

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000383-MR

KIT PRESCOTT

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 04-CR-00045

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

ACREE, JUDGE: Kit Prescott appeals from an order of the Hardin Circuit Court revoking his probation and sentencing him to twenty years' imprisonment. Prescott argues the trial court denied him due process by revoking his probation after a hearing because the Commonwealth failed to introduce sufficient evidence that he possessed an illegal controlled substance. We disagree and affirm the trial court.

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Prescott had been convicted of two counts of first-degree trafficking, second or subsequent offense. The charges against him were Class B felonies, and Prescott was sentenced to a total of twenty years' imprisonment. The trial court ordered him to serve two hundred forty days and probated the balance of Prescott's sentence. One of the explicit conditions of his probation was that Prescott not possess any controlled substance unless it was prescribed by a physician. Prescott was released on May 7, 2005. The Commonwealth moved to revoke his probation on December 14, 2005, on the grounds that he had been cited for possession of marijuana and was associating with persons convicted of felony and misdemeanor offenses. The trial court, after an evidentiary hearing, revoked Prescott's probation solely on the basis of his possession of marijuana. This appeal followed.

Prescott argues that the findings of the trial court were inadequate and were not supported by the evidence. In its order revoking his probation, the trial court stated

The Court finds by a preponderance of evidence that the Defendant violated the terms and conditions of his probation by possessing marijuana, an illegal controlled substance.

The Court does not find that the Defendant violated the terms of his probation by having contact with convicted felons as the evidence presented to the Court indicated that those individuals. . . appeared to initiate the contact observed and reported by the investigating officer.

“Revocation proceedings do not require proof beyond a reasonable doubt but merely proof of an occurrence by a preponderance of the evidence.” *Rasdon v. Commonwealth*, 710 S.W.2d 716,719 (Ky.App. 1986). (Citation omitted.)

Officer Brian Smith was the only witness at the revocation hearing to testify about finding the marijuana which Prescott allegedly possessed. Smith, a member of the Radcliffe Police Department, had been advised of an out-of-state arrest warrant for Prescott. While on patrol, Smith saw a vehicle he thought belonged to Prescott, so he decided to run the tags. After confirming that Prescott was, in fact, the car's owner, Smith pulled into a parking lot behind Prescott and approached him. Smith told Prescott about the warrant and asked to see his license. He then confirmed the warrant and, subsequently, arrested Prescott. Smith searched, handcuffed and placed Prescott in the back seat of Smith's cruiser.

Prescott's wife arrived at the scene, and police dogs were used to search both of their vehicles for drugs unsuccessfully. When they arrived at the police station, Prescott asked Smith whether he planned to search the backseat of his cruiser. Smith responded that he did. Prescott then asked that the search be conducted in his presence. When he searched the cruiser's back seat, Smith found a small baggie of suspected marijuana. The baggie's contents later tested positive for marijuana.

At the probation revocation hearing, Smith testified he thoroughly searched the cruiser's backseat when his shift began and that no one had been in the backseat that day prior to Prescott. Further, the marijuana was found directly beneath where Prescott had been sitting. Prescott introduced witnesses who testified that his clothing at the time of his arrest was not conducive to hiding anything on his person. He argued the police dog's failure to indicate the presence of drugs on his person, or in his car, outweighed the

officer's contention that there were no drugs in his cruiser prior to transporting Prescott to the police station. However, probation violations only require proof by a preponderance of the evidence. *Rasdon*, supra. Further, constructive possession of a controlled substance has been deemed sufficient to support a conviction for possession, which requires proof beyond a reasonable doubt. *Houston v. Commonwealth*, 975 S.W.2d 925, 927 (Ky. 1998). Consequently, we disagree with Prescott's claim that the evidence failed to support the trial court's order revoking his probation.

ALL CONCUR.

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