

SUPREME COURT OF VERMONT

State v. Decoteau

182 Vt. 433 (2007) · Decided August 31, 2007

SUMMARY

The Vermont Supreme Court reviewed a probation-violation and probation-revocation proceeding in which the trial court admitted a discharge summary and hearsay testimony concerning the defendant's removal from a residential treatment program. The court held that the hearsay lacked sufficient indicia of reliability and that the trial court failed to establish good cause for dispensing with the probationer's confrontation rights. Because the hearsay was central to the finding that the violation was willful, the court found plain error, vacated the revocation, and remanded for a new hearing.

OPINION

JOHNSON, J.

Johnson, J. ¶ 1. Defendant appeals a violation of probation and subsequent probation revocation. On appeal, defendant argues that the district court: (1) erred in admitting a discharge summary and hearsay testimony at the probation revocation hearing; (2) abused its discretion in finding that the probation violation was willful; and (3) violated defendant's Fourteenth Amendment due-process right to confront adverse witnesses.

We conclude that the trial court committed plain error in admitting the discharge summary and hearsay testimony; thus, we vacate and remand for a new hearing. ¶ 2. On July 5, 2005, defendant was arraigned for violation of an abuse prevention order. Subsequently, defendant was arraigned on additional charges, including disorderly conduct and violations of conditions of release.

Defendant entered several plea agreements to resolve these charges. Most recently, defendant entered a global plea agreement in February 2006. Pursuant to this agreement, he pleaded guilty to a violation of probation and was released on probation with several conditions, including that he attend, participate in, and complete a residential treatment program to the satisfaction of his probation officer.

On March 7, 2006, defendant entered a residential treatment facility called Serenity House. Ten days later, Serenity House staff contacted defendant's probation officer to inform him that they were discharging defendant from treatment for inappropriate language and threatening behavior. ¶ 3.

On March 20, 2006, defendant was arraigned on his probation-violation charge and held without bail. The court held a merits hearing on the probation-violation charge on May 17, 2006. At the

hearing, the State questioned defendant's probation officer regarding defendant's dismissal from Serenity House. Defendant's probation officer recounted that his overall impression from conversations he had with Serenity House staff, in particular defendant's caseworker, was that defendant's attitude and behavior had been counterproductive to treatment.

Defendant's probation officer stated that defendant's caseworker told him that staff reminded defendant on a daily basis to watch his attitude. Defendant's probation officer offered no dates or specifics concerning these conversations, but testified that the caseworker had spoken to defendant a couple of times, as had other staff members. Defendant did not object to the admission of this testimony. ¶ 4.

The State also introduced, without objection, the discharge summary from Serenity House. The discharge summary explained that, while in treatment, defendant "displayed intimidating behavior and made several derogatory remarks to female clients." In addition, the attached incident report explained that defendant was discharged for "violating program rules, such as using inappropriate language and threatening behavior." The report also commented that defendant exhibited a "general failure to follow clear cut staff directives." The report contained no specifics about conversations that staff had with defendant, and the progress notes contained no entries of particular instances when defendant violated program rules. ¶ 5.

Defendant testified at the hearing and recounted his version of events leading up to his discharge from Serenity House. Although he acknowledged three instances where his behavior may have been construed as inappropriate or threatening, he maintained that he had not threatened anyone and that Serenity House staff had warned him about his behavior on only one occasion prior to discharge.

Defendant explained that he felt another resident had falsely accused him of threatening behavior *437in order to have defendant removed from the program. The resident's roommate testified that he overheard the conversation between defendant and the resident in which defendant allegedly threatened the resident.

Although the roommate could not remember exactly what was said, he testified that there were no threatening comments and that the exchange seemed civil. ¶ 6. At the close of the evidence, defendant objected to the admission of the discharge summary and his probation officer's testimony regarding what his caseworker had relayed about defendant's behavior at Serenity House.

Defendant's counsel explained that she did not object sooner because she thought the caseworker would testify and thus be available for cross-examination. Without his live testimony, defendant argued that admission of the caseworker's statements through defendant's probation officer's testimony violated defendant's right to confront adverse witnesses. ¶ 7.

In response, the court noted that defendant did not object at the time the evidence was introduced. Nonetheless, the court considered the objection and held that the disputed evidence was admissible. The court noted that hearsay can be admitted at a probation-revocation proceeding if it bears indicia of reliability.

The court concluded that the discharge summary was reliable because it was the type of information a probation officer regularly relies on to make decisions. Further, the court reasoned that because the probation officer had direct communication with defendant's caseworker, who had the most knowledge about defendant's behavior, the content of these conversations was also reliable.

Addressing the merits, the court found that defendant knew he was required to complete a treatment program and that he did not complete this program. Further, the court found that defendant engaged in a pattern of disrespectful behavior, which he failed to correct after staff repeatedly spoke with him.

Thus, the court rejected defendant's argument that the violation was not willful and therefore did not amount to a violation of probation. Based on this violation, the court revoked probation and imposed the underlying sentence. This appeal followed. ¶ 8.

In a probation revocation proceeding, the State has the burden of establishing that a probation violation occurred by a preponderance of the evidence. *State v. Klunder*, 2005 VT 130, ¶ 7, 179 Vt. 563, 892 A.2d 927 (mem.).

The State may meet its *438burden by establishing that the probationer violated an express condition. *Id.* 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. *State v. Austin*, 165 Vt. 389, 398, 685 A.2d 1076, 1082 (1996).

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.* We will not disturb the court's findings if they are fairly and reasonably supported by credible evidence, and we will uphold the court's legal conclusions if reasonably supported by the findings.

Id. ¶ 9. On appeal, defendant first claims that the court erroneously admitted the discharge summary and defendant's probation officer's statements regarding what Serenity House staff members told him about defendant. Defendant argues that the statements are unreliable hearsay and should be excluded. Defendant contends that, without the hearsay evidence, the evidence does not support the court's finding that defendant's failure to complete the program was willful.

The State counters that defendant did not preserve his objection and that, in any event, the statements are reliable. ¶ 10. Defendant failed to make a timely objection to the admission of hearsay statements in his probation officer's testimony and the discharge summary at the time they were admitted. See *State v. Kinney*, 171 Vt. 239, 253, 762 A.2d 833, 844 (2000) (requiring party to make a timely motion to exclude evidence).

Although defendant claims his failure to make a timely objection was predicated on the assumption that defendant's caseworker would testify, such a misunderstanding does not rectify defendant's failure to object. Defendant's argument that he preserved the objection by challenging the admission at the close of the evidence also fails.

The party opposing introduction of evidence must object at the time the evidence is offered to preserve this issue for appeal. *Id.* (concluding that objection not preserved when made the day after the testimony was introduced). ¶ 11.

Having concluded that defendant failed to preserve his argument for appeal, we consider whether plain error applies in this situation. Generally, in civil proceedings, issues not raised below are waived. *Pope v. Town of Windsor*, 140 Vt. 283, 286, 438 A.2d 388, 390 (1981).

We conclude, however, that a plain-error analysis is appropriate in this case. Even though probation-revocation proceedings are not "essentially 'criminal' in nature," *State v. Brunet*, 174 Vt. 135, 141, 806 A.2d 1007, 1011 (2002), neither are the proceedings wholly civil. *State v. Leggett*, 167 Vt. 438, 446, 709 A.2d 491, 496 (1997) ("A probation-revocation proceeding is a hybrid criminal/civil proceeding.").

Furthermore, we have applied plain error in civil proceedings when "important interests and basic constitutional rights" were implicated. *Varnum v. Varnum*, 155 Vt. 376, 383, 586 A.2d 1107, 1110 (1990) (addressing mother's free exercise of religion claim, even though it was raised for the first time on appeal because "fundamental rights and interests [were] at stake").

Because defendant's claim involves his right to confront adverse witnesses and implicates the validity of the entire proceeding, we examine whether the court committed an error that "strikes at the heart of defendant's constitutional rights or results in a miscarriage of justice." *State v. Ayers*, 148 Vt. 421, 426, 535 A.2d 330, 333 (1987); see V.R.Cr.P. 52(b) (explaining that in exceptional cases where errors "affect[] substantial rights," error can lead to reversal absent a timely objection). ¶ 12.

Thus, we consider whether the court committed plain error in admitting the discharge summary and defendant's probation officer's testimony, both of which contained hearsay about why defendant was discharged from the program at Serenity House. Hearsay is not categorically inadmissible in a probation-revocation proceeding because the rules of evidence do not apply.

V.R.E. 1101(b)(3). A probationer is entitled to due process under the Fourteenth Amendment and, as such, is afforded the right to confront adverse witnesses. See *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (holding that a parolee is entitled to due process, including the right to confront and cross-examine adverse witnesses); see also *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 786 (1973) (extending due-process protections to probationers facing revocation).

Therefore, “a trial court must make an explicit finding, and must state its reasons on the record, whether there is good cause for dispensing with the probationer’s confrontation right and admitting hearsay into evidence.” *Austin*, 165 Vt. at 396, 685 A.2d at 1081.

Although we have not explicitly outlined the *440elements of good cause, we made clear in *Austin* that the reliability of the evidence is a key factor.¹ *Id.* ¶ 13. Defendant argues that the discharge-summary report and the probation officer’s hearsay statements do not bear sufficient indicia of reliability to be admissible.

In this case, the trial court reasoned that the probation officer’s testimony was reliable because he spoke directly with Serenity House staff, and that the discharge summary was reliable because it is the type of evidence probation officers routinely rely upon.

We disagree that these facts alone make the hearsay reliable and conclude that the hearsay evidence admitted in this case does not contain any of the typical guarantees of reliability. ¶ 14. We have not adopted a formal test to assess reliability, but some important considerations emerge from our review of past cases.

The first is the presence of corroborative evidence. See *Watker v. Vt. Parole Bd.*, 157 Vt. 72, 74, 596 A.2d 1277, 1279 (1991) (finding hearsay sufficiently reliable where defendant’s own testimony corroborated hearsay statements); *State v. Finch*, 153 Vt. 216, 218, 569 A.2d 494, 495 (1989) (concluding that hearsay testimony was reliable because the statements of the two hearsay declarants were mutually supportive).

Another factor is “whether the proffered hearsay is an objective fact reported by the declarant or instead contains conclusions which ought to be tested by cross-examination.” *Bailey v. State*, 612 A.2d 288, 294 (Md. 1992); see *Austin*, 165 Vt. at 397, 685 A.2d at 1081-82 (concluding that a police report does not bear indicia of reliability because unlike a urinalysis it is more personal and subject to inferences and conclusions).

Finally, hearsay evidence is more reliable if it contains a greater level of specific detail. See *Watker*, 157 Vt. at 77, 596 A.2d at 1280 (hearsay reliable where specific observations of various police officers included same details such as the weather and where the victim was found); see also *State v. James*, 2002 ME 86, ¶ 15, 797 A.2d 732 (including specificity as a factor in determining reliability of evidence). ¶ 15.

In light of these factors, we conclude that the evidence admitted by the trial court does not meet any of the traditional *441 guarantees of trustworthiness. First, there was no evidence to corroborate the hearsay allegations regarding defendant's misbehavior at Serenity House. Cf. Leggett, 167 Vt. at 440-41, 709 A.2d at 492-93 (affirming where ample direct evidence supported hearsay allegations).

Defendant's probation officer testified about what he heard from defendant's caseworker and the summary contained in notes by staff members, but no nonhearsay testimony supported these accounts of defendant's behavior at Serenity House or the measures staff took to address defendant's behavior. See *United States v. Taveras*, 380 F.3d 532, 537-38 (1st Cir. 2004) (concluding that hearsay testimony was unreliable where there was no corroborating evidence of the declarant's statement). ¶ 16.

We disagree with the dissent's contention that defendant's own statements corroborated, and were cumulative of, the hearsay evidence. Defendant testified that he did not complete the program, but explained that he followed staff instructions and did not threaten anyone at Serenity House.

In addition, although defendant admitted that he made inappropriate comments, he testified that Serenity House staff spoke to him about his behavior on only one occasion prior to his discharge. Rather than corroborating the hearsay statements, this testimony directly conflicted with the allegations that staff routinely spoke to defendant about his behavior, that he failed to follow staff instructions and that he engaged in threatening behavior. ¶ 17.

Second, the type of evidence introduced here contains judgments and conclusions, not objective facts. As the Maryland Court of Appeals in *Bailey* explained, "whether proffered hearsay evidence is a straightforward, objective fact observed by the declarant, or whether it contains inferences or conclusions drawn by the declarant, will weigh in the court's determination of its reliability." 612 A.2d at 294.

The hearsay admitted in this case did not recite objective facts about defendant's stay at Serenity House, but consisted primarily of conclusions and inferences concerning his behavior. Cf. *id.* at 295 (admitting hearsay letter from a treatment center where admitted for the sole purpose of demonstrating that probationer failed to complete the program and explaining the result might be different "if the State were alleging that [the probationer] violated his probation based on characterizations of [the probationer's] behavior").

For example, defendant's probation officer testified that his impression after speaking with defendant's caseworker was that *442 defendant's attitude was counterproductive to treatment. The discharge summary reported that defendant violated program rules and displayed threatening behavior, but provided no specifics of either.

The only objective fact in the report was that defendant had been discharged. This is the type of evidence we addressed in *Austin*, a case in which we distinguished a urinalysis report that relies on scientific data from a police officer's arrest report, concluding that the latter did not bear the same indicia of reliability because it was subject to personal opinion.

165 Vt. at 397, 685 A.2d at 1081-82 (citing *United States v. Bell*, 785 F.2d 640, 644 (8th Cir. 1986) ("While police reports may be demonstrably reliable evidence of the fact that an arrest was made,... they are significantly less reliable evidence of whether the allegations of criminal conduct they contain are true.")). Like the relationship between police officers and those they arrest, there is a personal and sometimes adversarial relationship between treatment providers and their patients; consequently, a treatment report, like a police report, is subjective and less inherently reliable than a laboratory report.² See *Bell*, 785 F.2d at 643-44 (explaining that police reports are inherently more subjective than lab reports because of the personal and adversarial relationship between officers and those they arrest). ¶ 18.

Finally, the hearsay allegations were not factually detailed, but rather stated as general statements and conclusions. Cf. *Egerstaffer v. Israel*, 726 F.2d 1231, 1235 (7th Cir. 1984) (finding statement reliable in part because it was reasonably detailed). Defendant's probation officer could not identify any particular conversations that staff had with defendant, nor did the discharge summary contain specific information about defendant's conduct.

Rather, the information that defendant's probation officer relayed in his testimony and that was contained in the discharge summary amounted to general allegations that defendant had displayed threatening behavior and violated rules.

In contrast, defendant offered detailed accounts of his behavior at Serenity House, including behavior or instances he thought staff may have *443 construed as threatening. He also recounted the conversation he had with his caseworker prior to his discharge. He was unable, however, to effectively rebut the hearsay allegations because he could not question witnesses to determine which behavior they deemed threatening or to ascertain when he had violated rules.

See *Mason v. State*, 631 P.2d 1051, 1055 (Wyo. 1981) (noting that it is impossible for the defendant to test the accuracy of statements made by state's witnesses if they are not available to testify and finding plain error where defendant was unable to demonstrate alternative theory).

Thus, in considering these factors, we conclude that none demonstrate that the evidence was reliable. ¶ 19. Having concluded that the hearsay evidence was not reliable, we further hold that the admission of hearsay was not harmless and was plain error.³ The hearsay evidence was critical to the main issue at trial — whether defendant's discharge from Serenity House was willful.

Defendant's entire theory at trial was that although he was discharged from Serenity House the discharge was due to circumstances beyond his control and was not a result of his willful conduct.

Thus, the information regarding defendant's behavior at Serenity House, the measures staff took to address his behavior and the ultimate reason for his discharge were the primary disputes at trial.

The State demonstrated defendant's behavior and the reasons for his violation solely through improperly admitted hearsay evidence. See *United States v. Comito*, 177 F.3d 1166, 1171 (9th Cir. 1999) (explaining that the more significant particular evidence is to a finding, the more important it is to demonstrate that the proffered evidence is reliable); *Mason*, 631 P.2d at 1057 (finding plain error in admission of hearsay testimony and concluding that defendant's interest in questioning the actual source of the information is far stronger when the evidence is introduced to establish a substantive violation, not merely defendant's general character). ¶ 20.

Moreover, the court relied on the hearsay evidence in its findings and in its decision to revoke probation. Specifically rejecting defendant's defense that his violation was not willful, the *444 court found that defendant "feels that other people are responsible for his conduct when, after ten days of conversations by staff his conduct remained unchanged, [and] he was discharged from that program." The court also found that defendant engaged in a pattern of inappropriate behavior.

The only basis in the record for the court's finding that defendant had engaged in a pattern of behavior that Serenity House staff tried to speak to him about on several occasions is the hearsay testimony related by defendant's probation officer.⁴ Defendant's testimony that staff spoke to him about his behavior only on one occasion directly contradicted these findings.

Although the district court found that defendant was not credible as a witness, there was no source independent of the hearsay evidence from which the court could find defendant had engaged in a pattern of inappropriate activity and that staff had continually confronted him about this behavior — findings that were integral to the court's decision to find a violation and revoke defendant's probation.

Compare *Leggett*, 167 Vt. at 444, 709 A.2d at 495 (affirming probation revocation where sufficient evidence supported finding without reliance on objectionable hearsay testimony), with *Austin*, 165 Vt. at 398, 685 A.2d at 1082 (holding that probation-violation finding was not supported by credible, non-hearsay evidence). Vacated and remanded for a new hearing.

Other courts consider additional factors, such as the availability of the declarant and "whether the evidence is offered to prove the principal contested issue in the violation or a matter peripheral thereto." *Bailey v. State*, 612 A.2d 288, 293 (Md. 1992).

The dissent contends that the potential bias or motive to fabricate present in a police affidavit following arrest is not present here because a counselor or probation officer does not have the same personal and adversarial relationship with a probationer as a police officer and an arrested person. Whether a counselor's relationship with a probationer is adversarial, the relationship is definitely personal and any reports are inherently subject to bias and interpretation.

Because we conclude that the hearsay testimony did not bear sufficient indicia of reliability to establish good cause, we do not reach defendant's additional arguments that the district court: (1) abused its discretion in finding that defendant's violation was willful, and (2) violated defendant's Fourteenth Amendment due-process right to confront adverse witnesses.

The dissent concludes that if there was error, it was harmless because defendant's own testimony supported the court's finding of a probation violation. Although defendant admitted that he was removed from the program, the court's conclusion that defendant's violation was willful relied on more than the simple fact that defendant did not complete the program.

The court's findings supporting its conclusion that his violation was willful - that staff spoke regularly to defendant and that defendant continually engaged in a pattern of inappropriate behavior - were based solely on the inadmissible hearsay evidence.

Thus, the admission of the hearsay testimony was not harmless because it supported the court's findings on the disputed issue in the case.