No. SC95370

IN THE

SUPREME COURT OF MISSOURI

State ex rel. SHARONDA TANKINS,

Relator,

v.

THE HONORABLE THOMAS FRAWLEY,

Respondent.

On a Writ of Mandamus to the Supreme Court of Missouri
From the Twenty Second Judicial Circuit
The Honorable Thomas Frawley, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Petitioner Sharonda Tankins was charged in Cause Number 1222-CR02866-01 with fraudulent use of a credit card device. The State alleged she used, without authorization, a Missouri Division of Employment Security MasterCard for the purpose of obtaining United States currency with a value of at least five hundred dollars ($500.00). Ms. Tankins pleaded guilty before the Honorable Thomas J. Frawley on December 4, 2012, at which time the Respondent suspended imposition of sentence and placed Ms. Tankins on probation for a period of four years.

The Respondent received notice of a violation of conditions of Ms. Tankins' probation (Resp. Ex. 1), and by Order dated November 8, 2013 (Rel. Ex. 3) the Respondent suspended Ms. Tankins' probation and ordered the issuance of a capias warrant for her arrest (Resp. Ex. 4). Ms. Tankins was arrested on May 22, 2015. Ms. Tankins filed a motion on August 31, 2015, seeking to be reinstated on probation in which she asserted she had not been able to pay restitution, as ordered by the Respondent, because she had not been able to obtain employment and was indigent. The Respondent ordered Ms. Tankins released on her own recognizance with the direction to report to her probation officer immediately.

A probation revocation hearing was held on September 4, 2015, at which Ms. Tankins appeared in person and with counsel. The State called Probation Officer Lakesha Thomas, at which point defense counsel objected that Ms. Thomas had no firsthand knowledge of any of the events of which she was going to testify and that her testimony would constitute inadmissible hearsay (Tr. page 4, line 16). The Respondent said it would have to hear her testimony to make a determination of whether the information should be considered (Tr. page 4, line 22). Ms. Thomas testified that she inherited Ms. Tankins' case from another probation officer on or about August 19, 2015 and she was familiar with Ms. Tankins' case (Tr. page 5, line 12-22). Ms. Thomas had probation reports with her at the hearing and she testified that she prepared such reports, which document probation violations, as a part of her job. Ms. Thomas said a probation violation report, which documents which conditions were violated and how they were violated, is turned over to the probation officer's supervisor who reads over the report, and the report is then "given to clerical to file a form and give them to the correct courtroom." (Tr. page 7, line 13 to page 8, line 18). Ms. Thomas was handed a probation violation report dated October 17, 2013 (Tr. page 9, line 22), and the Respondent permitted Ms. Thomas to read from the report over the objection of defense counsel. Judge Frawley stated, "It's done as an ordinary and customary part of the business of the Probation and Parole and is maintained by the

Department of Probation and Parole. So I'm going to receive it as an exception to the hearsay rule over your objection." (Tr. page 11, line 5-9) Judge Frawley made the same ruling as to each of the reports relied upon by Ms. Thomas.

Ms. Thomas recited numerous violations by Ms. Tankins of conditions of her probation. Ms. Thomas stated that Ms. Tankins failed to enroll into an employment program, or had failed to provide documentation that she had done so (Tr. page 15, line 1-5); she failed to make monthly restitution payments in the amount of seventy dollars ($70.00) (Tr. page 15, line 6); she was cited on March 25, 2013 for drugs (Tr. page 15, line 16); she failed to make her monthly thirty dollar ($30.00) intervention fee (Tr. page 16, line 9-12); she was charged with petty larceny, a charge that was dismissed (Tr. page 16, line 15); she tested positive for marijuana on June 11, 2013 (Tr. page 17, line 6-10); she failed to seek employment and provide her job log (Tr. page 17, line 16); and, she failed to pay restitution (Tr. page 17, line 18). Defense counsel cross-examined Ms. Thomas regarding the conduct referenced in the reports as violations of conditions of probation, including whether the positive marijuana test necessarily showed Ms. Tankins used drugs during her probationary period and whether the reports showed that Ms. Tankins had in fact obtained employment.

Ms. Tankins was called as a witness at the revocation hearing. Ms. Tankins stated her name and age in response to those questions (Tr. page 22, line 20 to page

23, line 1), and then proceeded to assert her Fifth Amendment privilege and refuse to answer questions regarding whether she pleaded guilty to fraudulent use of a credit card, whether she failed to pay restitution, paid any fees, provided a "dirty urine analysis," enrolled in a structured employment program, provided job search logs, stopped reporting, and was she arrested for larceny (Tr. page 25-26). Answering these questions could have been admissions to violations of conditions of probation, but none of the questions called for a response that could have implicated Ms. Tankins in criminal conduct.

Judge Frawley ruled that while a person may assert her Fifth Amendment privilege in a probation revocation hearing, which is a civil proceeding, the Court is permitted to draw a negative inference that should she have answered the question, "the answer would have been detrimental to her interests." (Tr. page 26, line 1-11)

Judge Frawley revoked Ms. Tankins' probation and released her on her own recognizance at the conclusion of the violation hearing. Sentencing is now set for May 31, 2016.

ARGUMENT

POINT 1

The hearing court properly admitted hearsay evidence in the form of the probation violation reports. (Response to Relator's Point I)

A probation violation hearing is a civil, and not a criminal proceeding, see *State ex rel. Manion v. Elliott*, 305 S.W.3d 462, 464 (Mo. banc 2010). Evidence that would violate the Sixth Amendment or would be inadmissible hearsay at a criminal trial may be considered under proper circumstances at a probation or parole revocation hearing without violating the due process or confrontation rights of the probationer. The Court should consider why confrontation would be undesirable or impractical such as where it would be difficult or impractical to procure live witnesses, and the Court should consider whether the hearsay evidence sought to be admitted bears substantial indicia of reliability. In some cases probation violation reports have been found to have reliability because of their status as business records. See, *State ex rel. Mack v. Purkett*, 825 S.W.2d 851, 855-856 (Mo.banc 1992).

Relator relies on *Morrissey v. Brewer*, 408 U.S. 471 (1972) in attempting to establish that her rights to due process and confrontation were violated. In *Morrissey v. Brewer*, the Court established a six prong test to determine if the

second stage of the parole revocation process, a formal parole hearing, comports with the "minimum requirements of due process." Relator, here, relies specifically on the fourth prong "(d) the right to confront and cross examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Id.* At 487-488.

As to Relator's subsection 1 under Point I, Relator was afforded the opportunity to confront her assigned probation officer, Lakeisha Thomas. Relator, through her attorney, cross examined Ms. Thomas on all violations of Relator's probation. While not controlling, in *U.S. v. Boyd,* 792 F.3d 916 (2015), the 8th Circuit addressed a probation revocation hearing where the probation officer, Jay Hudson, was assigned the same month that the government sought to revoke Mr. Boyd's probation. *Id.* At 918. Officer Hudson had not written the report, as the previous probation officer, who retired, had prepared it. The court allowed Officer Hudson's testimony as to Mr. Boyd's violation of his probation. In upholding the district court's decision, the 8th Circuit wrote "[a] supervised release defendant is not entitled to a trial during a revocation hearing, the rules of evidence are inapplicable, and the government has a lower burden of proof." *Id.* At 919. The 8th Circuit also found that "Officer Hudson's testimony was based on a probation document produced by his agency, whereas in *Johnson*, the probation officer was seeking to testify about a police report prepared by officers of a separate law

enforcement agency… the testimony here concerned a document designed to report on the status of a supervised release defendant, and Officer Hudson is personally familiar with the process for creating that document." *Id.*at 920. The Court referenced *U.S. v. Johnson*, 710 F.3d 784 (2013), in which a probation officer was allowed to read from a police report instead of the government producing the police witness in order to prove the violation. In the case at hand, we have a newly assigned probation officer reading from a report, the creation of which she was familiar as it was produced in the regular course of business at the agency for which she works. The Court in *Boyd* also did not require a finding of unavailability. "While the court should have inquired further about Officer Sims's (the previous probation officer) present residence, whereabouts and availability to testify, we cannot say the court abused its discretion when it allowed Officer Hudson to testify in substitution of Officer Sims." *Boyd* at 920.

As to Relator's claim that the hearing court improperly admitted hearsay evidence, the Court in *Morrissey v. Brewer* found it necessary, after establishing its due process test, to write "[w]e emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; 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." *Id.* at 489. The Court expected and allowed hearsay evidence to be

considered when determining whether an individual's parole is to be revoked. As a probation violation hearing is a civil, and not a criminal proceeding, see *State ex rel. Manion, supra*, any rule governing hearsay in a criminal proceeding does not apply to a probation revocation hearing.

Relator's reliance on *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), and *State v. March*, 216 S.W.3d 663 (Mo. banc 2007), in Relator's subsection 2 under Point I, in an attempt to establish a confrontation requirement when it comes to probation revocation hearings, is misguided. All those cases are criminal trials, not probation revocation hearings. As has been made abundantly clear in *Morrissey v. Brewer*, a probation revocation hearing is not a criminal prosecution and the same rights do not attach. Similarly, Relator's reliance on further United States Supreme Court cases including *Ohio v. Clark*, 135 S.Ct. 2173 (2015) when addressing whether statements are testimonial is equally misguided as all those cases were criminal prosecutions.

The Missouri Business Records Statute, § 490.680 RSMo, allows the admission of business records that would not survive a hearsay challenge under common law. *Kitchen v. Wilson*, 355 S.W.2d 38, 43 (Mo. 1960). The statute allows for a "a custodian or **other qualified witness**" [emphasis added] to testify to a hearsay document's "identity, mode of preparation and if it was made in the

regular course of business, at or near the time of the act, condition or event." Id. Further, "[t]he determination of whether a party has laid sufficient foundation to admit a document into evidence is within the sound discretion of the trial court." *Jamestowne Homeowners Ass'n Trustees v. Jackson*, 417 S.W.3d 348, 354 (Mo.App.E.D. 2013). Other opinions have described the trial court as having "broad discretion" to determine whether the statute has been complied with. *Alberswerth v. Alberswerth*, 184 S.W.3d 81, 102 (Mo.App.W.D. 2006). Testimony must be offered from someone with "sufficient knowledge of the business operation and methods of keeping records of the business to give the records probity." *Asset Acceptance v. Lodge*, 325 S.W.3d 525, 528 (Mo.App.E.D. 2010). The Uniform Business Records as Evidence Law "is designed to facilitate the admission of documents which experience has demonstrated to be trustworthy." *Piva v.General American Life Insurance Company*, 647 S.W.2d 866, 877 (Mo.App.E.D.1983). The sponsoring witness of the documents need not have personal knowledge of the mode of preparation of the documents sought to be admitted. The bottom line is the discretionary determination by the trial court of their trustworthiness. *Rouse Company of Missouri v. Justin's, Inc.*, 883 S.W.2d 525, 530 (Mo.App.E.D. 1994).

In the present case, the evidence showed that Lakeisha Thomas was a probation officer and, when questioned by the State on the record, she stated that

such probation reports were prepared in the regular course of business, and as a probation officer she, herself, has prepared such reports in other cases. While not the custodian of records, Ms. Thomas was a witness qualified to lay the foundation to enter the records into evidence under the statute. The fact that she prepares these types of reports and can verify that the reports are consistent with the policies of her office is indicia of their reliability. The Respondent here used his sound discretion to admit the probation violation reports into evidence as business records. In its written order, the court cited RSMo 469.680 as its basis for doing so.

There are also public policy and practical considerations at play in allowing probation officers to enter probation violation reports into evidence as business records. It is not uncommon for probationers to report to officers outside of the jurisdiction in which they were found guilty, and to report to multiple officers during their time on probation. In this case, one of the reports was prepared by Probation and Parole but in a different district. Other reports were prepared by probation officers prior to August 19, 2015, when Ms. Thomas inherited Relator's case. A finding by a court that a probation officer, who is in the business of preparing the very reports at issue in this case, is not a person qualified to lay the foundation for these reports as business records, would put the state and the courts in the difficult position of having to track down multiple probation officers across

the state for probation revocation hearings. Such a ruling would create a burden on the court system and would not take into account that, as stated in *State ex rel. Mack, supra*, it may be undesirable or impractical to present live testimony is some situations. Section 490.680 RSMo. clearly envisions the court in a probation revocation hearing having the discretion to admit these types of records.

It is also significant that in Relator's case, Respondent did not rely solely on the properly admitted business records when determining that Relator had violated conditions of her probation. In addition to the probation violation reports, the Respondent considered Relator's improper invocation of her Fifth Amendment rights, and the inferences he was entitled to draw from such invocation, to make its final determination that she had, in fact, violated her probation.

POINT 2

The Court Did Provide a Written Statement as to the Evidence Relied on for Revoking Relator's Probation as well as all the conditions it considered in deciding to revoke Relator's probation. (Response to Relator's Point II)

The Respondent filed a written order revoking Relator's probation and listed the violations provided through the testimony of Lakesha Thomas, as well as the Respondent's right to draw inferences, based on Relator's invoking her Fifth Amendment rights, that she had violated conditions of her probation. The Respondent is not required to only choose one violation when revoking an individual's probation. The written order serves as recognition that all violations recited by Ms. Thomas were considered and relied on by the Respondent in making the decision to revoke Relator's probation.

POINT 3

The Relator Being Called as a Witness by the State Did Not Violate Relator's Rights to Due Process and Her Privilege Against Self Incrimination.

(Response to Relator's Point III)

A probation revocation hearing is not a criminal proceeding. It is a civil action and not a continuation of the earlier criminal proceeding. *State ex rel. Manion, supra*. In a civil proceeding, a party has the right to call an adverse party as a witness, *see* 491.030 RSMo. Therefore, the State had the right to call Relator as a witness at the probation revocation hearing.

The rule in criminal cases is that no negative inference is permitted from a defendant's failure to testify based on the assertion of the defendant's Fifth Amendment privilege. *Mitchell v. United States*, 526 U.S. 314, 327-328 (1999). This rule does not apply in civil cases, unless answering would incriminate the witness in a later criminal proceeding. *Id.*; *Johnson v. Missouri Board of Nursing Administrators,*130 S.W.3d 619, 628 (Mo.App.W.D. 2004). The invocation of the privilege by a witness in a civil proceeding permits an inference that if the witness answered the question truthfully, the answer would have been unfavorable to the witness. *In re Berg*, 342 S.W.3d 374, 385 (Mo.App.S.D. 2011). Such an inference is particularly appropriate where the answers could not have implicated Relator in

criminal conduct. *See Lappe & Associates v. Palmen*, 811 S.W.2d 468, 471 (Mo. App. E.D. 1991) and *In re Monning*, 638 S.W.2d 782, 788 (Mo. App. W.D. 1982).

Permitting an adverse inference or adverse consequences based on the assertion by a witness of the Fifth Amendment privilege has been permitted in a habeas corpus proceeding, *Reasonover v. Washington*, 60 F.Supp.2d 937 (E.D.Mo. 1999); at a parole hearing, *Speth v. Pennsylvania Board of Probation and Parole*, No. 98-1631 (E.D.Pa. 1998); and in the Sexually Violent Predator context, *Spencer v. State*, 334 S.W.3d 559 (Mo.App.W.D. 2010) and *In re Berg*, supra.

In the context of a probation revocation hearing, a probationer cannot be compelled to testify against himself where the answers might incriminate him in a future criminal proceeding. *United States v. Rapert*, 813 F.2d 182, 185 (8th Cir. 1987); see also, *United States v. Saechao*, 418 F.3d 1073, 1076-1078 (9th Cir. 2005) (State may require probationer to appear and discuss matters affecting probationary status, but may not require, under threat of revocation, answers to questions that would incriminate probationer in later criminal proceeding). Where the questions put to a probationer are relevant to his probationary status and pose no realistic threat of incrimination in a separate criminal proceeding, the Fifth Amendment privilege is not available even if answering may result in a termination of the probation. Therefore, a State may revoke probation based on the probationer's refusal to answer, if the refusal itself violates a condition of

probation, and the probationer's silence may also be considered as a factor in deciding whether other conditions of probation have been violated. *See, Minnesota v. Murphy*, 465 U.S. 420, 425 fn. 7 (1984).

Relator Tankins was called as a witness at the revocation hearing. She stated her name and age and then proceeded to assert her Fifth Amendment privilege and refused to answer the following questions posed by the prosecuting attorney:

1) Did you plead guilty on December 4th to the fraudulent use of a credit device? (Tr. page 23, line 2) The parties agreed that the Court could take judicial notice and, as this was the guilty plea for which relator was on probation, answering could not have subjected her to a future criminal prosecution and the answer could not have been a basis for revoking her probation.

2) During your time on probation did you make any restitution payments? (Tr. page 24, line 9) While a negative answer might have constituted a violation of a condition of probation, a negative answer could not have subjected her to criminal prosecution.

3) During your time on probation did you pay any fees at all? (Tr. page 24, line 22) An answer could not have subjected relator to a criminal prosecution.

4) During your time on probation did you provide what is referred to as a dirty urine analysis? (Tr. page 24, line 25) While possession of a controlled substance, meaning illegal drugs, is illegal in the State of Missouri, proof of drug use by itself is not a criminal offense. Relator was not asked a question as to a date, time or place when she possessed illegal drugs, or as to the amount of the drugs, but just a general question regarding a positive result of a drug test, which result cannot itself lead to a criminal prosecution. Relator also only tested positive for THC, or marijuana, the possession of which is a misdemeanor if under 35 grams. The failed drug test in question was in February of 2013. The question was asked September 4, 2015, or in excess of eighteen months after the test. The statute of limitations for a misdemeanor is one year. § 556.031.2(2) RSMo. Prosecution of any sort would not be legally possible. Additionally, without any actual marijuana seized from her person and a subsequent lab analysis confirming the substance as marijuana, and without time travel technology to go back to the time of her drug test and produce any marijuana she may have had, any prosecution for possession, trafficking, or any drug crime associated would be impossible. No answer to the question of whether she provided a dirty urine analysis could lead to a criminal prosecution.

5) During your time on probation did you enroll in a structured employment program? (Tr. page 25, line 4) An answer could not subject relator to criminal prosecution.

6) During your time on probation did you provide any job search logs at all? (Tr. page 25, line 7) An answer could not subject relator to future criminal prosecution.

7) During your time on probation were you arrested for larceny? (Tr. page 26, line 21) While an answer to a question whether she committed larceny could be incriminating, answering whether she was arrested would not be incriminating.

8) During your time on probation did you stop reporting, otherwise known as abscond? (Tr. page 26, line 24) An answer could lead to revocation of probation but could not form the basis for a criminal prosecution.

The Court was entitled to draw negative inferences from relator's refusal to answer all eight questions above and the negative inferences could properly be considered, along with other evidence, in determining whether to revoke relator's probation.

Relator cites *In re Berg, supra*, in arguing that a witness cannot be called by either party **at a jury trial** solely for the purpose of having the witness invoke the

Fifth Amendment. *Berg* does not apply to the case at hand for the reason that relator was not called to assert her privilege before a jury.

Relator's reliance on *United States v. Rapert, supra,* is also misplaced. In *Rapert* the court ruled that "a probationer cannot be compelled to testify against himself at a probation hearing when his testimony might incriminate him in a later criminal proceeding." *Id.* at 185. Relator's answers to the questions posed regarding probation violations could not have implicated her in a later criminal proceeding.

Relator's point regarding Ms. Tankins' asserting her Fifth Amendment privilege as proper because her answers would make her vulnerable to prosecution for either perjury or tampering with a judicial officer had she answered the State's questions is without any foundation in law. Established law is actually the opposite of Relator's point. In *State v. Benson*, 633 S.W.2d 200 (1982) the Court of Appeals wrote "[t]he Fifth Amendment protects a witness from being required to give self-incriminating evidence of prior crimes. The privilege does not protect a person from being presented with the opportunity to commit possible future perjury." *Id.* at 202. The Supreme Court of the United States has also acknowledged there is no such "anticipatory perjury" doctrine. *U.S. v. Apfelbaum,* 445 U.S. 115, 131 (1980).

Conclusion

For the foregoing reasons, Respondent requests that this Court deny Relator's Petition for a Writ of Mandamus, rule that Respondent's revocation of probation shall stand, and allow the matter to continue to sentencing.

CERTIFICATE OF SERVICE AND COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4288 words, excluding the cover and certification, as determined by Microsoft Word 2010 software, and that on April 11, 2016 a true and correct copy of the foregoing was e-filed with this Court and sent to Randall Brachman, attorney for Relator, via the Missouri E-Filing System Clerk.

Respectfully submitted,

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