

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs) No. 11-0558 (Marshall County 08-F-63)

**Jesse Allen Wilson,
Defendant Below, Petitioner**

FILED
April 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Jesse Allen Wilson, by counsel Roger R. Weese, appeals the Marshall County Circuit Court order entered July 1, 2010, revoking his probation. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State, by counsel Laura Young, has filed its response.

This Court has considered the parties' briefs and the appendix on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner pled guilty to one count of entering without breaking and one count of petit larceny-second offense. Due to a prior felony conviction, petitioner's sentence was enhanced, and he received two to ten years for the entering without breaking charge and one year for the petit larceny charge, with the two sentences to run consecutively. The sentences were suspended in lieu of eighteen months of supervised probation. Within six months of sentencing, a petition to revoke petitioner's probation was filed after petitioner failed three drug screens in three months, testing positive for cocaine. After the petition was filed, petitioner ceased contact with his probation officer and failed to appear at the initial hearing on the petition for revocation. A capias warrant was issued for his arrest, and petitioner eluded police for over five months. A supplemental petition for revocation was filed, adding petitioner's failure to remain in contact with his probation officer and his failure to report changes in his address. Petitioner was eventually found by police, who received information as to his whereabouts. He was located hiding in the floorboard of a pickup truck that was pulled over by deputies.

Several hearings were held on the motion to revoke petitioner's probation, and petitioner testified that he was using Orajel during the time he tested positive for cocaine. Petitioner believes that the Orajel caused the positive screens. Further, petitioner admits that he knew there was a warrant for his arrest, but notes that he did not want to turn himself in or contact his probation officer for fear of missing his son's Christmas. Petitioner's counsel objected to the use of the drug test results, arguing that they were hearsay, but this argument was overruled. The confirmations of each positive drug test were presented as evidence as well, and each confirmed that petitioner had cocaine in his system. The circuit judge therefore revoked petitioner's probation. Petitioner moved for a modification of his sentence, but this also was denied.

On appeal, petitioner argues that the circuit court erroneously allowed the results of petitioner's drug tests into evidence without the confirmation results of the cocaine test being provided to the petitioner prior to the hearing. Petitioner contends that this violated his due process rights and relies on *State v. Brown*, 215 W.Va. 664, 600 S.E.2d 561 (2004). Petitioner argues that he was using Orajel for dental pain at the times he tested positive for cocaine, and that he tested positive at a low level. Further, he argues that the admission of the tests was hearsay. He also argues that he never moved from his residence and only stayed at some job sites, and that he did not check in with his probation officer because he believed that after the petition to revoke was filed that he no longer had to meet with him.

In response, the State argues that the *Brown* case is not on point, as the defendant in *Brown* had his probation revoked based solely on hearsay testimony regarding the confirmation of the drug tests, whereas in this case there were actual confirmation reports from the laboratory. Counsel for petitioner then questioned the probation officer regarding the confirmation sheets, and did not object to the confirmation sheets. Further, the State argues that the petitioner could have called the lab technician to testify as to whether the Orajel could cause a positive cocaine screen, but he produced no evidence in support of that contention. Additionally, the State argues that there was ample evidence to revoke petitioner's probation even absent the drug screens.

This Court has stated:

"When reviewing the findings of fact and conclusions of law of a circuit court sentencing a defendant following a revocation of probation, we apply a three-pronged standard of review. We review the decision on the probation revocation motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review." Syllabus Point 1, *State v. Duke*, 200 W.Va. 356, 489 S.E.2d 738 (1997).

Syl. Pt. 1, *State v. Inscore*, 219 W.Va. 443, 634 S.E.2d 389 (2006). Furthermore:

"The final revocation proceeding required by the due process clause of the Fourteenth Amendment and necessitated by *W.Va. Code* [§] 62-12-10, *as amended*, must accord an accused with the following requisite minimal procedural protections: (1) written

notice of the claimed violations of probation; (2) disclosure to the probationer of evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a 'neutral and detached' hearing officer; [and] (6) a written statement by the fact-finders as to the evidence relied upon and reasons for revocation of probation." Syl. Pt. 12, *Louk v. Haynes*, 159 W.Va. 482, 223 S.E.2d 780 (1976).

Syl. Pt. 2, *State v. Brown*, 215 W.Va. 664, 600 S.E.2d 561(2004). First, this Court points out that petitioner argued below that the *Brown* case governs this matter, but the circuit judge gave a lengthy response on the record indicating how this case differs from *Brown*. This Court concurs in the circuit court's assessment that the main issue in *Brown* was the hearsay testimony used to confirm the laboratory drug test reports. In this matter, the circuit court based its decision to revoke on multiple issues, not the least of which is the fact that petitioner in effect disappeared for nearly six months, knowing that there was a warrant for his arrest. This Court finds that the revocation hearings met all of the requirements stated above and we find no error in the revocation of petitioner's probation.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 16, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh