IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No. SC2015-367
KYLE QUEIOR,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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TENTH JUDICIAL CIRCUIT

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SUMMARY OF THE ARGUMENT

There is no conflict here because the two cases are quite different, both factually and with regard to the issues preserved and raised on appeal.

ARGUMENT

THERE IS NO CONFLICT HERE.

The district court certified a conflict with *Terry v. State*, 777 So. 2d 1093 (Fla. 5th DCA 2001) "regarding the sufficiency of a probation officer's testimony about the results of a field test to support a finding of [a] violation of ... probation ['VOP']." *Queior v. State,* 2015 WL403960, *6 (Fla. 2d DCA Jan. 30, 2015). With all due respect, this statement is accurate only if we analyze the issues in these cases on a very basic and abstract level that wholly overlooks the differences in the two cases, which include differences in both the facts and the issues preserved and raised on appeal.

There are significant factual distinctions between the two cases. Respondent was given a Drug Check Dip Drug Test and he tested positive for opiates and oxycodone. 2015 WL403960 at *1-2. Terry tested positive for cocaine based on a "field test" that was not further identified in the opinion. 777 So. 2d at 1093. While both probation officers testified that they were "certified by the State to administer the test," the "certifications" that Respondent's officer produced to prove this fact gave "no indication that the State of Florida played any role in either the training or the issuance of the certificates." 2015 WL403960 at *1

and n.1; 777 So. 2d at 1093. Respondent's officer admitted that 1) "on a prior occasion, he had a field test that was positive for a substance and a corresponding laboratory test ... was negative for the same substance"; and 2) although the field test in the present case was positive for opiates and oxycodone,

> the laboratory report reflected that [Respondent's] sample was negative for oxycodone, but was positive for hydromorphone[, which] is an opiate. Thus the laboratory test verified the field test to the extent it established that [the] sample contained an indicator of opiate use. [But the laboratory test] was inconsistent with the field test to the extent that the field test was positive for oxycodone and the laboratory test was negative for oxycodone.

2015 WL403960 at *2. We had no such testimony in *Terry.*

Most significantly, before Respondent's probation officer "testified about the test results, *defense counsel objected on the ground that the State had not laid the proper predicate to establish the reliability of the Drug Check presumptive test, a scientific analysis*." *Id.* (emphasis added). In contrast, "Terry *did not object to the probation officer testifying as to the results of the field test*." 777 So. 2d at 1093 (emphasis added). Further, "[a]t the conclusion of the hearing Terry sought a judgment of acquittal arguing [only] that the State failed to introduce competent evidence of his cocaine use." *Id.* In contrast, Respondent argued that the State did not prove the VOP because, although "hearsay is admissible in a probation hearing to supplement or explain competent evidence,"

> the State had failed to introduce any competent, *nonhearsay* evidence of [his] drug use. [The probation officer] could not establish the reliability of the field test that he performed. Thus, it was not

competent evidence of [Respondent's] drug use.

2015 WL403960 at *3 (emphasis added). Thus, the *Queior* court said "the question [in this case] is whether [the probation officer's] testimony concerning his experience in performing the Drug Check Dip Drug test and in the interpretation of its results constituted competent, *nonhearsay* evidence sufficient to [prove the charged VOP]." *Id.* at *4 (emphasis added). Based on the facts that the officer "was ignorant of the nature of the chemical and could not explain the scientific basis for the field test" and, "on a prior occasion, he had performed a field test that reflected a positive result for a substance and received a laboratory test result for the same substance that was negative for the same substance," the court "conclude[d] that [the] testimony about the field test results was not competent, *nonhearsay* evidence that [Respondent] had ... violat[ed] his probation." *Id.* (emphasis added).

No hearsay issue was raised in *Terry*. The only issue there was whether "the State failed to introduce competent evidence of his drug use." 777 So. 2d at 1093.

We must note here that hearsay not within an exception is admissible in VOP proceedings, although a revocation cannot be based entirely on it. *Russell v. State*, 982 So. 2d 642 (Fla. 2008). We will call such otherwise-inadmissible hearsay "probation hearsay."

Like all evidentiary rules of limited admissibility, this rule can be waived by a failure to properly raise the issue. Since *all* hearsay is generally admissible in VOP proceedings, a simple

"hearsay" objection, made when probation hearsay is introduced, is not well taken. But if, at the close of the evidence, it appears that the only evidence introduced to prove an alleged violation was probation hearsay, defense counsel should then argue that that evidence was insufficient to prove that alleged violation. *See McDoughall v. State*, 133 So. 3d 1097, 1099 (Fla. 4th DCA 2014) ("[A] probationer need not object to every bit of hearsay introduced ... during [a VOP] hearing in order to ultimately argue that there is insufficient non-hearsay evidence to justify a revocation ... A challenge to the sufficiency of the ... hearsay evidence is preserved [if] raised at the [VOP] hearing.") (citations omitted) (some brackets added in original).

But if counsel fails to properly raise the issue of the limited use of probation hearsay, then that hearsay will be deemed to have been "fully" admitted, which means that a revocation *can* be based entirely on it, just as a revocation can be based entirely on hearsay *if that hearsay is within a recognized exception. E.g., Gammon v. State*, 778 So. 2d 390, 392 (Fla. 2d DCA 2001).

The *Queior* court did *not* say that the probation officer's testimony about the field test result was inadmissible. Rather, the court concluded this testimony "was not competent, *nonhearsay* evidence that [proved the VOP]." 2015 WL 403960 at *4 (emphasis added). The probation officer's testimony about the test result is hearsay (and probation hearsay, because it is not within an exception) because the officer does not personally have the

expertise or specialized knowledge to interpret the meaning of the test and opine on its reliability. His knowledge about such matters is based on hearsay, *i.e.*, what he was told by someone else (*e.g.*, another probation employee or someone from the test kit supplier). *See Rothe v. State*, 76 So. 3d 1010, 1011-12 (Fla. 1st DCA 2011) ("the [probation] officer's testimony about the results of the drug test she performed ... is hearsay [because] she has no specialized training, expertise or certification in drug testing"); *Bray v. State*, 75 So. 3d 749, 749-50 (Fla. 1st DCA 2011) (testimony of two probation officers about field test results was hearsay because, "[w]hile both [officers] had conducted hundreds of urinalyses, neither testified as to any expertise as to narcotics or drug testing.").

No probation-hearsay objection was made to the field test result in *Terry*, which meant that the probation officer's testimony about that test result was "fully" admitted (and thus was sufficient in itself to prove the VOP). But Respondent did raise the probation-hearsay objection to the testimony about the test result, which meant that testimony was not "fully" admitted.

Thus, not only are the underlying facts in the two cases quite different, the issues raised and preserved in the two cases are significantly different. *Terry* establishes the proposition that, if there is no objection to a probation officer's testimony about the results of a field test he performed, then that test result is sufficient to prove the defendant had in his system the substance revealed by that test. The present case raises a

different issue: If, at a VOP hearing, the State wishes to "*fully*" prove a fact through the use of scientific evidence, then it must abide by the rules for the admission of such evidence. *See* secs. 90.702-.704, Fla. Stat. (2014). If the State fails to lay the required predicate of expertise and reliability, then testimony about the test result may be admitted as probation hearsay; but it is insufficient, in itself, to prove a VOP.

In sum, these two cases apply well established (and wholly different) rules of law to significantly different sets of facts. There is no conflict here.

The *Queior* court also said that "*Terry* incorrectly equates the probation officer's expertise in performing a field test with scientific testimony about how the test works to establish the test's reliability." 2015 WL 403906 at *5. But *Terry* did not say "the probation officer's expertise in performing a field test ... establish[es] the test's reliability." The issues of the test's reliability, or how one might prove that, or the relationship between the test's reliability and the officer's ability to perform the test, were not addressed in *Terry.*

The *Queior* court also said it "disagree[d] with the holding in *Terry*" "to the extent *Terry* conflicts with" four cases from the other district courts. 2015 WL 403960 at *5. But *Terry* does not conflict with any of these four cases, and for the same reason that it does not conflict with the present case: The cases are distinguishable, primarily on the ground that objections were made to the scientific reliability of the field test results. *Carter v.*

State, 82 So. 3d 993, 995-96 (Fla. 1st DCA 2011) (holding the evidence was insufficient to prove a VOP when the probation officer "testified over objection that he performed a field test [and it was] positive" but the officer "did not know the name of the field test ... or how it worked scientifically"; the officer "did not demonstrate any expertise concerning or understanding of the workings of the test, and could not offer an opinion about the significance of the test results."); *Bray*, 75 So. 3d at 749-50 (holding the evidence was insufficient to prove a VOP because "only hearsay evidence was admitted as proof"; testimony of two probation officers about their field test results, admitted over defendant's objection, was hearsay because the officers did not "testif[y] as to any expertise as to narcotics or drug testing."); *Weaver v. State*, 543 So. 2d 443, 443-44 (Fla. 3d DCA 1989) (holding the evidence was insufficient to prove the VOP because "the only non-hearsay evidence [proving the substance at issue was] heroin, was the [officer's] testimony [that] he conducted a field test [directly on the substance but he] could not remember the name of the field test and [he] did not know whether such a test is reliable"); *Starling v. State*, 110 So. 3d 542, 542-43 (Fla. 1st DCA 2013) (citing *Carter* and *Weaver* and holding the evidence was insufficient to prove the VOP when the probation officer testified that his field test was "positive for cocaine and [that] came back confirmed [by a lab test]" but the lab report "was not admitted into evidence.").

Thus, *Terry* does not conflict with any of these cases or with

the present case. The district court erred in concluding otherwise.

In its brief, the State does not identify the perceived conflict in the two decisions. Rather, the State asserts the *Queior* court "conclud[ed] that a probation officer's testimony regarding a positive field test result and a laboratory test report does not represent competent, nonhearsay evidence of a [VOP]." IB, p. 5. The State cites nothing in *Queior* to support this assertion.

The *Queior* court did not state a broad "conclu[sion] that a probation officer's testimony regarding a positive field test result and a laboratory test report does not represent competent, nonhearsay evidence of a [VOP]." Such a conclusion would be absurd. A lab test report, *properly introduced as a business record*, would prove a VOP on its own. *E.g., Davis v. State*, 562 So. 2d 431, 432 (Fla. 1st DCA 1990). Similarly, as *Terry* establishes, an officer's testimony about a field test result would also be sufficient in itself to prove a VOP, if it is admitted either 1) without objection, or 2) over objection, provided the proper predicate for expert testimony was established. Nothing in *Queior* indicates the contrary. Neither does anything in *Terry*. In *Terry*, no lab report was introduced and there was no challenge to the admission of the field test result.

What *Queior* "concluded" was that the evidence did not prove the charged VOP because it was all probation hearsay: The lab report was not properly authenticated, and the State did not lay a

proper predicate for the field test after Respondent challenged its scientific reliability. Nothing in *Terry* conflicts with this.

The State also asserts that the *Queior* court "conclud[ed] that a probation officer's expertise in performing a field test does not represent a basis on which the probation officer may testify to the test's reliability." IB, p.6. The State cites nothing in *Queior* to support this assertion. Nor does the State cite anything in *Terry* that would conflict with this assertion (assuming the *Queior* court did say this).

The *Queior* court did note that "*Terry* incorrectly equates the probation officer's expertise in performing a field test with scientific testimony about how the test works to establish the test's reliability." 2015 WL 403906 at *5. But, as noted above, it is not clear that this is an accurate statement. Further, the State does not suggest that this statement in *Queior* conflicts with anything in *Terry*. Again, *Terry* did *not* say that a probation officer's "expertise in performing a field test establishes the test's reliability."

Such a statement would be absurd in any event. The fact that a probation officer is an "expert" in "performing" the test tells us nothing about the scientific reliability of the test itself. In the present case, the "expertise" needed to "perform the test" consists of the ability to obtain a cup of urine and dip a "drug strip" into the cup. It is not clear whether the test in *Terry* required more; the opinion says nothing about how the test was performed in that case. But the "expertise" needed to dip a little

strip of some type into a cup of urine is something that the average seven-year-old can learn in about two minutes.

But expertise in urine-cup-dipping does not qualify one to testify about the scientific principles that undergird the test, regardless of how often one does such dipping. Knowing how to punch the buttons on a remote control does not make one an expert on how a cable TV system works.

In sum, the two cases are significantly different, both factually and with regard to the legal issues that were preserved and raised on appeal. There is no conflict here.

CONCLUSION

There being no conflict, this Court should not take jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 26th day of March, 2015.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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