

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 98-00018-04-CR-W-ODS
)	
JACQUELINE FENIMORE,)	
)	
Defendant.)	

ORDER

Pending is the Government's motion to revoke Defendant Jacqueline Fenimore's supervised release (Doc. # 209). Evidence relating to the pending motion was presented by the parties at hearings before the Court on August 13, 2003, and August 20, 2003. This Order supplements the portion of the Court's ruling at the August 20, 2003 hearing, where the Court specifically rejected Defendant's challenge to the reliability of the sweat patch. For the following reasons, the Court rejects Defendant's challenge to the reliability of the sweat patch and finds that the sweat patch is reliable evidence that Defendant used illegal drugs, thereby violating a condition of her supervised release.

I. BACKGROUND

On October 14, 1998, Defendant was sentenced to thirty-six (36) months in custody and five (5) years supervised release after pleading guilty to the charge of distribution of methamphetamine. Defendant began her supervised release on February 27, 2001. On August 30, 2001, a violation report was filed alleging that Defendant violated the law and excessively used alcohol. Defendant admitted the violations, and her supervised release conditions were modified to include no alcohol and two months in the ignition interlock program. On July 18, 2002, a violation report was filed alleging that Defendant used a controlled substance. Defendant admitted the

violation and was placed in an inpatient drug program. On October 24, 2002, a violation report was filed alleging that Defendant failed to complete the halfway house program, mental health counseling and substance abuse testing. Defendant admitted these violations. On January 23, 2003, Defendant's supervised release was revoked, and she was sentenced to time served plus one day and three years of supervised release, including four months at a halfway house.

On April 17, 2003, a violation report was filed alleging that defendant violated her supervised release by using a controlled substance and associating with a person convicted of a felony. Defendant has admitted the violation of associating with a felon. The Government alleges that Defendant used cocaine in violation of the following condition of the supervised release: "[t]he defendant shall refrain from any unlawful use of a controlled substance." The Government's allegation is based on a PharmChem laboratory report that concluded that a sweat patch applied to Defendant on March 27, 2003, and removed on April 3, 2003, tested positive for cocaine. Defendant denies using a controlled substance and argues that the sweat patch is susceptible to being contaminated by drugs from outside sources.

II. STANDARD

The Court may revoke a term of supervised release if it finds by a preponderance of evidence that the defendant violated a condition of supervised release. See 18 U.S.C. § 3583(e)(3). If the Court finds that Defendant violated a condition of her supervised release, it can sentence Defendant to all or part of the term of supervised release authorized by statute for the offense for which Defendant was originally sentenced with or without credit for time served. Id.

III. DISCUSSION

At the hearing, Defendant argued that the sweat patch was contaminated through her frequent contact with currency due to the nature of her job as a waitress. Also, Defendant claimed the sweat patch was contaminated because she came into contact with crack cocaine when she discovered a co-worker using crack cocaine in the

bathroom at the restaurant where she worked. Subsequent to Defendant's discovery, Defendant and the co-worker got into a physical confrontation in the bathroom. Finally, Defendant argued that a negative hair test, which was conducted subsequent to her arrest for the violation at issue, negates the results obtained from the sweat patch.

The Government presented testimony from Michael Sanders, who applied the patch to Defendant on March 27, 2003, and Martin Joyce of Northstar, who removed the patch on April 3, 2003. The Government also presented testimony from Dr. Leo J. Kadehjian. Dr. Kadehjian testified that the sweat patch is a reliable method of detecting controlled substances in persons who wear it, and that experiments performed suggesting the possibility of internal or external contamination are not relevant to real-world situations.

In light of the evidence presented by the parties at the hearings held on August 13, 2003, and August 20, 2003, the Court makes the following findings:

1. The sweat patch is accepted as a scientifically reliable method of testing for evidence of drug use. First, the sweat patch is the most widely used method of testing for drug use by the Administrative Office of the United States Courts. In fact, in 1996, field studies of the sweat patch were conducted in twelve (12) judicial districts, which lead the Administrative Office to authorize the sweat patch in 1997. Second, the PharmChem sweat patch was cleared by the FDA in 1990 for marketing as a medical collection device, and, in 1995, the FDA cleared the immunoassays used to analyze the patch. Prior to these clearances with the FDA, detailed data from laboratory and clinical studies documenting the performance of the sweat patch were submitted to the FDA. Third, Dr. Kadehjian, an expert in the field of toxicology and a biomedical consultant who provides services to public and private drug programs and the Administrative Office, testified about the reliability of the sweat patch, the methods used in the application, removal and testing of the sweat patch, his familiarity with PharmChem, and the unlikelihood of sweat patch contamination in this case.

2. The Court accepts the testimony of Dr. Kadehjian that PharmChem procedures for application and removal of the sweat patch are proper. The Court finds that both Michael Sanders and Martin Joyce, the individuals who applied and removed the sweat patch from Defendant, were properly qualified and trained to apply and remove the sweat patch. Mr. Sanders applied the patch consistent with his training and took all reasonable steps to properly apply the sweat patch, including swabbing the area with an alcohol solution prior to application. The Court further finds that Mr. Joyce removed the patch in accordance with his training, which included inspecting the patch to determine whether it had been compromised and, finding that it had not, he properly packaged and preserved the patch. Based on this finding, the Court holds that the sweat patch was not rendered unreliable by any outside substance contaminating the patch due to inappropriate application or removal.
3. The Court finds that PharmChem's report regarding the testing of the sweat patch placed on Defendant and the information contained therein is generally reliable evidence from which to determine whether Defendant used cocaine thereby violating a condition of her probation.
4. Absent a showing of outside contamination by Defendant, the Court finds that the PharmChem report submitted by the United States is a sufficient basis on which to find by a preponderance of the evidence that Defendant used cocaine in violation of the conditions of her supervised release. This finding is consistent with other courts. United States v. Redd, 318 F.3d 778, 782 (8th Cir. 2003); United States v. Zubeck, 248 F. Supp.2d 895, 899 (W.D. Mo. 2002).
5. On May 9, 2003, Defendant submitted a sample of her hair for testing. The test, conducted by U.S. Drug Testing Laboratories on May 10, 2003, was negative for cocaine use. However, the Court finds that Defendant's negative hair test, even if reliable, does not conflict with the positive sweat patch. For example, controlled dosing studies have demonstrated that

low doses of a drug may be insufficient to be detected in hair. Doses above 120-170 mg of cocaine are necessary to be detected in hair, so that the amount of cocaine needed to produce Defendant's positive sweat patch level of 92ng/mL could also result in a negative hair test. It is also possible that the head hair specimen actually contained cocaine or benzoylecgonine, but that the presence of these drugs was missed by the screening assay, as Defendant presented no evidence supporting the reliability of the hair test. Furthermore, cocaine levels in hair decline with both time and hair treatment such as dyeing or cleansing the hair with specialized shampoos, so that the hair could have been positive in early April, and negative in May.

6. Having found that Defendant presented no evidence of the possibility of outside contamination and raised no challenge to the reliability of the sweat patch beyond a general denial, the Court finds that the results of the testing performed on the sweat patch worn by Defendant show, by a preponderance of the evidence, that Defendant used cocaine in violation of the conditions of her supervised release.

IV. CONCLUSION

For the foregoing reasons, the Court rejects Defendant's challenge to the reliability of the sweat patch and finds the results from the sweat patch are reliable evidence that Defendant used illegal drugs, thereby violating a condition of her supervised release.

IT IS SO ORDERED.

DATE: August 29, 2003

/s/ Ortrie D. Smith

ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT