

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0750-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK R. McNAMEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: ROD SMELTZER, Judge. *Affirmed.*

PETERSON, J. Mark McNamee appeals a judgment convicting him of possession of tetrahydrocannabinol (THC) and an order denying his postconviction motion. The circuit court originally placed McNamee on probation under the conditional discharge statute, § 961.47, STATS., after he pled no contest to possession of a controlled substance. Section 961.41(3g)(e), STATS. Following a probation violation, the circuit court found him guilty of the possession charge

and entered the judgment of conviction on the record. McNamee claims the court lacked jurisdiction because the court proceeding occurred two days after his probation term expired. Because this court concludes that the probation revocation procedures do not apply to conditional discharge dispositions and, even if they did apply, the circuit court properly entered the judgment of conviction within a reasonable time after McNamee's violation, this court affirms.

FACTS

McNamee pled no contest to possession of THC on August 12, 1997. The circuit court deferred adjudication of guilt and placed him on one year probation under the conditional discharge statute, § 961.47, STATS. The following July, McNamee's probation agent informed the court that McNamee had been charged in Marquette County with a felony, manufacturing THC. The agent requested that the Dunn County circuit court enter an adjudication of guilt on the possession charge and sentence McNamee.

The court scheduled a hearing on the agent's request for July 24. McNamee's attorney asked for an adjournment because the attorney was on vacation until July 31. The court rescheduled the hearing for August 14.

At the hearing, McNamee's attorney conceded that McNamee had violated probation. However, he challenged the court's jurisdiction because McNamee's probation had expired two days before the hearing. The circuit court overruled the objection, ordered entry of an adjudication of guilt, and sentenced McNamee to six months in the county jail.¹

¹ McNamee renewed his objection in a postconviction motion, which was also denied.

DISCUSSION

McNamee claims that the trial court lost jurisdiction when his probation term expired. He bases his argument on several cases dealing with probation revocation, most notably *Locklear v. State*, 87 Wis.2d 392, 274 N.W.2d 898 (Ct. App. 1978). However, this is not a probation revocation case. Rather, this is a conditional discharge case in which McNamee did not meet the conditions necessary to qualify for discharge.

McNamee was placed on probation under § 961.47(1), STATS., which sets forth a unique procedure for certain drug possession first offenders.² With the defendant's consent, a court may defer proceedings and place the defendant on probation without adjudicating guilt. If the defendant fulfills the conditions of probation, the court will dismiss the charges. However, if the defendant violates a condition of probation, the court may enter an adjudication of guilt and proceed to formal sentencing.

Conditional discharge is quite different from regular probation. Under regular probation, if a defendant violates conditions of probation, the department may initiate revocation proceedings. *See* § 973.10(2), STATS.

² Section 961.47(1), STATS., provides in relevant part:

Whenever any person who has not previously been convicted of any offense under this chapter, ... pleads guilty to or is found guilty of possession or attempted possession of a controlled substance or controlled substance analog under s. 961.41(3g)(b), the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him or her on probation upon terms and conditions. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him or her.

Detailed procedures must be followed. *See* WIS. ADM. CODE § DOC 331. However, under conditional discharge, the court must decide whether the defendant has fulfilled the conditions of probation. There is no formal revocation; rather, the court decides whether to grant the defendant the conditional benefit of dismissing the charges. Section 961.47(1), STATS.

Here, McNamee's probation agent merely informed the court of a new felony charge and recommended that McNamee not get the benefit of conditional discharge. The circuit court agreed with the agent. McNamee offers no reason why the circuit court could not reach this decision after his probation expired.

Furthermore, even if probation revocation principles do apply, *Locklear* does not deprive the circuit court of jurisdiction. Contrary to McNamee's assertion, *Locklear* does not require that a hearing be held before probation ends. *State ex rel. Avery v. Percy*, 99 Wis.2d 459, 463, 299 N.W.2d 886, 889 (Ct. App. 1980), which discussed *Locklear*, stated:

If the trial court's decision were to prevail, a probation or parole violation taking place during the last few weeks of a conditional release period would have to be ignored since it would be unlikely that a final revocation hearing could be held prior to the expiration of the release period.

Locklear merely required a final revocation hearing within a reasonable period of time. *See id.* at 405-06, 274 N.W.2d at 904.

By any stretch, the hearing was held within a reasonable period of time. The agent contacted the court on July 6. The court initially scheduled a hearing for July 24. It was delayed at the request of McNamee's attorney. The hearing was then held on August 14, only two days after the probation expired.

Locklear is premised on a procedural due process requirement: the right to a final determination that the terms of probation have been violated. *Id.* at 400, 274 N.W.2d at 901. That was particularly important there because Locklear had a possible defense. *Id.* at 403, 274 N.W.2d at 902. Here, however, McNamee concedes he violated probation. He has no defense and was not prejudiced in any way.

By the Court.—Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

