

No. 01-24-00725-CR

In the First Court of Appeals
Houston, Texas

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
12/2/2024 12:48:03 PM
DEBORAH M. YOUNG
Clerk of The Court

LEE ANDREW BENSON,
APPELLANT,

V.

THE STATE OF TEXAS,
APPELLEE.

On Appeal from the 177th Judicial District Court
Harris County, Texas
Robert Johnson, Judge Presiding
In Cause No. 1624941

APPELLANT'S OPENING BRIEF

Counsel of Record:

Alexander Bunin
Chief Public Defender
Harris County, Texas

Douglas R. Gladden
Assistant Public Defender
State Bar No. 24076404
Douglas.Gladden@pdo.hctx.net

Harris County Public Defender's Office
1310 Prairie, 4th Floor, Suite 400
Houston, Texas 77002
T:713.274.6700 | F:713.368.9278

IDENTITY OF PARTIES AND COUNSEL

Appellant: Lee Andrew Benson

Represented by: **Douglas R. Gladden** (on appeal)
Assistant Public Defender
Harris County, Texas
1310 Prairie, 4th Floor, Suite 400
Houston, Texas 77002
713-274-6700

William R. Gifford (at revocation)
3605 Katy Freeway
Houston, Texas 77007

Appellee: The State of Texas

Represented by: Kim Ogg, *Harris County District Attorney*
Shalynn Arbour, *Assistant District Attorney* (at trial)
Heather Axline, *Assistant District Attorney* (at trial)
Jessica Caird, *Appellate Division Chief* (on appeal)
Harris County District Attorney's Office
1201 Franklin
Houston, Texas 777002

Trial Judge: Robert Johnson, Presiding
177th Judicial District Court
Harris County, Texas

TABLE OF CONTENTS

Identity of Parties and Counsel	2
Table of Contents.....	3
Index of Authorities	4
Statement of the Case	6
Issue Presented	7
Statement of Facts	7
Benson's probation officer testifies from the files.	7
A Fort Bend Sheriff's Deputy describes Benson's arrest.	9
Benson testifies in his own behalf.	9
Summary of the Argument.....	10
Argument.....	11
The trial court abused its discretion when it revoked Benson's community supervision.	
1. A trial court abuses its discretion in revoking community supervision if the evidence is insufficient for the court to find a violation by a preponderance of the evidence.	12
2. The evidence in this case is insufficient to support the trial court's single finding.	13
2.1. The probation officer was not a competent witness to testify about alleged violations by Benson.	14
2.2. The probation officer's testimony was conclusory and devoid of any facts.....	15
2.3. Benson's testimony does not support revocation.....	15
3. Conclusion.....	17
Prayer	17
Certificate of Compliance.....	18
Certificate of Service	18

INDEX OF AUTHORITIES

TEXAS CASES

<i>DeGay v. State</i> , 741 S.W.2d 445 (Tex. Crim. App. 1987)	12, 17
<i>Ford v. State</i> , 158 S.W.3d 488 (Tex. Crim. App. 2005)	15
<i>Garza v. State</i> , 126 S.W.3d 79 (Tex. Crim. App. 2004)	14
<i>Gold v. State</i> , 736 S.W.2d 685 (Tex. Crim. App. 1987)	16
<i>Hacker v. State</i> , 389 S.W.3d 860 (Tex. Crim. App. 2013)	12, 13, 15
<i>Jones v. State</i> , 571 S.W.2d 191 (Tex. Crim. App. 1978)	12, 13
<i>Lackey v. State</i> , 364 S.W.3d 837 (Tex. Crim. App. 2012)	14
<i>Moore v. State</i> , 605 S.W.2d 924 (Tex. Crim. App. 1980)	12, 13
<i>Rickels v. State</i> , 202 S.W.3d 759 (Tex. Crim. App. 2006)	12
<i>Wright v. State</i> , 603 S.W.2d 838 (Tex. Crim. App. 1980) (op. on reh'g)	16

TEXAS STATUTES

Tex. Code Crim. Proc. art. 42A.755	6, 12
Tex. Health & Safety Code § 481.112	6
Tex. Penal Code § 12.42	6

RULES

Tex. R. App. P. 43.2	17
Tex. R. Evid. 602	14

To the Honorable Court of Appeals:

Appellant, Lee Andrew Benson, respectfully submits this opening brief.

STATEMENT OF THE CASE

This is a revocation appeal. Tex. Code Crim. Proc. art. 42A.755(e).

Benson was indicted for possession with intent to deliver more than 4 grams and less than 200 grams of cocaine, enhanced by two prior felony convictions.¹ Tex. Health & Safety Code § 481.112(a), (d); Tex. Penal Code § 12.42(d).

In accordance with a plea-bargain agreement, Benson pleaded guilty, the State abandoned the enhancement paragraphs, and the trial court sentenced him to 10 years' confinement, suspended for 8 years' community supervision, and a \$500 fine.²

A little over three-and-a-half years later, the State filed a motion to revoke Benson's community supervision, alleging 12 violations of Benson's conditions.³ At the start of the hearing, there was some

¹ Clerk's Record (CR):25.

² CR:65–66, 79–85.

³ CR:87–88.

back-and-forth about Benson’s plea to the motion, but the court ultimately found in the judgment that he pleaded “not true.”⁴

After the hearing, the trial court granted the motion to revoke, finding that Benson violated one condition: “by using, possessing, or consuming an illegal drug.”⁵ The court sentenced Benson to five years’ confinement.⁶ This appeal follows.

◆

ISSUE PRESENTED

Revocation. The trial court found a single violation, but the greater weight of the credible evidence does not prove that violation. Did the trial court abuse its discretion in revoking Benson’s community supervision?

◆

STATEMENT OF FACTS

Benson’s probation officer testifies from the files.

Jennifer Williams, a probation officer with the Harris County Community Supervision and Corrections Department, took over supervising Benson on November 1, 2023.⁷ Based on CSCD records,

⁴ CR:114; RR:8–15.

⁵ CR:115; Reporter’s Record (RR):51.

⁶ CR:114; RR:51.

⁷ RR:17, 28.

she told the court that Benson had been placed on probation on October 27, 2020, that he had received the terms and conditions of his probation that same day, and that he signed them to indicate that he had read and understood them.⁸

Williams then testified that Benson did not comply with the terms of his probation, and that his failure to comply was “documented.”⁹ The prosecutor then asked Williams whether Benson had complied with a series of specific conditions; to each one, she said, “No.”¹⁰ Then, for each one, when asked “how he failed to comply,” Williams read the allegation in the motion to revoke.¹¹ Williams then testified that she filed the motion to revoke based on the violations.¹²

On cross-examination, Williams acknowledged that there had never been a motion for the court to have a hearing and admonish Benson.¹³ Instead, she said, Benson’s prior probation officer, Christopher Stelle, had referred him to substance abuse treatment, which Benson completed before Williams took over his case.¹⁴

⁸ RR:18–19.

⁹ RR:20.

¹⁰ RR:20–25.

¹¹ RR:20–25; State’s Exhibit (SE) 2.

¹² RR:25–26.

¹³ RR:27.

¹⁴ RR:11, 22, 27–28.

A Fort Bend Sheriff's Deputy describes Benson's arrest.

Deputy Jason Paradis of the Fort Bend County Sheriff's Office testified that, on June 15, 2024, he arrested Benson for assault family violence.¹⁵ He did not know the current status of the case.¹⁶

Benson testifies in his own behalf.

Benson testified.¹⁷ At the time of the hearing, he had been in the Harris County jail for about two and a half months.¹⁸ The complainant in the Fort Bend County case was his wife of 12 years; they were in the process of getting a divorce.¹⁹ He described the difficulties he had had in finding employment while on probation, and that these difficulties were exacerbated by his health issues—sleep apnea, pneumonia, heart failure, oxygen dependency, and diabetes.²⁰ He explained that his payment arrears were due to his having to pay bills and house payments to support his daughters.²¹

He acknowledged testing “dirty” for marijuana while on probation, but that his prior probation officer, Mr. Stelle, had told

¹⁵ RR:31–32, 35.

¹⁶ RR:36.

¹⁷ RR:37.

¹⁸ RR:37.

¹⁹ RR:37, 41, 43.

²⁰ RR:38–39, 43.

²¹ RR:40.

him to “get clean” and to finish drug classes.²² He completed the drug classes, which “eventually helped.”²³

At the end of his testimony, the court asked him whether he smoked marijuana on the specific dates listed in the motion to revoke.²⁴ Benson could not remember whether he smoked marijuana on six of those dates.²⁵ He denied smoking marijuana on two of the dates.²⁶ He admitted smoking marijuana on September 16, 2022.²⁷

◆

SUMMARY OF THE ARGUMENT

A trial court abuses its discretion in revoking community supervision based on a violation if the evidence is insufficient to support the court’s finding of a violation by a preponderance of the evidence. Preponderance of the evidence is the greater weight of the credible evidence, and it is a much higher standard than probable cause or reasonable suspicion.

In this case, the court found that Benson used, possessed, or consumed an illegal drug, but the evidence is insufficient to prove

²² RR:39.

²³ RR:40.

²⁴ RR:45–48.

²⁵ RR:45–47.

²⁶ RR:48.

²⁷ RR:48.

that by a preponderance of the evidence. Officer Williams was not competent to testify to such a violation, and her testimony was conclusory and insufficient even to meet reasonable suspicion, much less a preponderance of the evidence. Benson's testimony does not support the trial court's finding of such a violation, either. He could not remember or denied using marijuana on eight of the alleged dates. Meanwhile, the one time he admitted using marijuana was an incident that his previous probation officer had already successfully addressed. The trial court must not arbitrarily revoke probation based on conduct that had already been dealt with.



ARGUMENT

The trial court abused its discretion when it revoked Benson's community supervision.

The trial court found that Benson violated his conditions of community supervision by using, possessing, or consuming an illegal drug. But the evidence is insufficient to support that finding by a preponderance of the evidence, so the court abused its discretion in revoking Benson's community supervision.

1. A trial court abuses its discretion in revoking community supervision if the evidence is insufficient for the court to find a violation by a preponderance of the evidence.

A revoked defendant may appeal the revocation of his community supervision. Tex. Code Crim. Proc. art. 42A.755(e). A trial court's revocation of community supervision is reviewed for an abuse of discretion. *Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013); *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006).

Community supervision, "once granted, should not be arbitrarily withdrawn by the court and the court is not authorized to revoke without a showing that the probationer has violated a condition of his probation imposed by the court." *DeGay v. State*, 741 S.W.2d 445, 449 (Tex. Crim. App. 1987). To prevail on appeal, an appellant must successfully challenge all the findings that support the revocation order. *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. 1980); *Jones v. State*, 571 S.W.2d 191, 193–94 (Tex. Crim. App. 1978).

A trial court abuses its discretion in revoking a defendant's community supervision if the evidence is insufficient to support, by a preponderance of the evidence, the judge's determination that the defendant violated a condition of his community supervision. *Hacker*, 389 S.W.3d at 865; *Rickels*, 202 S.W.3d at 763–64.

"Preponderance of the evidence," while a lower standard than beyond a reasonable doubt, "is a much higher standard" than either probable cause or reasonable suspicion. *Hacker*, 389 S.W.3d at 865.

A preponderance of the evidence is “that greater weight of the credible evidence which would create a reasonable belief that the defendant has violated a condition of his probation.” *Id.* The trial judge, as factfinder in a revocation hearing, is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Id.*

2. The evidence in this case is insufficient to support the trial court’s single finding.

In this case, the State alleged numerous violations in its motion to revoke, but the trial court found only one to be true—that Benson “violate[d] terms and conditions of community supervision by using, possessing, or consuming an illegal drug....”²⁸

Thus, Benson need only successfully challenge this finding to prevail on appeal. *Moore*, 605 S.W.2d at 926; *Jones*, 571 S.W.2d at 193–94. And the greater weight of the credible evidence in this case does not support the court’s finding. The probation officer’s testimony was unqualified and conclusory, while Benson’s own testimony does not support anything but an arbitrary decision.

²⁸ CR:87–88 (motion to revoke), 115 (finding in judgment).

2.1. The probation officer was not a competent witness to testify about alleged violations by Benson.

Benson's second probation officer, Jennifer Williams, testified that Benson tested positive for drugs on various dates, but she did so merely by reading the allegation in the State's motion to revoke from the "file" maintained by the Harris County Community Supervision Department.²⁹

Williams never testified that she had personal knowledge of any facts to support this allegation. Accordingly, she was not a competent witness to testify about this. *See* Tex. R. Evid. 602 (witness may testify only to a matter for which the witness has personal knowledge).

True, Benson's attorney did not object to Williams's testimony, but that is of no matter here. The trial judge, as factfinder, is presumed to disregard inadmissible evidence when the court "is called on to decide the merits of the case." *Garza v. State*, 126 S.W.3d 79, 83 (Tex. Crim. App. 2004); *see also Lackey v. State*, 364 S.W.3d 837, 843 (Tex. Crim. App. 2012). Thus, the judge is presumed to have disregarded Williams's unqualified testimony that Benson tested positive for drugs.

²⁹ RR:21.

2.2. The probation officer's testimony was conclusory and devoid of any facts.

Furthermore, even if this Court concludes that Williams was qualified to testify about the allegations that she read during the revocation hearing, those conclusory allegations are insufficient to sustain the State's burden of proof. The State must prove a violation by a preponderance of the evidence, which is a "is a much higher standard than the search-and-seizure standards of 'probable cause' and 'reasonable suspicion.'" *Hacker*, 389 S.W.3d at 865.

The Court of Criminal Appeals has said, in the search-and-seizure context, that mere conclusory allegations are insufficient to establish even reasonable suspicion. *Ford v. State*, 158 S.W.3d 488, 493–94 (Tex. Crim. App. 2005). This is because conclusory allegations are devoid of "any facts allowing an appellate court to determine the circumstances" under which the witness came to that conclusion. *Id.*

If conclusory statements are not enough to meet the search-and-seizure standard of reasonable suspicion, then they are certainly insufficient to meet the "much higher standard" of preponderance of the evidence. *Hacker*, 389 S.W.3d at 865. Williams's testimony was therefore insufficient to satisfy the State's burden of proof.

2.3. Benson's testimony does not support revocation.

The only other testimony about drug use came from Benson himself. He acknowledged testing "dirty" on March 8, 2021, and having a

conversation with his then-probation officer, Christopher Stelle, who told him that he “needed to get clean.”³⁰ Thus, even though he “did use marijuana to cope” early on, he “went to drug treatment and ... got clean for a while.”³¹

Benson did not know, specifically, if he smoked marijuana on March 8, 2021, April 26, 2021, June 10, 2021, July 19, 2021, April 26, 2022, or June 21, 2022.³² And he specifically denied smoking marijuana on May 15, 2023, and January 17, 2024.³³ None of this testimony is sufficient affirmative evidence to support a finding that he used marijuana on any of those dates. *See Gold v. State*, 736 S.W.2d 685, 689 (Tex. Crim. App. 1987) (citing *Wright v. State*, 603 S.W.2d 838, 840 (Tex. Crim. App. 1980) (op. on reh’g)) (holding that a factfinder’s “disbelief” of testimony is not substantive proof).

The only day that Benson admitted smoking marijuana was September 16, 2022.³⁴ But this was when Christopher Stelle was still his probation officer, and Jennifer Williams testified that Benson had been “referred to substance abuse treatment in response to his substance use,” and “that was completed” before she took over

³⁰ RR:39.

³¹ RR:46.

³² RR:46–47.

³³ RR:48.

³⁴ RR:48.

supervising him.³⁵ To turn around and revoke Benson two years later for something that Benson's probation officer had already *successfully addressed* is too arbitrary to support the court's revocation decision. *See DeGay*, 741 S.W.2d at 449 (a court may not arbitrarily withdraw community supervision).

3. Conclusion

The evidence is insufficient to support the court's finding. Therefore, the court abused its discretion in revoking Benson's community supervision. This Court should reverse the trial court's judgment.

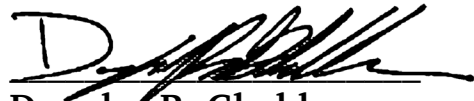
◆

PRAYER

Benson prays that this Honorable Court reverse the trial court's revocation judgment, and that it render a judgment denying revocation and continuing him on community supervision. Tex. R. App. P. 43.2(c).

Alexander Bunin
Chief Public Defender

Respectfully submitted,



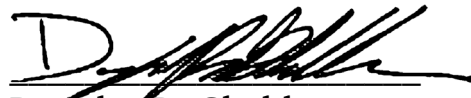
Douglas R. Gladden
Assistant Public Defender
Douglas.Gladden@pdo.hctx.net
State Bar No. 24076404

³⁵ RR:27-28.

1310 Prairie, 4th Floor,
Suite 400
Houston, Texas 77002
713.274.6700

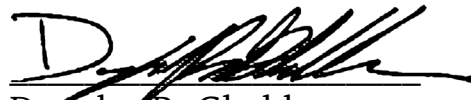
CERTIFICATE OF COMPLIANCE

I certify that this document contains 1,881 words, according to Microsoft Office 365, exclusive of the sections excepted by Tex. R. App. P. 9.4(i)(1).


Douglas R. Gladden

CERTIFICATE OF SERVICE

I certify that a true copy of this brief was served on Jessica Caird, attorney for the State of Texas, on December 2, 2024, by electronic service to caird_jessica@dao.hctx.net.


Douglas R. Gladden

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.

Judie Usukhbayar on behalf of Douglas Gladden

Bar No. 24076404

Enkhjin.Usukhbayar@pdo.hctx.net

Envelope ID: 94826472

Filing Code Description: Brief Not Requesting Oral Argument

Filing Description: Appellant's Opening Brief - L. Benson

Status as of 12/2/2024 1:30 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Caird	24000608	caird_jessica@dao.hctx.net	12/2/2024 12:48:03 PM	SENT
Douglas Gladden		douglas.gladden@pdo.hctx.net	12/2/2024 12:48:03 PM	SENT