

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1998 SESSION

FILED

December 10, 1998

**Cecil W. Crowson
Appellate Court Clerk**

STATE OF TENNESSEE,

*

C.C.A. # 01C01-9710-CC-00505

Appellee,

*

HOUSTON COUNTY

VS.

*

Hon. Allen W. Wallace, Judge

SHANE SMITH,

*

(Probation Revocation)

Appellant.

*

For Appellant:

For Appellee:

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, PRESIDING JUDGE

OPINION

The defendant, Shane Smith, appeals the trial court's revocation of probation. The single issue presented for review is whether the trial court abused its discretion.

We find no error and affirm the judgment of the trial court.

On January 27, 1995, the defendant entered pleas of guilt to three counts of sale of cocaine. As a part of the plea agreement, a charge of conspiracy to sell cocaine was dismissed. The trial court imposed concurrent five-year terms on each conviction and placed the defendant on a Community Corrections program. Thirteen months later the defendant was transferred to supervised probation.

On May 1, 1997, a probation violation warrant was issued based upon a new charge that the defendant had engaged in a conspiracy to sell cocaine. At the ensuing hearing, there was evidence presented that an informant, Juan Kiser, had telephoned the defendant and asked to purchase cocaine. The defendant responded, "Okay, I'll send her right down." Officer Samuel Shires, who was with the Drug Task Force at the time, overheard the telephone conversation. Shortly afterward, the defendant's girlfriend, Michelle Mitchell, delivered crack cocaine to Kiser at a pre-arranged meeting place.

A second incident, occurring four days later, was similar to the first transaction. Officer Shires taped the conversation between the informant and the defendant. Within five minutes, Ms. Mitchell delivered forty dollars worth of crack cocaine to the informant.

Both Ms. Mitchell and the defendant were indicted for the sales to Kiser. A police search of the defendant's residence yielded digital scales and marijuana residue.

At the revocation hearing, the defendant denied any involvement in the sales to Kiser. While acknowledging that he suspected his girlfriend of illegal drug usage, he testified that he was unaware that she had dealt in cocaine. He claimed that Kiser, who had been incarcerated before being enlisted by Officer Shires as an informant, was returning forty dollars he had stolen from Ms. Mitchell sometime earlier.

A TBI report indicated that the substance delivered to the defendant was crack cocaine. The defendant did not object to the admission of the report.

The trial court accredited the testimony offered by the state and rejected that presented by the defendant:

To send a pretty, young fianc[é] down [to the projects] to a dope dealer, and a burglar and a thief, by herself to get \$40.00 back he stole from her? Well now listen, I don't believe that.

In our view, the trial court did not abuse its discretion. State v. Harkins, 811 S.W.2d 79 (Tenn. 1991). Proof of a violation of probation need only be established by a preponderance of the evidence. Tenn. Code Ann. § 40-35-311(d); see State v. Duke, 902 S.W.2d 424 (Tenn. Crim. App. 1995). The state met that standard. Moreover, the failure on the part of the defense to object to the admission of the TBI laboratory report has been waived. In order to preserve the issue for appellate review, there must have been a contemporaneous objection. Tenn. R. App. P. 36(a).

Accordingly, the judgment is affirmed.

Gary R. Wade, Presiding Judge

CONCUR:

John H. Peay, Judge

Jerry L. Smith, Judge