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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1227**

State of Minnesota,
Respondent,

vs.

Judy Marie Henderson,
Appellant.

**Filed May 14, 2012
Affirmed
Peterson, Judge**

Lyon County District Court
File No. 42-CR-09-650

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Richard Robert Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Andrea Gabrielle M. Barts,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Larkin, Judge; and Crippen,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

PETERSON, Judge

In this probation-revocation appeal, appellant challenges the district court's revocation of her stay of adjudication, arguing that (1) the condition that she refrain from the illegal use of controlled substances was invalid because it was not imposed by the court, and (2) there was not clear and convincing evidence that she used a controlled substance. We affirm.

FACTS

Appellant Judy Marie Henderson pleaded guilty to one count of simulated-controlled-substance crime in exchange for a stay of adjudication and up to three years of probation. The disposition order imposed by the district court required her to “[r]emain law abiding.” While on probation, appellant tested positive for marijuana, and her probation agent filed a probation-violation report. Appellant denied the violation, and a contested probation-violation hearing was held.

A probation agent testified that appellant's probation agreement included the condition that appellant “abstain from the illegal use or possession of controlled substances and. . . submit to testing to verify compliance.” The agent testified that appellant submitted a urine sample on January 20, 2011, and testing by RSI Laboratories showed a positive result for marijuana. The test result was positive at 74 nanograms per milliliter; the threshold level is 50.

The probation agent testified that the Minnesota Department of Corrections contracts with Medtox Laboratory because Medtox uses gas-chromatography/mass-

spectrometry testing to confirm positive results and that RSI does not do so. Defense counsel objected to the RSI report being admitted into evidence, but the district court overruled the objection and admitted it.

Appellant testified that she submitted the urine sample in January 2011 and was not told until the beginning of February that the result had come back positive. Appellant denied using marijuana and requested that the sample be submitted for a confirmation test. The request was denied due to the expense.

Defense counsel argued that the state failed to establish the reliability of the RSI test result and that it was a false positive that could have been due to appellant's health conditions. The district court found that the state had met its burden of proving that appellant violated a probation condition by using marijuana. The district court vacated appellant's stay of adjudication and sentenced her to a stayed term of 13 months in prison. This appeal followed.

D E C I S I O N

I.

The imposition of sentences, including determining conditions of probation is exclusively a judicial function that cannot be delegated to executive agencies. When sentencing a defendant, a court “[s]hall state the precise terms of the sentence.” . . . It is an essential component of due process that individuals be given fair warning of those acts which may lead to a loss of liberty. This is no less true whether the loss of liberty arises from a criminal conviction or the revocation of probation. When the acts prohibited by the probation conditions are noncriminal, due process mandates that the petitioner cannot be subjected to a forfeiture of his liberty for those acts unless he is given prior fair warning. It follows that before a probation violation can occur, the condition

alleged to have been violated must have been a condition actually imposed by the court.

State v. Ornelas, 675 N.W.2d 74, 80 (Minn. 2004) (quoting Minn. R. Crim. P. 27.03, subd. 4(A)) (other quotations and citations omitted).

Appellant argues that because the condition that she refrain from the illegal use of controlled substances was contained only in the probation agreement and was not imposed by the district court, it was not a valid probation condition. But the disposition order imposed by the district court required appellant to “[r]emain law abiding.” Although Minnesota’s statutes do not define the use of marijuana as a criminal act, it is a violation of law. *See* Minn. Stat. § 152.027, subd. 4 (2010) (providing that unlawful possession of small amount of marijuana is petty misdemeanor); *see also* Minn. Stat. § 609.02, subd. 4a (2010) (stating that petty misdemeanor is not a crime). The requirement that appellant “[r]emain law abiding” meant that she was to obey all laws, not just laws that create crimes. The disposition order gave appellant fair warning that the illegal use of marijuana could subject her to a loss of liberty.

II.

Evidentiary rulings -- including the admission of chemical or scientific test reports -- are within the discretion of the district court and will not be reversed absent a clear abuse of discretion. But whether the admission of evidence violates a criminal defendant’s rights under the Confrontation Clause is a question of law which this court reviews de novo.

State v. Weaver, 733 N.W.2d 793, 799 (Minn. App. 2007) (quotation and citation omitted), *review denied* (Minn. Sept. 18, 2007).

Appellant argues that the Sixth Amendment right to confront witnesses against her should be applied to a probation-revocation proceeding and, therefore, the district court erred in admitting the test results without testimony by an RSI employee. The Supreme Court has held that parolees in parole revocation proceedings are afforded minimum rights to due process, including “the right to confront and cross-examine adverse witnesses,” but that such proceedings should not be equated to “a criminal prosecution in any sense” and that “the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.” *Morrissey v. Brewer*, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 2604 (1972); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S. Ct. 1756, 1759-60 (1973) (stating that probationers are entitled to the same due-process rights as those given to parolees in *Morrissey*). Admission of the RSI report was consistent with *Morrissey*.

Appellant also argues that the district court erred in admitting the RSI report because the record does not show the testing method used, and, therefore, the reliability of the RSI testing method was not established. The Minnesota Rules of Evidence, other than those regarding privilege, do not apply to a probation-revocation proceeding. Minn. R. Evid. 1101(b)(3).

[W]hen the defendant has had ample opportunity to present evidence in a probation revocation proceeding, the rules of evidence do not preclude admission of hearsay evidence, such as a letter reporting that defendant violated the terms of probation. Affording the defendant the opportunity to present evidence ensures that the defendant can expose potential flaws in the evidence. The reliability of the hearsay evidence will be weighed against other evidence and the risk of relying on untrustworthy hearsay evidence will be greatly minimized.

State v. Johnson, 679 N.W.2d 169, 174 (Minn. App. 2004).

The state must prove a probation violation by clear and convincing evidence. Minn. R. Crim. P. 27.04, subd. 2(1)(c)b. Evidence is clear and convincing if it is “unequivocal and uncontradicted, and intrinsically probable and credible.” *Deli v. Univ. of Minn.*, 511 N.W.2d 46, 52 (Minn. App. 1994), *review denied* (Minn. Mar. 23, 1994); *see also Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978) (stating that clear and convincing means that truth of facts alleged must be “highly probable”).

Appellant was afforded the opportunity to present evidence at the probation-revocation hearing. Nothing in the record indicates that appellant could not have obtained evidence regarding the testing method and presented it at the hearing if it supported her claim of unreliability. Appellant also argued at the revocation hearing that the positive result could have been a false positive resulting from her health conditions, but she presented no evidence supporting that claim. The uncontradicted RSI report was sufficient to prove the violation of a probation condition by clear and convincing evidence.

Affirmed.