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ARKANSAS COURT OF APPEALS

DIVISION IV

No. CACR09-903

LINDA KAY GRAHAM, APPELLANT V. STATE OF ARKANSAS, APPELLEE	**Opinion Delivered** 17 FEBRUARY 2010 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT [NOS. CR-2002-198, 2002-966, 2005-342] HONORABLE STEPHEN MERRILL TABOR, JUDGE REVERSED and REMANDED

D.P. MARSHALL JR., Judge

After concluding that Linda Graham delivered cocaine to a confidential informant, the circuit court revoked her suspended sentences for possessing cocaine, possessing drug paraphernalia, and commercial burglary. Graham asserts one error in her revocation hearing: the circuit court violated the Confrontation Clause by allowing a police officer's testimony that the informant had told him that Graham delivered cocaine. The informant did not testify.

Precedent requires that we reverse. *Goforth v. State*, 27 Ark. App. 150, 152, 767 S.W.2d 537, 538 (1989); *see also Jones v. State*, 31 Ark. App. 23, 25–27, 786 S.W.2d 851, 852–53 (1990) (following *Goforth*, but concluding that the confrontation error was

harmless). "[I]n a revocation proceeding the accused is entitled to 'the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).'" *Goforth*, *supra* (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972))).

Here, when the officer testified about what the informant had said, Graham's counsel promptly and repeatedly objected.

> Q. So, what did the C.I. do after the C.I. exi[ ]ted the residence at 5602 Elmwood Place?
>
> A. They were followed back to a predetermined meeting location where I made contact with the C.I. The C.I. turned over to me an off white, rock like substance which was represented to be crack cocaine. The C.I. told me that this was purchased from Linda Graham.
>
> [Defense Counsel]: Your Honor, we would object to what the C.I. said, it would be hearsay and it would deny the Defendant her right to confrontation of witnesses under the U.S. and Arkansas Constitutions.
>
> [Prosecutor]: Your Honor, I just offer that this hearing is a revocation hearing and as such rules of evidence don't apply, according to hearsay rules.
>
> THE COURT: I am going to allow it. Go ahead.
>
> [Defense Counsel]: Your Honor, an additional objection, too.

> Pardon me, but we also feel like it would deny her right to confront the witnesses. Of course, we had the U.S. Supreme Court decision, *Crawford* would be applicable, and we feel that the rules of confrontation apply even at a revocation hearing. So, we would again make that objection.

THE COURT: All right. Overruled. Go ahead.

Q. What did the C.I. say?

A. Just that they had purchased this amount of crack cocaine from Ms. Graham.

As part of his motion for dismissal, Graham's lawyer made the Confrontation Clause point again.

Once Graham invoked her confrontation rights, precedent required that the circuit court enforce those rights absent a specific finding of "good cause." *Morrissey*, 408 U.S. at 489; *see also Goforth*, 27 Ark. App. at 152, 767 S.W.2d at 538. The State did not refer to the Arkansas statute on point. Ark. Code Ann. § 5-4-310(c)(1) (Repl. 2006). Nor did the State argue the balance of interests that, under this statute, may allow the circuit court considering a revocation to proceed without confrontation. *Goforth*, 27 Ark. App. at 152–53, 767 S.W.2d at 538–39.[*]

[*]The effect, if any, of *Crawford v. Washington*, 541 U.S. 36 (2004) on the confrontation aspect of *Morrissey* and on Ark. Code Ann. § 5-4-310(c)(1) is not before us, and we express no opinion on that issue.

The circuit court abused its discretion by making an error of law in admitting the police officer's testimony about what the informant told him. *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 20–21, 894 S.W.2d 897, 900 (1995). Was this error harmless, as the State presses?

A Confrontation Clause error may be a harmless error. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Jones*, 31 Ark. App. at 26, 786 S.W.2d at 853.

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Jones, *supra* (quoting *Van Arsdall*, *supra*). We consider the *Van Arsdall* factors in turn.

First, the informant's testimony was important because it cinched the case against Graham. The police officer did not see the delivery; it took place inside a home. The exchange was not videotaped. The officer did not give detailed testimony about what he heard via the wire on the informant. The tape of the encounter, if one was made, was not introduced into evidence.

Second, the testimony was not cumulative.

Third, the informant's testimony was partly corroborated by other evidence: the informant entered a house where the water service was in Graham's name; the

informant entered with buy money and no cocaine; the officer heard the informant, a man, and a woman—whose voice "would be very close to the same voice[ ]" that the officer had heard when talking with Graham on other occasions; the officer heard the informant and the female voice discussing the drug transaction; the informant left the house with no money and a white substance that later tested positive for cocaine.

Fourth, the informant's testimony was never subject to cross-examination.

Fifth, and last, the State's case was not overwhelming to begin with. As the circuit court said in its ruling from the bench, "[w]ere the burden of proof something other than a preponderance of the evidence, I think the State would fall short." The court relied on three pieces of evidence in concluding that the evidentiary balance tilted against Graham: the officer's identification of the woman's voice as the person discussing the drug transaction; the utility records showing that the deal was done at Graham's residence; and "the informant had identified the individual as Ms. Graham." Without the informant's identification, the State's case was decidedly weaker.

After considering all the circumstances, we conclude that the confrontation error here was not harmless. We reverse and remand for further proceedings consistent with this opinion. The circuit court—which saw and heard the officer testify—should make the first call about whether, absent the informant's identification, the State proved by a preponderance of the evidence that Graham delivered cocaine. *Goforth*, 27 Ark. App.

at 154, 767 S.W.2d at 539 (reversing and remanding for further proceedings).

Reversed and remanded.

ROBBINS and GLOVER, JJ., agree.