

2013 IL App (1st) 103662-U

FIRST DIVISION
February 4, 2013

No. 1-10-3662

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 C6 60584
	)	
JUDAH GILL,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where probation officer testified incompletely to the procedures for random drug testing of probationers, and the testing order and test result for defendant were not entered into evidence at probation revocation hearing so that the revocation rested upon the officer's uncorroborated testimony, State laid insufficient foundation for evidence used to revoke defendant's probation for testing positive for cannabis. One of defendant's fees was erroneously assessed, and the fines and fees order must be corrected to properly reflect the total fines and fees.
- ¶ 2 Pursuant to a negotiated guilty plea, defendant Judah Gill was convicted of possession of cannabis and sentenced to two years' probation with community service and fines and fees. Upon a later finding that defendant violated the terms of his probation by testing positive for cannabis,

the court revoked probation and sentenced defendant to one year in prison. Defendant contends on appeal that the probation revocation was improper because it was based solely upon hearsay evidence insufficient to prove the alleged violation. Similarly, he contends that he was deprived of his right to confront witnesses against him when the court relied upon test results where the sole witness in the revocation hearing did not perform or observe the testing. Lastly, both parties agree that the order imposing fines and fees must be corrected to vacate an improper fee and properly reflect the total of his fines and fees.

¶ 3 Defendant was charged with possession of cannabis for allegedly possessing more than 30 grams, but not more than 500 grams, of cannabis on or about March 16, 2009. On June 2, 2009, defendant pled guilty in exchange for a sentence of two years' probation with 40 hours' community service, and \$700 in fines and fees.

¶ 4 In March 2010, the State filed a petition to revoke defendant's probation. The petition as amended alleged that he (1) was arrested for driving under the influence and other vehicular offenses on September 15, 2009, said charges still pending in April 2010, (2) "tested positive for marijuana (110.8 ng/mL) on February 5, 2010," and (3) had not paid \$310 of his probation fee or any of the \$700 in fines and fees.

¶ 5 On November 1, 2010, the court heard the State's petition, with the State proceeding on the cannabis allegation alone.

¶ 6 Cathy Thomas testified that she was a probation officer for over 14 years and was defendant's probation officer in particular. On February 5, 2010, defendant reported in person to her and submitted to random drug testing, for which she prepared a drug testing referral document (the form). Officer Thomas explained that the collecting of testing samples occurs elsewhere in the courthouse where she works, and a probation officer either directs that the probationer show identification to the collecting technician or, if he has no identification, takes

him there to identify him personally. Defendant submitted to testing that day as directed and Officer Thomas received the results of the test. When the State asked Officer Thomas what the result of the testing was, the court sustained defendant's foundational objection. Officer Thomas then testified that she received back the form after testing, explaining that the form is sent to a laboratory along with the sample and that the result of the testing is entered into the probationer's record. The form – referenced as a State exhibit at the hearing but neither formally entered into evidence nor included in the record on appeal – bore identifying numbers for defendant and the signatures of both defendant and the technician who received and tested the sample. The result of defendant's testing, bearing the same identifying numbers, was "positive for marijuana."

¶ 7 On cross-examination, Officer Thomas testified that she did not conduct or witness "the drug screen," but that it was done by "the people that routinely conduct the drug testing in [that] courthouse." She did not receive a paper copy of the test result. On redirect examination, she testified that the probation department has a contract with the laboratory used in this case.

¶ 8 Defendant moved to strike Officer Thomas's testimony, arguing that (1) there was no foundation laid for admission of the test result as a business record, and (2) it was hearsay because Officer Thomas did not witness either the collection of the sample or its testing at the laboratory. Defense counsel acknowledged that "hearsay is allowable in probation hearings" but argued that the compound or "double" hearsay here should be stricken. The State argued that hearsay is admissible in revocation hearings and that the standard is not proof beyond a reasonable doubt but mere preponderance of the evidence. The motion to strike was denied.

¶ 9 In closing arguments, defendant reiterated the above argument and also noted that Officer Thomas had not testified that testing negative for drugs was a condition of defendant's probation. During arguments, defense counsel confirmed for the court that defendant signed the form. The court found that defendant violated the terms of his probation and therefore revoked it, noting

that one of the conditions of probation is obedience of the criminal laws so that using marijuana is a violation of probation "in and of itself."

¶ 10 Defendant timely filed a motion to reconsider the decision, arguing that the evidence against him consisted solely of hearsay – Officer Thomas's testimony to testing that she did not perform or witness, to which defendant had objected on foundational and hearsay grounds – so that the State failed to prove the allegations in its petition as amended.

¶ 11 On December 7, 2010, the court denied the motion to reconsider. Following arguments of the parties and defendant's address to the court, in which he admitted cannabis use, the court sentenced defendant to one year of imprisonment. Defendant's post-sentencing motion was denied, and this appeal timely followed.

¶ 12 On appeal, defendant contends that the revocation of his probation was erroneous because it was based solely upon hearsay evidence and thus insufficient to prove a violation of probation. Relatedly, he contends that his constitutional right to confront witnesses against him was violated when the test result was introduced into evidence by Officer Thomas though she did not perform or observe the testing.

¶ 13 One of the statutory conditions of probation is that the probationer "not violate any criminal statute of any jurisdiction." 730 ILCS 5/5-6-3(a)(1) (West 2010). When the State alleges that a defendant on probation has violated a condition of his probation, the "State has the burden of going forward with the evidence and proving the violation by the preponderance of the evidence. The evidence shall be presented in open court with the right of confrontation, cross-examination, and representation by counsel." 730 ILCS 5/5-6-4(c)(West 2010). Thus, where the trial court finds a violation of probation, we will reverse on the basis of insufficient evidence only if the finding was against the manifest weight of the evidence. *People v. Colon*, 225 Ill. 2d 125, 158 (2007).

¶ 14 A probation revocation hearing is a civil proceeding where the full protections of criminal due process do not apply. However, due process still requires a determination that the acts forming the basis for the revocation petition indeed occurred. Therefore, in a probation revocation hearing, there must be an opportunity to be heard and to present evidence, and there is a right to confront and cross-examine witnesses, unless good cause is shown for not allowing confrontation. *People v. Lindsey*, 199 Ill. 2d 460, 467, 472-73 (2002). Moreover, the probation revocation statute establishes an "absolute" right to confront and cross-examine witnesses. *Id.* at 474. Hearsay evidence is not competent evidence in a probation revocation proceeding; thus, if the defendant objects to hearsay testimony, that evidence is not competent to sustain the State's burden of proof. *People v. Renner*, 321 Ill. App. 3d 1022, 1026 (2001). The reason for this rule is that hearsay evidence does not tend to establish a fact sought to be proven. *People v. Lewis*, 28 Ill. App. 3d 777, 780-81 (1975). Cf. *People v. Varghese*, 391 Ill. App. 3d 866, 868, 873 (2009) (where defendant admitted probation violation, hearsay admissible at sentencing hearing for violation; nonetheless, double hearsay should be at least partially corroborated).

¶ 15 Section 115-5 creates a business records exception to the general rule prohibiting hearsay and states in relevant part:

"writing or record *** made as a memorandum or record of any act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter." 725 ILCS 5/115-5(a) (West 2010); *People v. Universal Public Transportation, Inc.*, 2012 IL App (1st) 073303-B, ¶ 47.

However, a document is not admissible as evidence under the business record exception if it "has been made by anyone during an investigation of an alleged offense or during any investigation

relating to pending or anticipated litigation of any kind," 725 ILCS 5/115-5(c)(2) (West 2010).

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility." 725 ILCS 5/115-5(a) (West 2010).

¶ 16 The foundation for a business record may be established through the testimony of any person familiar with the business and its mode of operation; the witness need not be the author of the document, and the author need not be unavailable to testify. *People v. Henderson*, 336 Ill. App. 3d 915, 921 (2003); *In re A.B.*, 308 Ill. App. 3d 227, 235 (1999). The admission of test results as a business record does not require the establishment of a chain of custody for the testing sample. *Henderson*, at 921. The trial court's determination of whether the business records exception applies is within its sound discretion and will not be reversed absent an abuse of discretion. *Universal Public Transportation*, ¶ 48.

¶ 17 Here, the State was required to show by a preponderance of the evidence that defendant tested positive for cannabis. The evidence presented in support of that proposition was that Officer Thomas referred defendant for drug testing, that the referral form was returned with defendant's signature and identifying numbers and with the signature of the technician who received and tested defendant's testing sample, and that the test result with the same identifying numbers were positive for cannabis. Officer Thomas did not conduct or observe the collection or testing of defendant's sample, so that her testimony that the test results were positive concerned an out-of-court statement – the result from the technician who conducted the testing – offered for the truth of the matter asserted. Moreover, Officer Thomas's testimony about the test result was double hearsay, in that she did not testify that the technician reported the result to her but instead that the result was entered by another person into defendant's probation record from which she had read it.

¶ 18 Defendant argues that the report was prepared in anticipation of litigation, which would irredeemably place it outside the business records exception. We conclude that it was not prepared in anticipation of litigation. Officer Thomas testified that defendant was referred for random drug testing, and that the results of that testing are generally entered on the probationer's record and here were entered on defendant's record. There is no reason on this record to infer that only positive results – that is, those that could lead to further litigation – are reported by the laboratory to the department and entered on the probationer's record; when all results are reported and recorded, the department knows that the probationer was tested as directed and the laboratory establishes that it performed its contractual duty.

¶ 19 Notwithstanding the fact that we concluded that the report of the test results was not prepared in anticipation of litigation, we disagree with the State's assertion that the business records exception applies and renders the evidence admissible and competent. Officer Thomas's testimony hinted that the probation department has a procedure in the regular course of its business for random drug testing of probationers, that the firm contracted by the department to conduct the testing has a corresponding procedure in the course of its regular business, and that those procedures were followed in defendant's case. However, we find that Officer Thomas and the State elided some of the steps in that procedure rather than properly utilizing it. Moreover, it is highly questionable whether the business record exception applies on this record, as neither the referral form nor the notation of the test result on defendant's probation record were ever offered into evidence by the State at the revocation hearing. The only evidence actually presented during the hearing to the court was Officer Thomas's testimony, not the documents upon which she based that testimony. Stated another way, her double-hearsay testimony was not validated by the documents in question.

¶20 Having concluded that the trial court erred in admitting Officer Thomas's testimony, we must determine whether to reverse defendant's probation revocation outright or vacate his revocation and remand for a new revocation hearing. Where the evidence presented at the first trial or hearing, including the improperly-admitted evidence, was sufficient to convict, remand for a new trial or hearing is appropriate so that the State may lay a proper foundation for the improperly-admitted evidence. *People v. McKown*, 236 Ill. 2d 278, 311-13 (2010). We find that defendant testing positive for the use of cannabis is sufficient to support revocation of his probation, and that the State could lay a foundation for evidence that he tested positive, so that remand is proper.

¶ 20 Relatedly, defendant contends that the admission of Officer Thomas's testimony to the testing result violates his constitutional right to confront witnesses against him. In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that it is a violation of the Sixth Amendment right of confrontation to admit a witness's out-of-court testimonial statements unless the witness is unavailable for trial and there was a prior opportunity for cross-examination. However, the Sixth Amendment applies to "all criminal prosecutions." U.S. Const., amend. VI. As stated above, a probation revocation proceeding is civil in nature. *Lindsey*, at 467. Therefore, we hold that *Crawford* does not apply in probation revocation hearings as they are not criminal prosecutions under the Sixth Amendment. See *People v. Banks*, 237 Ill. 2d 154, 203 (2010)(*Crawford* inapplicable in sentencing hearing); *State v. Marquis*, 257 P.3d 775, 779 (Kan. 2011) and cases cited therein (*Crawford* inapplicable in probation revocation proceedings); *U.S. v. Washington*, 336 F. App'x 343, 346 (4th Cir. 2009) and cases cited therein (*Crawford* inapplicable in supervised-release revocation proceedings).

¶ 21 Moreover, even if we were to hold that *Crawford* applies to probation revocation proceedings, we would conclude that this case does not run afoul of *Crawford*. "Business and

public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). Conversely, "[w]hether or not they qualify as business or official records, the analysts' statements [of test results] here – prepared specifically for use at petitioner's trial – were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment." *Id.* Thus, the Supreme Court has clarified that the crucial factor in determining whether the admission of a business record is constitutionally permissible under *Crawford* is whether the record was prepared in anticipation of litigation. As stated above, we find that the referral form and the record of defendant's test result were not prepared in anticipation of litigation.

¶ 22 Lastly, defendant contends, and the State agrees, that one of his fees is erroneous and that the fines and fees order improperly reflects the total of his fines and fees. Though we are vacating his probation revocation, his fines and fees were assessed upon his underlying conviction. The parties are correct that the \$5 court system fee must be vacated because it applies only to vehicular offenses. 55 ILCS 5/5-1101(a) (West 2010). We also agree with the parties that the total of fines and fees here should be \$675 rather than \$700 as the order states.

¶ 23 Accordingly, the judgment of the circuit court revoking defendant's probation is reversed and this cause is remanded for further proceedings. Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), the \$5 court system fee is vacated and the clerk of the circuit court is directed to correct the order assessing fines and fees to reflect (1) that modification and (2) that the fines and fees total \$675.

¶ 24 Reversed and remanded; order corrected.