

NO. 12-16-00117-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

*DANNY CHARLES BUSSELL,
APPELLANT*

§ *APPEAL FROM THE 7TH*

V.

§ *JUDICIAL DISTRICT COURT*

*THE STATE OF TEXAS,
APPELLEE*

§ *SMITH COUNTY, TEXAS*

MEMORANDUM OPINION

Danny Charles Bussell appeals the trial court's order adjudicating him guilty of indecency with a child. In three issues, Appellant argues that the trial court abused its discretion in determining that he violated a condition of his community supervision. We affirm.

BACKGROUND

Appellant was charged by information with indecency with a child by contact. Pursuant to a plea bargain agreement, he pleaded "guilty" to the offense. The trial court deferred a finding of guilt and placed Appellant on community supervision for a term of ten years.

The State subsequently filed a motion to proceed with an adjudication of guilt, alleging one violation of Appellant's conditions of community supervision. After a hearing on the motion, the trial court found the allegation true, adjudicated Appellant "guilty" of indecency with a child, and assessed his punishment at imprisonment for twenty years. This appeal followed.

PROPRIETY OF REVOCATION

In Appellant's three issues, he argues that the trial court erred by revoking his community supervision based on the results of polygraph examinations.

Standard of Review and Applicable Law

The determination to proceed with an adjudication of guilt after a defendant is placed on deferred adjudication community supervision is reviewable in the same manner as a revocation hearing. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5(b) (West Supp. 2016). In revocation cases, the state has the burden to establish by a preponderance of the evidence that the terms and conditions of community supervision have been violated. *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). The preponderance of the evidence standard is met when the greater weight of the credible evidence before the trial court supports a reasonable belief that a condition of community supervision has been violated. *Rickels v. State*, 202 S.W.3d 759, 764 (Tex. Crim. App. 2006). In a hearing on a motion to revoke community supervision, the trial court is the sole trier of fact, and the judge of the credibility of the witnesses and the weight to be given their testimony. *Taylor v. State*, 604 S.W.2d 175, 179 (Tex. Crim. App. 1980).

When the state has met its burden of proof and no procedural obstacle is raised, the decision whether to revoke community supervision is within the discretion of the trial court. *Flournoy v. State*, 589 S.W.2d 705, 708 (Tex. Crim. App. [Panel Op.] 1979). Thus, our review of the trial court's order revoking community supervision is limited to determining whether the trial court abused its discretion. *Caddell v. State*, 605 S.W.2d 275, 277 (Tex. Crim. App. 1980). If there is some evidence to support the finding of even a single violation, the revocation order must be upheld. See *Hart v. State*, 264 S.W.3d 364, 367 (Tex. App.—Eastland 2008, pet. ref'd); *Cochran v. State*, 78 S.W.3d 20, 28 (Tex. App.—Tyler 2002, no pet.) (citing *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. 1980)).

Community supervision revocation involves the loss of liberty and therefore implicates due process. *Leonard v. State*, 385 S.W.3d 570, 577 (Tex. Crim. App. 2012). Whether the defendant was afforded due process is central to our review of the trial court's exercise of discretion. *Id.* When the defendant's compliance with a condition of his community supervision was subject to a third party's discretion, a reviewing court must examine the third party's use of discretion to determine whether the trial court abused its discretion. *Id.* The third party's discretion must have been used on a basis that was rational and connected to the purposes of community supervision, i.e., to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant. *Id.*; TEX. CODE CRIM. PROC. ANN. art. 42.12 § 11(a) (West Supp. 2016). When the third party's decision was based solely on inadmissible

evidence, such as polygraph results, the trial court abuses its discretion by adjudicating the defendant guilty based on that decision. *Leonard*, 385 S.W.3d at 583.

Analysis

Under the conditions of Appellant's community supervision, he was to "[a]ttend and participate fully in and successfully complete psychological counseling/treatment sessions (including aftercare) for sex offenders with an individual or organization, which provides sex offender treatment, or counseling as specified by or approved by the Judge or the Supervision Officer" and "[a]ssume responsibility for [his] offense." After over a year on community supervision and two unsuccessful discharges from sex offender treatment, the State filed an application to proceed to final adjudication alleging that Appellant violated this condition. The trial court agreed and revoked Appellant's community supervision. Appellant argues that the revocation was in error because he was discharged from sex offender treatment, at least in part, because of his failed polygraph examinations. Under the facts of this case, we disagree.

Tammy Hooley, Appellant's community supervision officer, testified that she first referred Appellant for sex offender treatment to Dr. Kimberly Modisette. About five months later, Hooley received a report from Modisette unsuccessfully discharging Appellant from treatment. Hooley then referred Appellant to another counselor, Kathy Keith, and notified the trial court of the discharge. After a status hearing, Appellant remained on community supervision. About a year later, Hooley received a report from Keith unsuccessfully discharging Appellant from treatment, and an application to revoke was filed.

Keith testified that Appellant was evasive and uncooperative with her efforts in treating him. She cited problems with Appellant's temper and inappropriate outbursts during group therapy sessions. Much of the time during the sessions was spent trying to assure Appellant that Hooley and the polygraph examiners were not targeting him and treating him unfairly. Keith testified that, throughout treatment, Appellant denied committing indecency with a child, claiming that he had only patted the victim's "rear."¹ Keith said that admission of an offense is required for completion of her program because "[i]f you deny your offense, then there's no reason for you to be in there. Because what am I treating you for?"

¹ A person commits indecency with a child by touching a child's anus, breast, or genitals, but not by touching a child's buttocks. See TEX. PENAL CODE ANN. § 21.11(a)(1), (c)(1) (West 2011).

Keith further testified that Jackie Grier, a polygraph examiner, reported that Appellant said if he committed the offense, he was in an alcohol-induced blackout at the time. Keith asked Appellant about the report. He denied alcohol use at the time of the offense and said he had not intended the statement to be taken literally. Keith regarded these statements as inconsistent and indicative of Appellant's dishonesty. Finally, Keith received a report from another therapist that Appellant had admitted to sleeping in the same bed with the victim. When Keith asked Appellant about this report, he denied making the statement. Keith testified that this is when she decided to discharge Appellant from the program because she cannot treat someone who continues to be dishonest.

Keith specifically stated that Appellant was discharged from her program for reasons other than his polygraph results. She further testified that he would have been discharged based on his conduct and demeanor during treatment regardless of the polygraph results.

On cross-examination by Appellant's counsel, Keith testified she was aware that the polygraph examiners asked Appellant whether he had penetrated the victim's mouth, vagina, or anus with his penis, that he had denied those acts, and that the examiners detected deception. Keith stated that she "partially" considered the polygraph results in deciding that Appellant was being evasive.

Citing *Dansby v. State*, Appellant argues that we should hold the revocation evidence is insufficient and the trial court abused its discretion in revoking his community supervision because the record contains evidence of both permissible and impermissible motives for his discharge from sex offender treatment. 398 S.W.3d 233 (Tex. Crim. App. 2013). In *Dansby*, the appellant, while on community supervision and in sex offender treatment, refused to answer sexual history polygraph questions that might incriminate him in extraneous prior offenses. *Id.* at 235. He was subsequently discharged from sex offender treatment, and his community supervision was revoked for (1) his refusal to obtain a sexual history polygraph, and (2) his failure to successfully complete sex offender treatment. *Id.* The appellant raised two issues on appeal challenging both revocation grounds. *Id.* at 239. The court of appeals affirmed the revocation on the second ground without reaching the constitutional issue in the first ground. *Id.* The court of criminal appeals remanded, holding that the record showed the defendant's Fifth Amendment invocation, while not the only factor, was the deciding factor in his discharge from

sex offender treatment, and the court of appeals thus erred not to address the constitutional issue. *Id.* at 243.

Appellant argues that we should apply the reasoning in *Dansby* to hold that the trial court here abused its discretion because his polygraph results were the deciding factor in his discharge, in violation of his Fourteenth Amendment due process guarantee. However, while the record supports an inference that Keith considered the polygraph results in discharging Appellant, it also supports an inference that those results were not the deciding factor. During a year of treatment, in direct violation of the condition that he assume responsibility for his offense, Appellant never admitted conduct that would constitute indecency with a child. He thwarted efforts to treat him by his inconsistent statements and inappropriate behavior during group therapy. After spending a year trying to make progress with Appellant, Keith decided to discharge him when he accused another therapist of lying about a statement he made. Thus, the record supports an inference that the deciding factor in Appellant's discharge was not his polygraph results but his persistent denial of his offense and failure to make any lasting progress toward taking responsibility for it.

Appellant, however, urges us to take such an expansive view of polygraph "results" that the term would encompass the statements he made to polygraph examiners before and after the examinations. Consequently, he argues that statements he made to Grier and on which Keith partially based his discharge were inadmissible. Grier testified that when he conducts an examination, he conducts a pre-polygraph interview, a series of targeted questions, and a post-polygraph interview. In his pre-polygraph interview with Appellant, Grier asked whether Appellant had made sexual contact with the victim, and Appellant denied doing so. In Appellant's post-polygraph interview, he told Grier that if he committed the offense, he was in an alcohol-induced blackout and did not remember it.

While acknowledging that the reason polygraph results are inadmissible is because they are scientifically unreliable, Appellant argues that his pre- and post-polygraph statements are inadmissible "results" of the polygraph examination. We disagree. The "result" of a polygraph examination is the conclusion based on the machine's graphic indications as to whether the defendant was being deceptive in answering a question. *Marcum v. State*, 983 S.W.2d 762, 766 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). Appellant's pre- and post-polygraph

statements are not conclusions based on the unreliable science of the polygraph machine and, therefore, are not inadmissible “results” of the polygraph examination. *See id.*

Based on our review of the evidence in the record, we conclude that the trial court did not abuse its discretion by revoking Appellant’s community supervision and adjudicating his guilt based on his failure to successfully complete sex offender treatment. Accordingly, we overrule Appellant’s first, second, and third issues.

DISPOSITION

Having overruled Appellant’s first, second, and third issues, we *affirm* the trial court’s judgment.

BRIAN HOYLE
Justice

Opinion delivered July 12, 2017.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JULY 12, 2017

NO. 12-16-00117-CR

DANNY CHARLES BUSSELL,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 7th District Court
of Smith County, Texas (Tr.Ct.No. 007-0719-14)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.