—El Paso Mar. 28, 2013, pet. ref'd) (not designated for publication). A defendant's mere dissatisfaction with appointed counsel or a request for hybrid representation does not establish a clear and unequivocal assertion of the right of self-representation. *See Saldaña v. State*, 287 S.W.3d 43, 55 (Tex. App.—Corpus Christi 2008, pet. ref'd); *Cain v. State*, 976 S.W.2d 228, 235-36 (Tex. App.—San Antonio 1998, no pet.); *see also Brown*, 2013 Tex. App. LEXIS 4063, at \*9-10. Whether a defendant clearly and unequivocally invokes the right of self-representation is a fact issue that we review for an abuse of discretion. *Brown*, 2013 Tex. App. LEXIS 4063, at \*8-9.

Here, the record shows that Figueroa never made a clear and unequivocal request to represent herself. By seeking to question a witness during the revocation hearing while she had appointed counsel, Figueroa was at best requesting hybrid representation, which the district court was not required to allow. *See McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) (noting trial judge was not required to allow hybrid representation); *Landers v. State*, 550 S.W.2d 272, 280 (Tex. Crim. App. 1977) (op. on reh'g) (noting that there is no constitutional right in Texas to representation partially pro se and partially by counsel). On the morning of the revocation hearing, Figueroa expressed an interest in proceeding with a retained attorney that her family had called, and she stated that she was not getting along with her appointed attorney.<sup>1</sup> Figueroa made no request to proceed without the assistance of an attorney. Further, her request to question a witness during the revocation

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<sup>1</sup> The district court stated that the court coordinator spoke with the attorney that Figueroa claimed to have hired and that the attorney was “not technically retained on the case.” The court noted that no substitution of counsel was filed and stated, “The defendant has hired and said she was going to hire and fired numerous attorneys. . . . Every time she's come to court, she's told me she's going to hire a new attorney.”

hearing was not a clear and unequivocal assertion of her right to self-representation. *See Saldaña*, 287 S.W.3d at 55 (concluding that defendant did not clearly and unequivocally assert his right to self-representation by requesting to ask questions of witness if he thought his counsel was not adequately conducting such questioning); *Cain*, 976 S.W.2d at 235-36 (concluding that defendant did not clearly and unequivocally assert right to self-representation by filing motion to dismiss counsel that did not affirmatively waive his right to counsel or ask to proceed by representing himself). In the absence of a clear and unequivocal assertion of a right to self-representation, the district court did not abuse its discretion by denying Figueroa's request. We overrule Figueroa's first issue.

#### **No harm from admission of evidence**

In her next issue, Figueroa complains that the district court erred by admitting evidence of heroin and a scale that she asserts were the products of an illegal search and seizure. However, even if we were to conclude that the court erred by admitting the complained-of evidence, Figueroa has not shown that she was harmed by it. *See* Tex. R. App. P. 44.2(b). Any erroneous admission of evidence is non-constitutional error that reviewing courts disregard unless the error affected the defendant's substantial rights. *Id.*; *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011); *see Parker*, 2014 Tex. App. LEXIS 13838, at \*6. We will not overturn a criminal conviction for non-constitutional error if, after examining the record as a whole, we have fair assurance that the error did not influence the fact finder, or did so only slightly. *See Barshaw*, 342 S.W.3d at 93; *see also Parker*, 2014 Tex. App. LEXIS 13838, at \*6.

Assuming without deciding that the evidence of the heroin and the scale was inadmissible and that the court improperly relied on that evidence, there was also evidence that Figueroa tested positive for THC, failed to report for urinalysis four times, failed to meet with her probation officer more than three times, and was arrested for evading arrest. These were independent violations of the terms and conditions of her community supervision that required no evidence of the heroin or the scale. Any one of these violations was sufficient to support the revocation of Figueroa's probation. *See Smith*, 286 S.W.3d at 342; *Baxter*, 936 S.W.2d at 472; *see also Parker*, 2014 Tex. App. LEXIS 13838, at \*7. Thus, Figueroa failed to show that she was harmed by the court's decision to admit the evidence of the heroin and the scale. We overrule Figueroa's second issue.

### CONCLUSION

We affirm the district court's judgment revoking community supervision.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: June 29, 2017

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