

NO. 01-24-00084-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
9/26/2024 11:56:49 PM
DEBORAH M. YOUNG
Clerk of The Court

Dimenisa Deshay Birdwell

VS

STATE OF TEXAS

Appeal from the 12th Judicial District Court
Grimes County, Texas
Cause No. 18786

APPELLANT'S BRIEF

Attorney for Appellant:

John W. Williford, Jr.
Attorney At Law
1202 Sam Houston Ave.
Huntsville, Texas 77340
Telephone: (936) 291-0882
john@willifordlegal.com

Attorney for Appellee:

Andria Mosley Bender
Grimes County District Attorney
270 FM 149
Anderson, Texas 77830
Telephone: (936) 873-2137
andria.bender@grimescountytexas.gov

ORAL ARGUMENT NOT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

The following is a complete list of all names and addresses of all parties to the Trial Court's final judgment and the names and addresses of all trial counsel:

Appellant:	Dimenisa Deshay Birdwell TDCJ Inmate # 02485705 SID Number: 06198380 TDCJ Unit: Murray 1916 North Hwy. 36 Bypass Gatesville, TX 76596
Counsel at Trial	Zach Coufal SBN: 24102829 2505 Willow Bend Drive Bryan, TX 77802 zctxatty@gmail.com
Counsel on Appeal:	John W. Williford, Jr. State Bar No. 21635600 1202 Sam Houston Ave. Huntsville, Texas 77340 <i>john@willifordlegal.com</i>
Appellee:	State of Texas
Counsel:	David Armbruster Grimes County Criminal District Attorney 270 FM 149 Anderson, Texas 77830 <i>andria.bender@grimescountytexas.gov</i>
Trial Court:	Hon. David Moorman 12 th District Court 1100 University Ave. Huntsville, Texas 77340 Tel: 936-436-4916 Email: <i>tmschweitzer@co.walker.tx.us</i>

TABLE OF CONTENTS

Identity of Parties and Counsel	ii
Table of Contents	iii
Index of Authorities	iv
Statement of the Case	1
Issue I. Presented:	1
THE COURT ERRED IN FINDING ALLEGED VIOLATIONS OF CONDITIONS 2D AND 2E AS TRUE. (<i>RRI 91; Appendix</i>)	
Issue I. Restated:	
No expert testimony was admitted supporting the allegation of THC consumption. (<i>RRI 18-20; CR 81; Appendix</i>)	
Issue II. Presented: -	1
THE COURT ERRED IN FINDING ALLEGED VIOLATION OF CONDITION 4 AS TRUE. (<i>RRI 91; CR 81; Appendix</i>)	
Issue II. Restated:	
No testimony was admitted supporting the allegation that Appellant had missed monthly reporting to probation as pled. (<i>RRI 20-22; Appendix</i>)	
Statement of Facts	2
Summary of the Argument	4
Argument and Authority	4
Conclusion	5
Prayer	6
Certificate of Service	6
Certificate of Word Count Compliance	7

Index of Authorities

CASES

Melendez-Diaz v. Massachusetts, 557 U. S. 305 (2009)

Cardona v. State, 665 S.W.2d 492 (Tex. Crim. App. 1984) 4

Cobb v. State, 851 S.W.2d 871 (Tex. Crim. App. 1993) 4

Leonard v. State, 385 S.W.3d 570 (Tex. Crim. App. 2012) 5

Moore v. State, 605 S.W.2d 924 (Tex. Crim. App. 1980) 5

STATUTES AND RULES

Penal Code Sec. 38.04(b)(2)(A) 1

3

STATEMENT OF THE CASE

Appellant was charged in one indictment with *evading detention in a vehicle* on October 5, 2020, a felony of the third degree, *Penal Code Sec. 38.04(b)(2)(A)*. (CR 4). Appellant pled guilty to the allegation and the Court entered a *Judgment Deferring Adjudication* on 9/27/21, which judgment placed Appellant on community supervision for a period of 2 years. (CR 22). Subsequently on 1/30/24, the Court after a contested hearing, adjudicated Appellant and sentenced her to **4 years confinement**. (RRI 1, 99; CR 92). On the same day of the hearing, Appellant gave notice of appeal. (CR 103).

Issue I. Presented:

THE COURT ERRED IN FINDING ALLEGED VIOLATIONS OF CONDITIONS 2D AND 2E AS TRUE. (RRI 91; Appendix)

Issue I. Restated:

No expert testimony was admitted supporting the allegation of THC consumption. (RRI 18-20; CR 81; Appendix)

Issue II. Presented: -

THE COURT ERRED IN FINDING ALLEGED VIOLATION OF CONDITION 4 AS TRUE. (RRI 91; CR 81; Appendix)

Issue II. Restated:

No testimony was admitted supporting the allegation that Appellant had missed monthly reporting to probation as pled. (RRI 20-22; Appendix)

STATEMENT OF FACTS

After Appellant was placed on deferred adjudication on 9/27/21 for *evading detention in a vehicle*, the State filed a motion to adjudicate on 9/29/23 and a first amended motion to adjudicate on 12/20/23. (*CR 62, 80*). On January 30, 2024, the trial court conducted a hearing and received evidence in support of the State's amended motion. The motion set forth a myriad of alleged violations consisting of performance of proscribed acts by Appellant, as well as failure to perform ordered acts of supervision. (*CR 80*). At the conclusion of the hearing, the trial court found the following alleged violations as true, to wit: violations 1B; 2A; 2B; 2C; 2D; 2E; 2F; 4; allegations of Condition 6 as to October 2021, January 2022, February 2022, May 2022, December 2022, and March 2023; Violation 9; and Violation 11, as to fees incurred prior to May of 2023. (*RRI 91*).

Appellant's supervision officer, Cassie Fowler testified that Appellant violated the conditions of the Community Supervision Order, as follows:

1. 1B, by Appellant failing to report Appellant's arrest on 9/14/23, by the Navasota Police Department within 48 hours of the contact with law enforcement. (*RRI 11-12*).
2. 2A; 2B; 2C; and 2F, all proscribed instances of illegal drug consumption, by Appellant admitting to illicit use of marijuana/THC on 11/23/21, 2/17/22, 9/29/22 and 7/04/23. (*RRI 12, 15, 16; RRII 5-7, 16*).

3. 2D and 2E, all proscribed instances of illegal drug consumption, by Appellant submitting urine samples which tested positive at the probation office for illicit use of marijuana/THC on 12/28/22 and 6/29/23. (*RRI 13, RRII 8, 13*). However, Appellant denied the use, so confirmation by an “outside testing laboratory” was requested but the results were not admitted. (*RRI 19-20*).

4. 4, by *merely reading the allegation* that Appellant failed to report in person to the Supervision Officer at the County Community Supervision and Corrections Department on a monthly basis for the months of December 2021, April 2022, August 2022, October 2022, January 2023, February 2023, April 2023, July 2023, September 2023, November 2023, and December 2023. However, after the probation officer read the allegation, the State *only asked* how many times the Appellant had reported *since December 20 of 2023*, a further allegation objected to by Appellant as not being plead. No other evidence or testimony was offered concerning condition “4” as pled. (*RRI 20-22*).

5. 6, by Appellant failing to work faithfully at suitable employment for the months of October 2021, January 2022, February 2022, May 2022, December 2022, March 2023, May 2023, June 2023, July 2023, August 2023, and October 2023. (*RRI 22*). The State’s supporting evidence merely consisted of the assertion that Appellant never submitted any verification of part-time or full-time employment. (*RRI 41*).

6. 9, by Appellant failing to pay costs incurred for alcohol and controlled substance testing in the amount of 114 dollars. (*RRI 22*).

7. 11, by Appellant failing to pay any Supervision Fees while on supervision, which included time frames in which Appellant was able bodied to pay but refused to pay. The supervision officer further testified and explained that Appellant became disabled in May of 2023. (*RRI 26, 34*).

SUMMARY OF THE ARGUMENT

The evidence admitted at trial was insufficient to support the trial court's finding of "True" to the alleged violations of conditions of supervision as pled in the *State's First Amended Motion to Adjudicate*, to wit: 2D; 2E; and condition 4. (*CR 80; Appendix*).

ARGUMENT and AUTHORITY

"The State's burden of proof in a revocation proceeding is by a preponderance of the evidence." *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). "When the State has failed to meet its burden of proof, the trial court abuses its discretion in issuing an order to revoke probation." *Cardona v. State*, 665 S.W.2d 492, 493-94 (Tex. Crim. App. 1984).

In the case at bar, the State failed to introduce admissible evidence, testimony from a lab analyst, that Appellant's urine tested positive for THC as alleged in violations 2D and 2E. As such, there was insufficient evidence supporting the trial court's finding that such allegations were "True." Analytical results by laboratory technicians are testimonial and inadmissible without the

accused having an opportunity to confront and cross-examine the lab analysts who prepared the results. *Melendez-Diaz v. Massachusetts*, 557 U. S. 305 (2009).

Likewise, the State failed to introduce any evidence supporting a finding of “True” by the trial court concerning condition 4. The mere reading of the pled allegation in open court isn’t evidence. A trial court abuses its discretion by adjudicating a probationer guilty without supporting admissible evidence. *Leonard v. State*, 385 S.W.3d 570 (Tex. Crim. App. 2012).

However, “[i]f the probation revocation can be upheld on one ground, the insufficiency of other grounds will not render the judgment erroneous. *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. 1980). In the case at bar, there were other grounds, supported by sufficient evidence, which would uphold an adjudication of guilt. Notwithstanding such other grounds, Appellant was not given the minimum sentence of two years incarceration for her violations, but was given a sentence of four years incarceration. Throughout the adjudication hearing, the State would offer extraneous bad acts and violations not pled, and the trial court would “allow and consider them only for punishment purposes” if need be - in the face of Appellant’s objections. (*RRI 21, 24, 31, 49*)

CONCLUSION

It is reasonable to believe that the trial court took into account its unsupported findings in assessing Appellant’s incarceration during the punishment phase, all to the wrongful detriment of Appellant.

PRAYER

Wherefore, Premises Considered, Appellant prays that this Court reverse the trial court's judgment and remand this case to the trial court for a new punishment hearing.

Respectfully submitted,

/s/ John W. Williford, Jr.

John W. Williford, Jr.

Bar No.21635600

1202 Sam Houston Ave., Suite 1

Huntsville, Texas 77340

Tel.: 936-291-0882;

john@willifordlegal.com

Attorney for Appellant

CERTIFICATE OF SERVICE

I, John W. Williford, Jr., certify that on this the 26th day of September, 2024, a true and correct copy of the above Appellant's Brief was forwarded to the District Attorney's Office for Grimes County, Texas, the counsel for the Appellee by electronic delivery and to the Appellant by mail, at:

Dimenisa Deshay Birdwell

TDCJ Inmate # 02485705

SID Number: 06198380

TDCJ Unit: Murray

1916 North Hwy. 36 Bypass

Gatesville, TX 76596

/s/ John W. Williford, Jr.

John W. Williford, Jr.

CERTIFICATE OF COMPLIANCE

(With Word Count)

I, John W. Williford, Jr., certify pursuant to the provisions of TEX. R. APP. P. 9.4(i)(3), that the word count of the foregoing Appellant's brief is **1,664 words**.

Respectfully submitted,
/s/ *John W. Williford, Jr.*
John W. Williford, Jr.

Cause # 18786

THE STATE OF TEXAS

§
§
§
§
§

IN THE 12TH DISTRICT COURT

VS.

OF

DIMENISA DESHAY BIRDWELL

GRIMES COUNTY, TEXAS

STATE'S FIRST AMENDED MOTION TO ADJUDICATE

The State of Texas, through the Grimes County District Attorney's Office, files this motion seeking to Adjudicate The Defendant's Guilt And Assess Punishment as a result of violations of rules of community supervision that were ordered by the Court on the date indicated below for the offense indicated below wherein the defendant received punishment as follows:

("CSCD" means Community Supervision and Corrections Department and "CSO" means Community Supervision Officer)

Date of Community

Supervision Order: September 27, 2021Judge: David MoormanOffense: Evading Arrest Detention W/Veh Or Watercraft
5, 2020Date of Offense: October☒ Felony, Degree: SJF☒ Deferred Adjudication, placed on community supervision for 2 Years☒ 9 Months Extension.☐ 0 Days Time Credit

The defendant has violated the conditions of the Community Supervision Order by failing to comply, indicated as follows:

CONDITIONS OF COMMUNITY SUPERVISION & VIOLATION

1. Commit no offense against the laws of this State or of any other State or of the United States or any governmental entity, and report to your Supervision Officer within forty-eight hours if arrested or questioned by a law enforcement officer;

VIOLATION:

a. The defendant committed the offense of Assault Causes Bodily Injury- Family Violence on September 13, 2023 in Navasota, Texas; the charge was rejected by the Grimes County District Attorney's Office.

b. The defendant failed to report to the supervision officer within forty-eight hours of an arrest conducted by the Navasota Police Department on September 14, 2023 in Navasota, Texas.

2. Avoid injurious or vicious habits and abstain from the use of any harmful substance, including any controlled substance, dangerous drug, or controlled substance analog in any form, except as prescribed by a licensed physician for legitimate medical purposes.

VIOLATION:

- a. The defendant submitted a urine sample that tested positive for marijuana/THC on November 23, 2021 and signed an admission statement to that effect.
- b. The defendant submitted a urine sample that tested positive for marijuana/THC on February 17, 2022 and signed an admission statement to that effect.
- c. The defendant admitted to using marijuana during an office visit on September 29, 2022 and signed a statement to that effect.
- d. The defendant submitted a urine sample that tested positive for marijuana/THC on December 28, 2022. These results were confirmed positive by Alere Toxicology Laboratories on December 30, 2022.
- e. The defendant submitted a urine sample that tested positive for marijuana/THC on June 29, 2023. These results were confirmed positive by Alere Toxicology Laboratories on July 4, 2023.
- f. The defendant submitted a urine sample that tested positive for marijuana/THC on August 8, 2023 and signed an admission statement to that effect.

4. Report in person to the Supervision Officer at the County Community Supervision and Corrections Department as directed by the Court and your Supervision Officer, at least once each calendar month, beginning immediately and continuing until you are discharged from Community Supervision, and obey all rules and regulations of the Community Supervision and Corrections Department as provided for you.

VIOLATION:

The defendant failed to report in person on a monthly basis for the months of December 2021, April 2022, August 2022, October 2022, January 2023, February 2023, April 2023, July 2023, September 2023, November 2023 and December 2023.

6. Work faithfully at suitable employment and notify your Supervision Officer within 48 hours of any change in said employment; support your dependents that you have now or that you may acquire during the term of this probation; and, report the sources and amounts of all income or money received and all debts and expenditures to your Supervision Officer.

VIOLATION:

The defendant has failed to work faithfully at suitable employment for the months of October 2021, January 2022, February 2022, May 2022, December 2022, March 2023, May 2023, June 2023, July 2023, August 2023 and October 2023.

9. At the request of your Supervision Officer, freely cooperate and voluntarily submit to medical and/or chemical tests and examinations for the purpose of determining whether or not you are using or are under the influence of alcohol, narcotic drugs, marijuana, or any other controlled substance, and pay for the same.

VIOLATION:

The defendant failed to pay costs incurred for alcohol or controlled substances testing in the amount of \$114.00.

10. Pay a fine, if one be assessed and the costs of Court, in one or several payments; in addition, pay court-appointed attorney's fees and make restitution in any amount the Court shall determine, to wit:

Attorney Fees	0.00
Court Costs	320.00
Fines	500.00
Restitution	1311.25
TOTAL	2131.25

The above unpaid total shall be paid in equal monthly installments over 23 months in the amount of \$46.52 per month, between the first and tenth day of every month, beginning (the next month following the entry of this order and continuing until paid)(the next month after release from incarceration/inpatient counseling/SAFP/Other and continuing until paid). The Court hereby finds that the above restitution is fair, just and reasonable and further finds the defendant has the present ability to pay the above unpaid total.

VIOLATION:

The defendant failed to pay Court Costs in the amount of \$320.00; the defendant paid \$0.00 and is delinquent \$320.00.

The defendant failed to pay Restitution in the amount of \$1311.25; the defendant paid \$300.00 and is delinquent \$1,011.25.

The defendant failed to pay a Fine in the amount of \$500.00; the defendant paid \$0.00 and is delinquent \$500.00.

11. Pay to the County Community Supervision and Corrections Department a supervision fee of \$60.00 per month every month of the probationary period to be due on the first day of the month beginning in the next month following entry of this order.

VIOLATION:

The defendant failed to pay supervision fees of \$60.00 per month; the defendant paid \$0.00 and is delinquent \$1,440.00.

15. Submit to an evaluation by a Supervision Officer or by a program, person, or facility approved by the Texas Commission on Alcohol and Drug Abuse for the purpose of having the facility prescribe and carry out a course of conduct necessary for the rehabilitation of any drug or alcohol dependence condition. You are to cooperate and participate in any recommended plan of treatment.

VIOLATION:

- a. The defendant failed to pay costs incurred for the substance abuse questionnaire in the amount of \$15.00.
- b. The defendant failed to pay costs incurred for an alcohol/drug evaluation in the amount of \$50.00.

51. Defendant shall make a one-time fine of \$50.00 to Grimes County Crime Stoppers Organization, as defined by Sec. 414.110 Government Code, and as certified by the Texas Crimes Stoppers Council payable to the community Supervision department within 90 days of the date of this judgment pursuant to CCP 42.301(b)(20) Program.

VIOLATION:

The defendant failed to make a one-time fine of \$50.00 to Grimes County Crime Stoppers Organization; defendant paid \$0.00 and is delinquent \$50.00.

52. Defendant shall make a one-time payment to the compensation to victims of crime fund in the amount of \$50.00 if the offense is a Misdemeanor and \$100.00 for a felony offense payable to the community supervision department within 90 days of the date of this judgment pursuant to CCP 42.301(b)(17).

VIOLATION:

The defendant failed to make a one-time payment to the compensation to victims of crime fund; the defendant paid \$0.00 and is delinquent \$100.00.

*****THIS IS AN AMENDED MOTION TO ADJUDICATE; THE ORIGINAL WARRANT HAS BEEN SERVED.*****

The State recommends that the court issue an order as follows:

_____ A warrant for the arrest of the defendant with a bond set at \$ _____.

_____ A summons to the defendant to appear in court.

20 Dec 2023

DATE



ATTORNEY FOR THE STATE

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Envelope ID: 92517074

Filing Code Description: Brief Not Requesting Oral Argument

Filing Description: Appellant's Brief

Status as of 9/27/2024 8:00 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Andria Bender		andria.bender@grimescountytexas.gov	9/26/2024 11:56:49 PM	SENT
Melissa Fuentes		mfuentes@co.walker.tx.us	9/26/2024 11:56:49 PM	SENT