Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-266

MAY TERM, 2009

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

MAY 29 2009

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Rutland Circuit
	}	
Stacy Silva	}	DOCKET NO. 219-2-06 Rdcr

Trial Judge: William D. Cohen

In the above-entitled cause, the Clerk will enter:

Defendant appeals from the trial court's order revoking her probation. She argues that the court erred in finding that she violated certain conditions of probation. We affirm.

In May 2006, defendant pled guilty to one felony count of possession of 2.5 grams or more of cocaine in violation of 18 V.S.A. § 4231(a)(2) and one felony count of sale of less than 2.5 grams of cocaine in violation of 18 V.S.A. § 4231(b)(1). She was sixteen years old at the time. She was sentenced to three to ten years, all suspended, and placed on probation. In August 2007, the trial court found that defendant violated several conditions of probation, including failing to meet with her probation officer (PO) for scheduled appointments and failing to maintain full-time employment or be in a full-time verifiable work search. The court split her sentence on the first count, and remanded her to the custody of the Commissioner of Corrections for a period of not less than three years and not more than five years, and required her to serve ten months, with credit for eight months served. As to the second count, the court imposed a zero to five year sentence, suspended, with probation, to run consecutively. The court imposed the same conditions of probation as originally mandated.

In December 2007, defendant's PO filed another probation violation complaint, which was later dismissed without prejudice at the PO's request. In April 2008, a third probation violation complaint was filed. The complaint alleged, in relevant part, that defendant (1) failed to report as directed by her PO on two occasions in violation of Condition F of her probation agreement; (2) admitted to her PO that she had relapsed on Buprenorphine and tested positive for cocaine in violation of Condition L and Condition 32; (3) failed to perform any community service as ordered; and (4) violated Condition 34 by failing to complete the Job Corps program. The complaint sought to have defendant held without bail pending her entry into a residential substance abuse treatment facility. Defendant failed to appear at a Rule 5 hearing on the complaint, and she was subsequently arrested and held without bail. On May 13, 2008, defendant's PO filed an addendum to the probation violation complaint, alleging additional violations of Conditions F and 32. The PO indicated that following defendant's arrest, she tested positive for cocaine, Buprenorphine, and THC. Additionally, correction officials received information that defendant brought approximately sixty-five grams of crack cocaine into the correctional facility, which defendant allegedly admitted. The PO also indicated that defendant failed to show up for her arraignment, and that she had made no attempt to contact the PO or to take care of her legal responsibilities as an individual on probation.

Following a hearing, the trial court found that defendant had violated multiple conditions of probation. It was undisputed that she failed on several occasions to meet with her probation officer as directed, which violated Condition F. Condition L provided that she was not to buy, have, or use any regulated drug unless prescribed by a doctor. The court found that defendant had admitted to her probation officer that she was taking medication, Buprenorphine, for which she did not have a prescription. Thus, she was in violation of Condition L. Condition 32 similarly required that defendant not purchase, possess or consume any regulated drug without a valid doctor's prescription, which the court also found that defendant had violated by her own admission to using Buprenorphine.[1] Additionally, defendant violated a condition that required her to perform 150 hours of community service within three years. The court found that defendant had made no attempt whatsoever to meet this requirement. Finally, defendant violated Condition 34, which required her to attend, participate and complete any educational program in which she was referred by her PO. The court explained that defendant had been referred to the Job Corps program, but she had not completed that program as directed by, and to the full satisfaction of, her PO.

As to the May addendum to the probation violation complaint, the court found that defendant had admitted to a corrections employee that she brought 65 grams of crack cocaine into the correctional facility. The court noted that defendant had raised an issue about "corpus delicti," which at common law means "the body of the crime." State v. Fitzgerald, 165 Vt. 343, 350 (1996). This rule appears to be limited to criminal proceedings, as it is designed "to foreclose the possibility of conviction based on false confession where, in fact, no crime has been committed." Id. The rule "mandates that where the State's case is based on a confession, the corpus delicti must be corroborated by independent evidence." Id. It does not require that "corroborating evidence . . . independently prove commission of the crime beyond a reasonable doubt," and "even slight corroboration may be sufficient." Id. The trial court assumed that the rule applied and found defendant's admission to bringing crack cocaine into the prison facility sufficiently corroborated by testimony from a corrections officer. See id. (stating that it is the province of the trial court to decide if there is adequate corroboration). The officer testified that, after obtaining information that defendant brought cocaine into the facility, prison officials conducted drug tests on thirty-three inmates, and an unusually high number of individuals tested positive for cocaine. The court thus found a violation of her probation based on this behavior as well.

At a sentencing hearing in June 2008, the court concluded that defendant would be best served by entering the Tapestry Program, and she would be eligible for this program only if her probation was revoked. The court recognized that it could impose a short sentence and allow defendant to enter a short-term treatment facility, but it had less confidence that a short-term residential treatment program would be as effective for defendant. It also found that it would be inappropriate, given defendant's behavior, to simply place her back on probation. The court made it clear, however, that its decision to revoke probation was based on defendant being able to enter the Tapestry Program, and it emphasized that if for any reason defendant was not eligible for this program because of a Department rule or regulation (as opposed to defendant's own behavior), counsel could file a motion to modify and the court would impose a different sentence. Defendant appealed.

We begin with defendant's challenge to the court's finding that she violated conditions L and 32 by taking Buprenorphine. Defendant maintains that her alleged admission to the probation officer

---

[1] This language appears to be essentially the same as the first portion of Condition L. Condition L also provides, however, that a probationer may be required to undergo random urinalysis testing.

was unreliable, and that there was no other evidence upon which to base a finding that she violated these conditions. She complains that the State failed to produce physical evidence or other reliable testimony to corroborate her alleged confession, and that it elicited hearsay evidence from the PO to show that she also admitted to employees at Job Corps that she used this drug. According to defendant, the only other credible evidence showed that she provided a clear urine sample, which contradicted her alleged admission.

At a probation revocation hearing, the State must prove that a probation violation occurred by a preponderance of the evidence. State v. Decoteau, 2007 VT 94, ¶ 8, 182 Vt. 433. It "may meet its burden by establishing that the probationer violated an express condition. If the State meets its burden, then the burden of persuasion shifts to the probationer to demonstrate that his violation was not willful but, instead, resulted from factors beyond his control." Id. The question of whether a violation occurred "is a mixed question of law and fact." Id. "The trial court must first determine what actions the probationer took and then make a legal conclusion regarding whether those acts violate probation conditions." Id. "Findings of fact fairly and reasonably supported by any credible evidence must stand," and we "will uphold the trial court's legal conclusions if reasonably supported by its findings." State v. Austin, 165 Vt. 389, 398 (1996).

The court's finding that defendant violated Conditions L and 32 by taking Buprenorphine is supported by the record here. At the hearing, defendant's PO testified that defendant admitted to her that she was taking Buprenorphine. Defendant did not have a prescription for this drug. Defendant suggests that the PO's testimony was unreliable hearsay, but in fact, as the trial court found, the testimony was nonhearsay because it was an admission of a party-opponent. See V.R.E. 801(d)(2) (a party's own statement offered against him or her is not hearsay). Thus, the court was not required to make a specific finding as to the reliability of this statement. Cf. Decoteau, 2007 VT 94, ¶ 12 (while rules of evidence do not apply in probation revocation proceeding, probationer has right to confront adverse witnesses, and thus, trial court must make an explicit finding whether there is good cause for dispensing with probationer's confrontation right and admitting hearsay into evidence). It is evident that the trial court found this testimony reliable, and it is for the trial court, not this Court, to assess the credibility of witnesses and weigh the persuasiveness of the evidence. Cabot v. Cabot, 166 Vt. 485, 497 (1997). Defendant asserts that there is evidence that she provided a clean urine sample on March 19, the day that she admitted using Buprenorphine to her PO. Evidence that defendant tested "clean" on March 19 is modifying evidence, however, and it does not show that the court's finding is clearly erroneous. Indeed, there is no evidence to show if defendant was tested for Buprenorphine, as opposed to cocaine use, on that date. There is credible evidence to support the court's finding as to defendant's use of this drug.

As to defendant's remaining contention, the record shows that in light of defendant's invocation of the "corpus deliciti rule," the court allowed the State to offer additional evidence of defendant's use of this drug, not for its truth, but to corroborate defendant's admission to her PO. The PO thus testified that she received information from the Job Corps program that defendant used Buprenorphine at the program. She indicated that she received a telephone call to this effect from the leader of the Job Corps crew, and she also received a memorandum from the acting social development manager who had interviewed defendant at the program. Defendant admitted to this individual that she had obtained and used Buprenorphine. This evidence was cumulative to the PO's testimony cited above, and it was elicited in response to defendant's assertion that the corpus delicti rule applied. Any error in its admission was harmless. See State v. Burgess, 2007 VT 18, ¶ 9, 181 Vt. 336 (reasoning that, if wrongly admitted evidence is cumulative, error is harmless beyond a reasonable doubt). Defendant does not pursue the corpus delicti rule on appeal, other than briefly referring to it in a

footnote. We thus consider this issue waived. See V.R.A.P. 28(a)(4); Johnson v. Johnson, 158 Vt. 160, 164 n.1 (1992) (Supreme Court will not consider arguments not adequately briefed). We note, in any event, that defendant does not cite any cases where the corpus delicti rule has been applied in a probation revocation proceeding, and in fact, she acknowledges that the case law is to the contrary. Defendant fails to show that the court erred in finding that she violated Conditions L and 32 by taking Buprenorphine.

Because the trial court's finding that defendant violated Conditions L and 32 is supported by credible evidence, we need not address defendant's challenge to the court's finding that she also violated Condition 32 by taking drugs into a correctional facility.[2] While defendant contends that the trial court committed plain error by admitting evidence to support this latter finding, she does not argue that her probation would not have been revoked absent this finding. See State v. Pelican, 160 Vt. 536, 538-39 (1993) (plain error exists "only in exceptional circumstances where a failure to recognize error would result in a miscarriage of justice, or where there is glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights," and "[p]rejudice must exist to demonstrate that error undermined fairness and contributed to a miscarriage of justice" (citation omitted)). Instead, she states only that "but for the confession, there would be no violation." As stated above, however, a violation of Condition 32 was also established by defendant's use of Buprenorphine. Any evidence about her admission to bringing crack cocaine into the prison was cumulative.

The record shows the court's decision to revoke defendant's probation is supported by numerous findings, which are in turn supported by the record. See 28 V.S.A. § 304(a) ("If a probation violation is established, the court has discretion to revoke probation and require defendant to serve the underlying sentence."); State v. Therrien, 140 Vt. 625, 628 (1982) (absent showing that trial court abused or withheld its discretion, enforcement of original sentence after finding of violation is without error). As noted above, the court found that defendant violated probation by taking Buprenorphine, failing to meet with her PO as directed, and failing to perform community service as ordered. As discussed below, she also violated probation by failing to complete the Job Corps program to the satisfaction of her PO. The court explained that it was revoking probation to allow to defendant, who was apparently homeless, to participate in a long-term residential treatment program. See 28 V.S.A. § 303(a), (b) (stating that violation of probation is "a necessary and a sufficient ground" for revocation, and identifying grounds on which court may revoke probation and order confinement of probationer). We are persuaded that the result would have been the same even without the challenged evidence.

This case is not like Decoteau, 2007 VT 94, ¶ 20, where the State attempted to establish the sole probation violation at issue—whether the defendant had attended and completed a residential treatment program to the satisfaction of his probation officer—though hearsay evidence. In that case, the hearsay evidence was integral to the court's decision to find a violation of probation and to revoke defendant's probation. Id. ¶ 19. The record here does not support the same conclusion, and indeed, defendant does not so argue. We conclude that the admission of the challenged evidence here was harmless and it was not plain error warranting reversal, particularly given that defendant violated Condition 32 through other behavior.

Finally, as referenced above, we reject defendant's challenge to the court's finding that she violated Condition 34 of the modified probation order by failing to complete the Job Corps program.

---

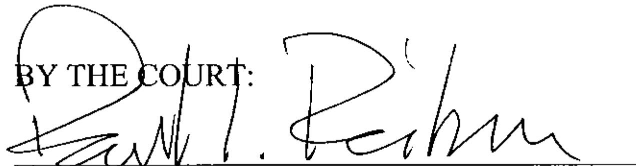
[2] Defendant suggests that the court did not make clear what conditions she violated by taking drugs into the prison facility. The State alleged in its complaint that this behavior violated Condition 32, however, and it is evident that this condition was at issue.

Defendant argues that the State failed to prove that she violated this condition by a preponderance of the evidence, and thus, the court's finding is clearly erroneous. Defendant acknowledges that her PO testified that defendant failed to complete the Job Corps program to her satisfaction. She asserts, however, that the tenor of the PO's testimony failed to indicate that defendant's participation in the Job Corps program was a necessary predicate to fulfilling Condition 34. Defendant points to evidence that she obtained her GED, as well as testimony from her PO that Job Corps was a voluntary program that defendant needed to initiate on her own. According to defendant, her discharge from Job Corps for alleged misconduct does not necessarily show that she violated this condition.

This argument is without merit. Condition 34 expressly required defendant to "attend, participate in and complete any educational program to which you are referred by your probation officer including but not limited to a GED, or high school diploma program, all as directed by and to the full satisfaction of your PO." The PO testified that Job Corps was a job training and educational program, and that she instructed defendant to participate in this program. Defendant began the program but she was asked to leave. Defendant met with her PO following her discharge from the program, and they discussed that her discharge was the result of drug use. The PO indicated that defendant did not complete this program to her satisfaction. The PO's recognition that she could not force defendant to attend Job Corps does not undermine this testimony. The court's finding that defendant violated this condition is amply supported by the record, and we find no error.

Affirmed.

BY THE COURT:



Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice