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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000106-MR

JASON ROBINSON — APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 97-CR-00021

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE. Appellant Jason Robinson appeals the Letcher Circuit Court's revocation of his probation for violating one of the conditions of probation. Appellant argues that it was an abuse of discretion for the court to decide to revoke his probation based on "double hearsay," and on the results of a drug screen which were not established as being reliable. In addition, he argues that his sentence was excessive. We have reviewed these claims and we affirm.

Appellant's first argument is that the evidence against him was merely double hearsay evidence regarding the results of a scientific test. He contends that his right of confrontation was violated because persons with knowledge of the complete results and the methodology of the test were not available for cross-examination. The Commonwealth responds[1] that hearsay is permitted in probation revocation proceedings pursuant to KRE 1101(d)(5).

In Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), the United States Supreme Court established the minimum due process requirements for parole revocation proceedings. In Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S. Ct. 1756, 1759-60, 36 L. Ed. 2d 656 (1973), the Court held that the due process guarantees for probation revocation were the same as those required for parole revocation proceedings. The Court in Gagnon held, therefore, that the following minimum due process requirements apply to probation revocation proceedings:

> (a) written notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee of evidence against him; (c) opportunity to be heard in

[1]The Commonwealth also argues that this claim was not preserved for appellate review. However, we note that appellant made an argument before the court at the hearing that the only evidence against him was "double hearsay," and the Kentucky probation officer could not provide information about the lab test performed in Virginia. Therefore, we find this argument sufficiently preserved.

> person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking (probation or) parole.

Gagnon, 411 U.S. at 786, 93 S. Ct. at 1762, quoting from Morrissey v. Brewer, 408 U.S. at 489, 92 S. Ct. at 2604. In the informal type of hearings which are permitted under the minimum due process requirements, it is not improper to allow hearsay to be admitted. Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503 (1986). KRE 1101(d)(5) states that the rules of evidence do not apply in proceedings for revoking probation.

Appellant's argument on appeal essentially is that he was denied the right of confrontation. The probationer has the due process right to confront and to cross-examine adverse witnesses unless the court finds good cause for not allowing the confrontation. Gagnon, 411 U.S. at 786, 93 S. Ct. at 1762. In Gagnon, the Court stated, "While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in Morrissey intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions and documentary evidence." 411 U.S. at

782 n.5, 93 S. Ct. at 1760. As a result, there is no absolute right to confront witnesses at the informal probation revocation hearings, particularly when the reliability of the witnesses can be easily ascertained. Marshall v. Commonwealth, Ky. App., 638 S.W.2d 288, 289 (1982). Where the government demonstrates an inordinate burden of producing live testimony and offers instead hearsay evidence that is demonstrably reliable, it has made a showing of good cause for denying confrontation. United States v. Bell, 785 F.2d 640, 643 (8th Cir. 1986). Other federal courts have agreed that this approach satisfies due process, and concluded that the results of a urinalysis or a blood test have sufficient reliability to be introduced by a probation officer against a probationer in a revocation hearing. See United States v. Kindred, 918 F.2d 485 (5th Cir. 1990); United States v. Penn, 721 F.2d 762 (11th Cir. 1983).

We do not believe that in the case at bar the court was required to make a specific finding of good cause for not allowing confrontation. Further, it is not necessary in this Commonwealth that the court find that witnesses were unavailable for the revocation hearing. Marshall v. Commonwealth, Ky. App., 638 S.W.2d 288, 289 (1982). Instead, good cause has been inferred where the witnesses are outside the court's jurisdiction. Id.

Here, the court did not specifically find good cause. However, the test technician and the probation officer who ostensibly ordered the test and who reported the results to the Kentucky Division of Probation were in Virginia. Since the witnesses were outside the court's jurisdiction and it likely would have been difficult and expensive to bring them here for a probation revocation hearing, good cause may be inferred.

We believe, moreover, that the documentary evidence presented at the hearing satisfies the requirement of reliability. KRE 803(6) provides an exception to the hearsay rule for records of regularly conducted activity. The report at issue from a drug test would be part of the regularly conducted activity of the Virginia Department of Corrections Southwest Virginia Day Reporting Center which provided the analysis. Although KRE 803(6) provides that the report shall be introduced through the testimony of the custodian or other qualified witness, in a probation hearing the witness may be excused, as with any other witness, for good cause. We believe the drug test record was shown to be sufficiently reliable for a revocation hearing. The record itself was attested on its face as an accurate record by the employee who performed the test. Appellant was not precluded from calling this witness himself or obtaining an affidavit to refute the test's accuracy. We conclude that it is satisfactory for the court to allow the

introduction of a drug test such as in the case at bar where there is good cause to do so and it has been shown to have reliability. Thus, we reject appellant's arguments that double hearsay violated his right of confrontation in the hearing.

Appellant lastly argues that the trial court abused its discretion by imposing a penalty which was not proportionate to the offense for which his probation was revoked. We find this argument to be completely without merit. Appellant argues that it is cruel and unusual punishment for him to have to serve two years for having failed a drug test, and says that the highest offense he would have faced for prosecution of that offense (public intoxication) is a misdemeanor.

Appellant was on probation for commission of the offense of receiving stolen property, which has a penalty range of one to five years. KRS 514.110. In May 2000, the trial court imposed a sentence of two years, which was probated for two years. When appellant violated his probation, the trial court determined that appellant was required to serve the remainder of his two-year sentence. Appellant's sentence, having been given before his revocation, was clearly imposed for his original offense of receiving stolen property and did not result from the condition of probation he violated. Appellant's sentence was, therefore, unquestionably proportionate to the offense for which he was convicted.

For the foregoing reasons, we affirm the order of the Letcher Circuit Court revoking appellant’s probation.

ALL CONCUR.

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