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2011 IL App (3d) 090982-U

Order filed November 8, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois
Plaintiff-Appellee,)	
v.)	Appeal No. 3-09-0982
)	Circuit No. 07-CF-2489
DANA PENAHERRERA,)	Honorable
Defendant-Appellant.)	Daniel J. Rozak, Judge, Presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* After the defendant tested positive for opiates, the circuit court revoked the defendant's probation. Because there was no evidence presented at the probation revocation hearing that the defendant ingested the hydrocodone for which she had a prescription and because there was no evidence that the judge failed to serve as a neutral arbiter at the hearing, the appellate court affirmed the circuit court's judgment.

¶ 2 The defendant, Dana Penaherrera, was charged with unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2006)) and unlawful possession of a hypodermic syringe or needle (720 ILCS 635/1 (West 2006)). She pled guilty to the former charge and was

sentenced to probation under section 410 of the Criminal Code of 1963 (720 ILCS 570/410 (West 2006)). Her probation was revoked after a hearing in which the circuit court found that she tested positive for opiates. The court eventually sentenced the defendant to one year of imprisonment. On appeal, the defendant argues that: (1) the court erred when it found she had an illicit drug in her system, as she had a prescription for hydrocodone; (2) the court erred when it denied her motion for a directed verdict; and (3) her due process rights were violated because the judge was not a neutral arbiter at the probation revocation hearing. We affirm.

¶ 3

FACTS

¶ 4 In 2008, in exchange for pleading guilty to unlawful possession of a controlled substance, namely, heroin, the defendant was sentenced to 24 months of probation. One of the terms of her probation required that she:

"Shall refrain from having in [her] body the presence of any illicit drug prohibited by the Cannabis Control Act, or the Illinois Controlled Substances Act, unless prescribed by a physician, and submit samples of [her] blood or urine, or both, for tests to determine the presence of any illicit drug as requested by the Court or [her] probation officer, and waives the right to confrontation to contest the results."

¶ 5 On October 23, 2009, the defendant tested positive for opiates in her system, and the State filed a petition to revoke the defendant's probation. When the case was called, the defendant told the court that she had a prescription for hydrocodone dated October 22, 2009. She obtained the prescription around 9:00 p.m. that night. There were only two pills in the bottle; the defendant claimed that she left the other pills at home. The court noted that the

defendant was called in the afternoon on October 22, "[a]nd after you were called, you decided you needed a prescription for something that would yield a positive for opiates." The defendant claimed she was at work and did not learn of the call until after she got the prescription at the hospital. When asked why she had gone to the hospital that night, the defendant stated:

"Because two days previously I had been there. Some kids ran out -- ten years ago I was in a head-on accident and I had a broken sternum. Two days ago two kids ran out in front of my car and my boyfriend was with me. I had to step on the brakes really hard and the seat belt locked up. And I also have chronic back pain."

¶ 6 Shortly thereafter, the court stated:

"I don't -- I flat-out don't believe you, ma'am. I mean, I can hear The Twilight Zone music in the background. You needed this prescription literally a few hours after you were called to come in for a drug test. That's just -- it's right out of a Rod Serling episode."

The court then set the case for a hearing on the petition.

¶ 7 On October 29, 2009, the circuit court held a hearing on the State's petition to revoke. At the outset of the hearing, the following exchange took place:

"[PROSECUTOR]: State would be proceeding -- I believe we have an agreed stipulation:

That if called to testify members from probation that work in the drug testing facility here in the courthouse would testify that defendant did test positive for opiates in the courthouse on October 23rd of 2009.

I believe those individuals would also testify that basically opiates -- a positive result for opiates can result from a number of things, specifically two of those things, one being heroin and one being hydrocodone, and those would both yield positive results for opiates on the drug test.

THE COURT: So stipulated?

[DEFENSE COUNSEL]: Yes, your Honor.

THE COURT: Any other evidence?

[DEFENSE COUNSEL]: I'm sorry. There is one other. The drug test result that was sent up from the drug testers does indicate on it that [the defendant] had a prescription for hydrocodone.

We are also stipulating there was a prescription for hydrocodone and she did have that prescription bottle with her in court on October 23rd.

THE COURT: Which she got the night before.

[DEFENSE COUNSEL]: Correct.

THE COURT: So stipulated?

[PROSECUTOR]: So stipulated, judge."

¶ 8 After the State rested, the defense counsel moved for a directed verdict, alleging that the State had not proved by a preponderance of the evidence that the defendant had an illicit drug in her system. The court took judicial notice of the previous in-court statements that the defendant obtained the prescription at 9:00 p.m., which was several hours after the call to inform her of the next day's drug test, and that the defendant said she did not learn of the call until after she had obtained the prescription.

¶ 9 The defendant's mother testified that she took the call for the drug test, which was some time between 1:00 and 2:30 p.m. She did not give the message to the defendant until at earliest 10:00 p.m. While she did tell the defendant's friend (who lived with the defendant and her mother) earlier about the phone call, she did not believe the defendant's friend relayed the message to the defendant. The defendant did not leave the house that night after receiving the message from her mother. The defendant did not mention a hospital trip to her mother.

¶ 10 After the defense rested and the parties completed arguments, the circuit court asked defense counsel a series of questions without objection of the parties. In her responses, defense counsel said that the prescription was for 15 pills and the defendant only brought two to court because she feared jail personnel would destroy them if she was taken into custody. Defense counsel also stated that there was no time listed on the prescription bottle. Also, defense counsel stated that the defendant's near-accident occurred around four days before the drug test, and the pain was manageable until October 22 when she aggravated the injury while at work. She did not go to the hospital immediately from work because she did not have medical insurance. She left work between 4:00 and 5:00 p.m. and went to an emergency room, where she had to wait because it was crowded.

¶ 11 The court also requested more information, including: (1) the defendant's work schedule, which indicated she left work on October 22 at 2:55 p.m.; (2) the hospital's discharge record, which did not list admission and release times, but did include instructions on caring for soft tissue injuries, chest contusions, and back pain; and (3) the prescription bottle, which did not list a time. After receiving and reviewing those materials, the court revoked the defendant's probation.

¶ 12 The defendant filed a motion to reconsider. At the hearing, defense counsel told the circuit court that a subpoena had been returned from the hospital, and the included documents showed that the defendant was admitted at 7:44 p.m. on October 22, 2009. Eventually, the court denied the motion and sentenced the defendant to one year of imprisonment based on the parties' agreed recommendation. The defendant appealed.

¶ 13 ANALYSIS

¶ 14 The defendant's first argument on appeal is that the circuit court erred when it found that the defendant had an illicit drug in her system, as she had a prescription for hydrocodone at the time of the test.

¶ 15 At a probation revocation hearing, the State has the burden to prove a violation by a preponderance of the evidence, and the defendant has "the right of confrontation, cross-examination, and representation by counsel." 720 ILCS 5/5-6-4(c) (West 2008)). "In evaluating whether the State met its burden, the trial judge is free to resolve inconsistencies in the testimony and to accept or reject as much of each witness's testimony as the judge pleases." *People v. Love*, 404 Ill. App. 3d 784, 787 (2010). Once the circuit court has found that the State has proven a probation violation, we will reverse that finding only if it is against the manifest weight of the evidence. *People v. Colon*, 225 Ill. 2d 125, 158 (2007).

¶ 16 In this case, a condition of the defendant's probation was to "refrain from having in [her] body the presence of any illicit drug prohibited by the *** Illinois Controlled Substances Act, unless prescribed by a physician." Opiates are Schedule II controlled substances under the Illinois Controlled Substances Act. 720 ILCS 570/206(b)(1) (West 2008). Among other things, the parties stipulated that the defendant tested positive for opiates, that she had a prescription for

hydrocodone that she obtained hours after her mother took a phone call from the court about the next day's drug test, and that hydrocodone can cause a positive test result for opiates. In light of the fact that there is no evidence in the record to indicate that the defendant in fact ingested the hydrocodone, we cannot say that the court's decision was against the manifest weight of the evidence. See *Love*, 404 Ill. App. 3d at 787.

¶ 17 The defendant's second argument on appeal is that the circuit court erred when it denied her motion for a directed verdict at the close of the State's case-in-chief. The State claims the defendant has forfeited this argument on appeal because she did not renew the motion at the close of the evidence. However, as defense counsel did repeat her argument in her closing argument, the defendant adequately preserved the issue on appeal. See *People v. Kelley*, 338 Ill. App. 3d 273, 277 (2003).

¶ 18 "In moving for a directed verdict, the defendant admits the truth of the facts stated in the State's evidence for purposes of the motion." *Kelley*, 338 Ill. App. 3d at 277. We review the circuit court's decision on a motion for directed verdict under the *de novo* standard. *Kelley*, 338 Ill. App. 3d at 277.

¶ 19 As previously stated, the State had the burden of presenting evidence that the defendant violated her probation by having an illicit substance in her system. The evidence in this case included that the defendant tested positive for opiates, that she had a prescription for hydrocodone that she obtained hours after her mother took a phone call from the court about the next day's drug test, and that hydrocodone can cause a positive test result for opiates. There was no evidence that the defendant in fact ingested the hydrocodone. Under these circumstances, we conclude that a reasonable mind could fairly conclude that the defendant had violated her

probation. See *Kelley* 338 Ill. App. 3d at 277. Accordingly, the circuit court did not err when it denied the defendant's motion for a directed verdict.

¶ 20 The defendant's third argument on appeal is that her due process rights were violated because the judge was not a neutral arbiter at the probation revocation hearing. While this issue has been forfeited on appeal because it was not raised in the circuit court (see, e.g., *People v. Enoch*, 122 Ill. 2d 176, 190 (1988)), the defendant requests that we review the matter for plain error, claiming that the evidence was closely balanced and that the alleged error denied her a fair hearing.

¶ 21 The plain-error doctrine allows a reviewing court to consider a forfeited error when plain error occurred and either: (1) "the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against [the defendant]"; or (2) "the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 22 There was no error in this case. At the initial appearance on the State's petition to revoke, the judge told the defendant he did not believe her story that she obtained the prescription without knowledge of the next day's drug test. Even if the that comment could be construed as improper, the judge made no such comments at the hearing on the State's petition. There is nothing in the record to indicate that the judge was anything but a neutral arbiter in this case. The defendant's claim that the judge was biased against her and violated her due process rights is purely speculative and lacks merit.

¶ 23 CONCLUSION

¶ 24 The judgment of the circuit court of Will County is affirmed.

¶ 25 Affirmed.