

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL J. CEBENKA,	§	
	§	No. 462, 2011
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	Court Below:
	§	Superior Court of the
STATE OF DELAWARE,	§	State of Delaware,
	§	in and for New Castle County
Plaintiff Below,	§	
Appellee.	§	Cr. I.D. No. 1001016462

Submitted: February 1, 2012
Decided: March 14, 2012

Before **STEELE**, Chief Justice, **BERGER** and **RIDGELY**, Justices.

ORDER

This 14th day of March, 2012, on consideration of the briefs of the parties, it appears to the Court that:

1) Michael Cebenka appeals from a Superior Court decision finding him in violation of probation (VOP). Cebenka argues that he did not violate the terms of his probation, because he reported his use of a prescription narcotic four days after he started taking the drug. Alternatively, he argues that the trial court should have dismissed the VOP because the State failed to provide him with a copy of urinalysis test results. We find no merit to either claim, and affirm.

2) Cebenka was serving Level IV probation on July 11, 2011, when he met with his probation officer, Kevin Hunter, and told him that he would be having a tooth removed later that month. Cebenka had a history of heroin abuse, and Hunter told Cebenka to tell his dentist about his substance abuse. In addition, Hunter told Cebenka not to take any medication other than Advil or Tylenol.

3) On July 21, 2011, Cebenka had his tooth removed. He did not tell his dentist about his history of heroin abuse, and, later that day, he obtained a prescription for Hydrocodone, a narcotic painkiller. Hunter visited Cebenka on July 21st, after the tooth extraction but before Cebenka had requested the Hydrocodone. Cebenka did not report his use of Hydrocodone until his July 25th meeting with Hunter. At that time, Cebenka tested positive for opiates. Two days later, Cebenka again tested positive, at a much higher level.

4) On August 1, 2011, Cebenka was arrested for VOP. The Administrative Warrant charged Cebenka with violation of Home Confinement Condition #6 – “You will not possess or use any . . . drug except for prescribed medication of which you have made your officer aware”¹ Cebenka moved to dismiss the VOP. The trial court denied the motion and, after a hearing, revoked Cebenka’s probation.

¹Appellant’s Appendix, A-16.

5) “The grant of probation is an ‘act of grace’ and a sentencing judge has broad discretionary power when deciding whether or not to revoke probation.”² We review the revocation of Cebenka’s probation for abuse of discretion.³ The rules of evidence do not apply with full force in probation proceedings, but Delaware law still requires “some competent evidence to prove the violation asserted.”⁴ The judge must be “reasonably satisfi[ed] . . . that the conduct of the probationer has not been as good as required by the conditions of probation.”⁵

6) Cebenka argues that he did not violate Condition #6 because, on July 25th, he did notify Hunter that he had a prescription for Hydrocodone. The fact that he did not notify Hunter sooner should not constitute a violation, according to Cebenka, because nothing in Condition #6 says that notification must be immediate. The trial court disagreed:

Although condition 6 does not state directly a temporal component immediately . . . , a reasonable reading of that condition is that the probationer must advise the probation officer of the prescription medication within a reasonable time frame so that the officer can make

²*Collins v. State*, 897 A.2d 159, 160 (Del. 2006).

³*Brown v. State*, 249 A.2d 269, 272 (Del. 1968).

⁴*Collins v. State*, 897 A.2d at 160.

⁵*Ibid.*

any adjustments in supervision that might be required by virtue of the fact that the probationer was taking prescribed medication. Otherwise, there would simply be no purpose to be served at all in that condition.⁶

7) The trial court's conclusion is supported by the evidence. Cebenka knew that Hunter was concerned about the possibility that Cebenka would be prescribed narcotic drugs. Hunter visited Cebenka right after the tooth extraction and asked what medicine had been prescribed. A few hours after Hunter left, Cebenka obtained the Hydrocodone prescription and started taking the narcotic. For the next three days, Cebenka used the drug without Hunter's knowledge. By withholding that information, Cebenka was able to continue taking the drug without supervision. Cebenka knew, or should have known, that he was required to report the prescription medication promptly. His failure to do so for four days violated Condition #6. Accordingly, we find that the trial court acted within its discretion in revoking Cebenka's probation.

8) Cebenka's alternate argument – that the State committed a discovery violation by failing to provide the urinalysis test results – is moot. The trial court expressly stated that it was not basing its decision on any urinalysis reports. Thus, the State's failure to provide the reports in a timely fashion had no impact on the VOP hearing or decision.

⁶Appellant's Appendix, A-41.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice