IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-662-2017**
	:	**CP-41-CR-1350-2017**
vs.	**:**	**CP-41-CR-1929-2017**
	:	
	:	
TIMMOTHY COHICK,	**:**	
Appellant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this court's order dated May 10, 2018, in which the court found that Timmothy Cohick (hereinafter "Appellant") violated the conditions of his parole and probation by consuming alcohol.

By way of background, on November 3, 2017, Appellant pled guilty to fleeing or attempting to elude a police officer, DUI, possession of a controlled substance, possession of drug paraphernalia, resisting arrest, tampering with physical evidence, and driving under suspension-DUI related under Information 662-2017 and to two counts of theft by failure to make required disposition of funds under Information 1350-2017. On February 2, 2018, Appellant pled guilty to providing false identification to law enforcement under Information 1929-2017.

On March 26, 2018, the court sentenced Appellant to an aggregate term of 9 to 18 months' county incarceration, followed by 3 ½ years of supervision under the Intermediate Punishment (IP) program, followed by 1 ½ years' probation. Appellant had sufficient credit for time served that he was made eligible for parole. The court also stated

that Appellant was eligible for Treatment Court and, if he was accepted into one of the Treatment Court programs, a condition of Appellant's supervision was to attend and successfully complete such. On March 28, 2018, Appellant was accepted into DUI Court and, as a condition of his supervision, he was directed to attend and successfully complete that program.

On April 2, 2018, Appellant was released from incarceration. The next day, as part of the DUI Court program, he was placed on a Transdermal Alcohol Device (TAD) unit.[1] Within days, two positive drinking events registered on the TAD unit. On April 8, 2018, there was a reading of .104 between 12:52 a.m. and 6:27 a.m., and there was a reading of .025 between 11:27 p.m. on April 8 and 12:42 a.m. April 9, 2018.[2]

In the afternoon on April 10, 2018, Appellant appeared for his regular appointment with his probation officer, Sara Johns, and he was detained.

The court held a parole, intermediate punishment (IP) and probation violation hearing in this case on May 10, 2018. At the conclusion of the hearing, the court found that Appellant violated the conditions of his parole, IP, and probation by consuming alcohol. The court referred the case to the Treatment Court for imposition of sanctions.

On June 4, 2018, Appellant filed a notice of appeal from the Order dated May 10, 2018, in which the court found him in violation of the conditions of his parole, IP, and probation supervision. The sole issue asserted on appeal is that the court "erred in finding that the Commonwealth proved by a preponderance of the evidence that he knowingly consumed alcohol on the dates in question."

[1] As a condition of supervision, participants in the DUI Court program are prohibited from consuming alcohol. TAD units are routinely used in the DUI Court program to monitor a participant's compliance with this condition.

Initially, the court notes that Appellant may have appealed from the wrong order. The court's May 10 order finding that Appellant violated his parole, IP, and probation by consuming alcohol was not a final order, as it did not impose any sanctions against Appellant but instead referred the matter to the Treatment Court for the imposition of sanctions. Rather, Appellant should have appealed from the order imposing sanctions, which made final the May 10 order.

Numerous witnesses testified at the revocation hearing. Montana Tate, of Geo Re-entry Services, testified that on April 3, 2018, she reviewed Appellant's conditions with him and he signed them (see Commonwealth Exhibit 1). She placed the TAD unit on Appellant's ankle and explained to him the things he needed to avoid in order to keep the TAD unit functioning properly, which included prohibitions against swimming, putting the unit in the bath tub while bathing, placing a sock or any foreign material between the unit and his skin, and using products that contained alcohol. She also testified that she received Appellant's TAD unit from an adult probation officer and sent it to Behavioral Interventions (BI), which confirmed the results.

Sara Johns testified that she received notice of the positive drinking events on April 10, 2018. Later that day, when Appellant appeared in her office, she detained Appellant and informed him of the two alcohol events. Appellant denied consuming any alcohol. At that time, he did not have an explanation for the positive results. Probation Officer Luke Ellison removed the TAD unit from Appellant's ankle and placed it on PO Johns' desk. The TAD unit was then transferred to Montana Tate at Geo Re-entry Services, who sent the unit out to confirm the alcohol events. Ms. Johns did not conduct any other

[2] See Commonwealth Exhibits 3 and 4.

testing to confirm or rule out the presence of alcohol in Appellant's system. When Ms. Johns went to Appellant's residence several days later, Appellant's wife showed her some creams and hair gel that Appellant's wife believed contained alcohol and might explain the positive results. Ms. Johns also testified that Appellant sent a letter to Judge Butts, which was received on or about April 23, 2018, wherein Appellant claimed that he took a bath, he was using hair gel and bath products which contained alcohol, he went to bed, and the monitor was going off between 12 a.m. and 5 a.m.[3]

Richard Miller of BI testified about the TAD unit in general and the particular results in this case. Mr. Miller explained that the TAD registered the amount of alcohol that "comes through your sweat." To generate an alcohol event, a threshold of .02 needs to be reached, which for the average adult would require more than one alcoholic drink per hour. He testified that the .025 reading on April 9 was likely a two drink event and the .104 reading on April 8 was a classic alcohol event. He explained that it would typically take anywhere from 30 minutes to an hour after the alcohol was consumed for it to show up on the TAD unit as a drinking event.

With respect to Appellant's claims that hair gel and other bath products caused a false positive, Mr. Miller acknowledged that hair gels have alcohol in them but if you placed the gel on your hair, "that's not close enough proximity to create any kind of issue." If the hair gel was placed on the person's ankle, then the device is going to detect alcohol, but Mr. Miller did not know why someone would do that.

To get a .104 reading like the first event, the person would have to apply lotion directly on the sensor. Furthermore, for a claim like bath soap or lotion, one would

[3] The letter was introduced as Commonwealth Exhibit 2.

expect to see the reading on a daily basis. Instead, Mr. Miller described the .104 reading as a classic drinking event. He testified how the body temperature, alcohol reading, and contact graphs correlated to a drinking event.

Mr. Miller also indicated that, although he had not tested the scenario, submerging the device in a bath water that had an alcohol product in it would not create a reading of .10 because the alcohol in the product would be diluted by gallons and gallons of water, although it might be feasible to create a reading of .025. He also noted that the clients are instructed to avoid products with alcohol and read all labels of the products they use.

Appellant called several witnesses to support his claims that he did not consume alcohol. Nate Hill, a supervised bail officer, testified that he was at Appellant's residence at approximately 8:40 p.m. on April 8, 2018. Appellant seemed normal and "blew zeroes" on a breathalyzer. He did not know if his partner searched Appellant's fridge or not. He did notice, however, that Appellant had his sock pulled up between the TAD unit and his leg. Mr. Hill told Appellant that he could not wear his sock like that. Appellant told Mr. Hill that he didn't know; no one told him that. Appellant then removed his sock from between his leg and the TAD unit. In the morning of April 9, 2018, Mr. Hill advised Ms. Tate that she would probably get an event on Appellant in regards to blocking of the unit. Appellant reported to Mr. Hill's office after 2:00 p.m. and Mr. Hill did not notice anything that would signify intoxication.

Appellant's wife, Deborah Cohick, also testified. She stated that Appellant did not consume any alcohol on April 8 or April 9. She came home from work around 10:12 p.m. on April 8, 2018. Appellant was making supper. They ate and then went to bed around 12:00 or 12:30 a.m. After supper and before bed, Appellant complained about the monitor

moving and going off. Appellant told her that he took a bath. Mrs. Cohick stated that Appellant usually sits in the bath anywhere from 20 to 40 minutes. She also indicated that since this happened, she did a lot of research. Everything in her house has alcohol in it – her bath soap (Cetaphil), her laundry detergent (Persil), her dish detergent (Dawn Platinum X), her hairspray, and Appellant's lotion (Gold Bond Ultra Restoring Hand lotion). She further testified that Appellant used the lotion because his skin was broken out from when he was incarcerated, which was "not normal for [him] because he is very clean." He used the lotion on a daily basis, he used hair gel all the time, and he did the dishes.

Appellant testified that on April 8 between 9:30 and 10:00 p.m. he took a bath. He tried to keep the monitor out of the water. He was feeling sick and accidentally submerged the monitor into the water, but took it back out. He used the Cetaphil soap and had L.A. Looks hair gel in his hair. He neither knew that those products had alcohol in them nor that he was not supposed to use products containing alcohol. He testified that he did not request that a urine or blood test be taken, because he assumed he was being detained because the urine Mr. Hill took the day before tested for alcohol.

The burden of proof at a parole, IP, and probation revocation hearing is a preponderance of the evidence. *Commonwealth v. Moriarity*, 180 A.3d 1279, 1286 (Pa. Super. 2018)(citing *Commonwealth v. Sims*, 770 A.2d 346, 350 (Pa. Super. 2001)). "A preponderance of the evidence is only the greater weight of the evidence, i.e., to tip a scale slightly is the criteria or requirement for preponderance of the evidence." *Commonwealth v. Neysmith*, 192 A.3d 184, 189 (Pa. Super. 2018); *see also Commonwealth v. Brown*, 567 Pa. 272, 786 A.2d 961, 967-68 (2001).

In this case, the Commonwealth established, by a preponderance of the

evidence, that Appellant consumed alcohol. Quite simply, the court found the Commonwealth's witnesses credible and it did not find Appellant's testimony credible.

Appellant had the TAD unit on his ankle from April 3, 2018 to April 10, 2018. His wife testified that Appellant used products containing alcohol on a daily basis, but his TAD unit only registered alcohol events on two dates, April 8 and April 9. As credibly testified by Mr. Miller and consistent with common sense, if the alcohol events were false positives due to the use of alcohol containing products, one would expect positive results on a daily basis. Mr. Miller also credibly testified that the use of hair gel on one's head would not create a false positive, and there is no reason for a person to use hair gel on his ankle. Mr. Miller also explained that to obtain a false positive on a reading as high as .104, Appellant would have had to place the product containing alcohol such as lotion directly on the sensor. Neither Appellant nor his wife testified that the lotion or any other product containing alcohol was applied in such a manner.

Appellant also claimed he was never told that he should not use products containing alcohol or that he could not wear his sock between his leg and his TAD unit, but he admitted that Ms. Tate told him not to go swimming or to submerge his monitor. Ms. Tate, however, credibly testified that she explained to Appellant all the things he needed to avoid for the TAD unit to function properly. She also gave him paperwork that explained his conditions and the TAD unit.

Appellant did not do just one thing wrong with respect to his TAD unit; he did everything wrong. He wore his sock between his leg and TAD unit, and he used products containing alcohol. He knew he was not supposed to submerge his TAD unit in water, but he put his ankle in the bath tub while he was taking a bath. While he claimed this was

inadvertent due to not feeling well, the court did not believe him. Instead, it appeared that Appellant was doing everything he could to subvert the proper functioning of the TAD unit. Furthermore, the court found Appellant's overly frequent and vehement attempts to convince the court of his shock, being overwhelmed, being proud of being sober for nine months, and other gratuitous statements as to his sobriety were insincere and defensive attempts to convince the court of some matter of which the opposite was true. To quote Queen Gertrude in Shakespeare's *Hamlet*, Appellant "doth protest too much, methinks."

Mr. Hill's testimony that Appellant "blew zeroes" on a breathalyzer around 8:40 p.m. on April 8 and he had a negative urine test in the afternoon on April 9 did not impact the reliability of the TAD unit results. Unlike controlled substances like marijuana which can linger in fat cells and its metabolites can be detected in blood tests weeks after ingestion, alcohol is rapidly absorbed and eliminated from the body. Appellant "blew zeroes" approximately 14 hours after the first alcohol event and his negative urine test occurred approximately 13 hours after the second alcohol event, which was ample time for his body to eliminate any alcohol consumed on April 8 and April 9.

The Commonwealth presented credible evidence to establish that drinking events occurred on April 8, 2018 and April 9, 2018. The Commonwealth also presented credible evidence that negated Appellant's purported explanations for these events. Appellant's explanations were not credible and were inconsistent with common sense. In summary, the evidence which the court found credible was sufficient to establish by a preponderance of the evidence that Appellant violated the conditions of his parole, IP, and probation by consuming alcohol.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Matthew Welickovitch, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)