

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-000414-MR

LASTEVEN CLEAVER

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 00-CR-00117

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE. LaSteven Cleaver (hereinafter appellant) appeals from an order of the Hardin Circuit Court revoking his probation. Appellant pled guilty to fleeing or evading police in the first degree, three counts of wanton endangerment in the first degree, possession of marijuana, possession of drug paraphernalia, resisting arrest, operating on a suspended operator's license, and operating a motor vehicle under the influence. Appellant was sentenced to a total of ten years'

imprisonment, and his sentence was probated for a period of five years. His probation was subject to various conditions, including that appellant submit to random alcohol and drug testing.

The Department of Probation and Parole reported that appellant's urinalysis of October 7, 2002, tested positive for cocaine. On November 4, 2002, the Commonwealth's Attorney filed a motion to show cause why probation should not be revoked. The trial court held a hearing on January 21, 2002. At the hearing the Commonwealth produced a faxed copy of the test results from a laboratory which showed a positive test result for cocaine.

Appellant testified at the hearing. He stated that on October 7, he went for an office visit with his probation officer. He testified that before he left he asked to use the restroom, and also reminded the officer that he had not provided a urine sample for drug testing since February. The probation officer decided to collect a sample at that time. The officer testified at the hearing that the time of the collection of the sample was approximately 8:45 a.m., as noted on a custody and control form. Appellant disputed the time of collection on the form because he said he did not arrive at the Probation and Parole Office until between 10:00 and 10:30 a.m. The officer performed a "field test" in the office before sending the sample to a lab. He informed appellant that his test showed that the

sample was "dirty," meaning that it revealed the presence of prohibited substances.

Appellant left the office and decided, based on prior advice from counsel, to have an independent laboratory test performed to challenge the accuracy of Probation and Parole's test. That same day, appellant went to Acute-Care in Elizabethtown, which provides testing services for the general public. According to the chain of custody on the report, collection of the second sample occurred at approximately 11:30 a.m. At the hearing, appellant submitted the independent laboratory results which reported that appellant's specimen was negative for any prohibited substance, including cocaine metabolites.

The trial court stated its decision came down to weighing the tests submitted by the parties. The evidentiary standard before the trial court was a preponderance of the evidence. Rasdon v. Commonwealth, Ky. App., 701 S.W.2d 716, 719 (1986). The court found the Commonwealth's test to be more credible for two reasons. First, it was an observed sample, meaning that the officer directly observed collection of the urine sample. Second, the court found it was a more sensitive screen than the one obtained by appellant. The trial court noted from the forms that the Commonwealth's test had a lower cutoff value and deduced that the Commonwealth's test was more

sensitive. The court concluded that the more sensitive test which was directly observed was more credible than the less sensitive test which was not directly observed. The court thus found that the Commonwealth had sufficiently established proof of a probation violation. Appellant appeals the order revoking probation.

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 requirements include (a) disclosure of evidence against the defendant; (b) opportunity to be heard; (c) the right to confront and cross-examine adverse witnesses; and (d) a written statement by the factfinder as to the evidence relied on and reasons for revoking probation. Morrissey, 408 U.S. at 488, 92 S. Ct. at 2604. Informal hearings are acceptable under the minimum due process requirements. Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503 (1986). Kentucky Rules of Evidence (KRE) 1101(d)(5) provides that the rules of evidence do not apply in proceedings for revoking probation. In

these hearings, hearsay may be admitted. Tiryung, 717 S.W.2d at 504.

On appeal, appellant first claims that he was denied due process of law by the admission of the faxed laboratory report because it did not bear indicia of reliability. Appellant argued at the hearing that he could not verify the authenticity of the information in the documents because it was merely a copy of an unseen original. On appeal, appellant does not assert that any part of the facsimile documents was irregular. The trial court noted that the faxed copy documented with a phone number where the fax originated. The faxed laboratory report included a chain of custody form containing signatures. The court overruled the objection, finding no basis for believing that any part of the forms had been doctored.

We find no authority on the question of whether a faxed copy is a lesser version of the original such that its introduction violates due process in the context of a probation revocation. We believe that the facsimile copy was suitable for purposes of a revocation hearing. Hearsay is allowed in a revocation hearing by the suspension of the rules of evidence in probation proceedings. KRE 1101(d)(5). In addition, if the best evidence rule is not applicable, an original writing is not required by KRE 1002. Incidentally, Justice Cooper has opined, in dissent, that "a facsimile is, in fact, a 'duplicate' under

KRE 1001(4) and admissible under KRE 1003." Hart v. Commonwealth, Ky., 116 S.W.3d 481, 487 (2003). In any event, we have no reason to believe from the evidence that the fax failed to provide an accurate copy of the laboratory report. Due process in probation proceedings requires only the disclosure of the evidence against appellant and an opportunity for appellant to be heard as to the claimed violations. Morrissey, 408 U.S. at 488, 92 S. Ct. at 2604. Appellant was afforded due process. We find no error.

Next, appellant argues that, under the Commonwealth's burden of proof, the fact that he provided countervailing negative laboratory results should have prevented a finding for the Commonwealth and tipped the scales in his favor. He complains that the trial court effectively invalidated his report and elevated the Commonwealth's report to a level of reliability which it did not possess. He further maintains that the fact that the original was not produced weighs against certitude in the Department of Probation and Parole's results. Appellant particularly argues his laboratory results were properly collected and just as reliable.

Appellant cites Kentucky Corrections Policy and Procedures which allow unobserved collection when the gender of the officer is different from the probationer. At Acute-Care, a female employee collected a sample from appellant. She did not

directly observe the collection, but stood behind appellant as he stood in a bathroom stall with the door open. In addition, no other containers were permitted in the stall, a dye substance was used in the commode to prevent test subjects from altering or diluting the sample, and a temperature strip was used on the sample to ensure it was given contemporaneously. Appellant argues these safeguards for testing are no less stringent than those required by the Commonwealth's lab to ensure that a sample is not substituted or tampered with. He believes it was error for the court to reject his test results.

The standard of review in revocation cases is whether the court abused its discretion in revoking probation. Tiryung, 717 S.W.2d at 504. We find no abuse of discretion in the trial court's finding that the Commonwealth's report was more reliable than the independent test. The trial court clearly articulated a reasonable basis for finding that the test results were not equivalent. Moreover, even if we accept appellant's argument that there was no more risk of tampering under Acute-Care's methods<sup>1</sup> than the Commonwealth's, appellant fails to adequately distinguish the court's finding that the Commonwealth's test was more sensitive.

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<sup>1</sup> The Commonwealth does not agree with this argument and asserts that Acute-Care's method was lacking because appellant was not searched prior to collection of the sample.

The records show that the Commonwealth's test consisted of an initial screen, followed by a gas chromatography and mass spectroscopy (GC/MS) confirmation following the positive result. The screen had a cutoff of 300 ng/mL, while the GC/MS cutoff was 150 ng/mL. Thus, the Commonwealth's test to confirm was indeed more sensitive and more accurate. The test appellant obtained at Acute-Care consisted only of the screen, with a cutoff of 300 ng/mL. The independent test did not conduct a confirmation test since, according to the report, only positive results are confirmed by a mass spectrometric technique. As a result, appellant's test failed to satisfy the court that it held the same level of precision.

Appellant calls attention to the fact that the Commonwealth's test registered a positive with a level of 567 ng/mL, yet the independent screen did not register a positive despite the fact that its threshold was below that at 300 ng/mL. Of course, appellant's test was done later in time. In any case, we do not believe it was necessary for the Commonwealth to distinguish the independent screen as long as the Commonwealth produced a reliable test which showed a probation violation. The court's decision certainly was not arbitrary, and therefore, we affirm the decision to revoke.

For the foregoing reasons, we affirm the order of the Hardin Circuit Court.

ALL CONCUR.

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