

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs June 27, 2006

STATE OF TENNESSEE v. ERIC D. DEVANEY

**Appeal from the Knox County Criminal Court
No. 78526 Ray L. Jenkins, Judge**

No. E2005-01986-CCA-R3-CD - Filed August 17, 2006

The Defendant, Eric D. Deveany, pled guilty to aggravated burglary and robbery, and the trial court ordered him to serve two concurrent five-year sentences. The Defendant applied for, and was given, probation. Subsequently, a violation of probation warrant was issued, and, following a revocation hearing, the trial court revoked the Defendant's probation. On appeal, the Defendant contends that the trial court erred when it revoked his probationary sentences and ordered him to serve the remainder of his sentences in the Tennessee Department of Correction. We affirm the judgment of the trial court.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JAMES CURWOOD WITT, JR., JJ., joined.

Mark E. Stephens and Robert C. Edwards, Knoxville, Tennessee, for the Appellant, Eric D. Devaney.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Leon Franks, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the Defendant's convictions for aggravated burglary and robbery, for which he was ordered to serve two concurrent five-year sentences on probation. Thereafter, a violation of probation warrant was issued, which alleged that the Defendant had violated two conditions of his probation, number 6 and number 10. The warrant alleges that the Defendant violated number 6 by failing to report to his probation officer in January and February of 2005. The warrant also alleges that the Defendant violated number 10 by failing to pay court costs, failing to report for community service, and failing to attend required anger management classes.

At the hearing on the violation of probation warrant, Mark Lawless, with the Tennessee Board of Probation and Parole, testified that he was the Defendant's supervising officer, beginning on June 11, 2004. He said that, in March of 2005, he filed a violation of probation warrant because the Defendant had failed to report to him in January and February. He said that he saw the Defendant on December 22, 2004, and that the Defendant had a scheduled appointment in January, but he failed to report. Officer Lawless left a message on the Defendant's answering machine, but he did not receive a response. The officer said that he last saw the Defendant on December 22, 2004, and that he did not see him again until the Defendant was apprehended on June 22, 2005. He said that, during this time, the Defendant did not attempt to contact him.

Officer Lawless testified that the Defendant was required to do community service, but he failed to perform any community service while on probation. Further, the Defendant was ordered to, but failed to attend, anger management classes.

On cross-examination, the officer said that it is possible that the Defendant did some community service, but he did not do any for the State. The officer agreed that the Defendant had not been arrested on any new charges and that he did not test positively on either of the two drug screen tests that he was given. Officer Lawless agreed that the Defendant was "cooperative."

Vyvian McCarthy, the supervisor of the Enhanced Probation Program, testified that the Defendant was placed in custody for the violation of probation about which Officer Lawless testified. She said that, after the Defendant was placed in custody, he was referred to her for an evaluation for enhanced probation. As part of that evaluation, she interviewed the Defendant, and she determined that he was not suitable for enhanced probation. McCarthy said that the Defendant was in "total denial" of his drug and alcohol problem and did not think that alcohol was a drug. Further, she said that the Defendant thought that maintaining a job for one of two months qualified as "employment," and he had had numerous jobs and had not had a steady employment history. McCarthy also testified that the Defendant told her that it was too hard to be on county probation and State probation at the same time. On cross-examination, McCarthy said that even if the Defendant were to voluntarily accept and complete a treatment program he still would not be a candidate for her enhanced probation program. She said that he would, however, be closer to being a better candidate if he dealt with his alcohol problem.

The Defendant testified that he made a mistake by not completing his anger management classes. He said that when he had attended his anger management classes he gained some benefit from them, but he stopped going because he was working six days a week and the only classes available were during his work-week. He said that, prior to his violation, he worked as a waiter at Shoney's, and he attempted to pay his costs and fees. The Defendant testified that, prior to being taken into custody, he lived with his mother and would return to her home if the trial court granted him probation again. He said that he was willing to accept any other living conditions that the court imposed. Further, he said that he now recognized that maybe his drinking alcohol played a part in "this downfall that [he] had." The Defendant said that his father died in an alcohol-related car crash, and he recognized the danger that it posed for him.

On cross-examination, the Defendant testified that some circumstances had changed since he was placed on probation last year. Specifically, he said that he was no longer on county probation, and his attitude had changed. He said that, previously, he had taken for granted that he was released, and now he realized that he had been given a second chance and had abused that chance. The Defendant agreed that he was shown, and given a copy of, the rules of his probation. He said that he had completed only eight hours of community service since June of last year and that he was required to perform eight hours per month.

Based upon this evidence, the trial court revoked the Defendant's probation, stating:

[The Defendant] seems to be the last in a long line of . . . probationers that want to control their own probation to the exclusion of . . . the officers. When it didn't suit him, he failed to report. You can't supervise unless the probationer is there to be supervised.

He has failed to pay toward his court costs since November of last year.

It didn't suit him to report for community service, and so he . . . says, well, I went once, ha, ha. I don't guess that's much community service.

And he failed to attend anger management, as directed by the Court, this in conjunction with a domestic assault in General Sessions Court. That was absolutely necessary in that offense, and even then he could not change his value system to that of following probationary rules.

It just got "too hard" doing County probation and State probation at the same time.

He cannot keep a job any longer than two to three months.

Although he does not believe he has an alcohol problem, the enhanced probation report said that during the commission of this offense for which he stands before this Court -- the victim stated the [D]efendant struck him several times which caused deep lacerations and required several stitches. But [he] denies he even remembers what happened because he was extremely intoxicated.

Ms. McCarthy, the probation manager of enhanced probation, has testified that perhaps a recognition of the alcohol problem would help, anything else would not.

The [D]efendant just does not appreciate what leniency was given him by the District Attorney's Office, the Probation Office, and this Court. As a result, he has earned the dubious right of serving his sentence in the penitentiary. Probation is

revoked.

It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant concedes that there are some “technical violations of the terms and conditions of his probation;” however, he asserts that the trial court erred when it did not consider him for alternative relief. When a trial court determines by a preponderance of the evidence that a probationer has violated the conditions of his or her probation, the trial court has the authority to revoke probation. Tenn. Code Ann. § 40-35-311(e) (2003). Upon finding that the defendant has violated the conditions of probation, the trial court may revoke the probation and either: (1) order incarceration; (2) order the original probationary period to commence anew; or (3) extend the remaining probationary period for up to two additional years. State v. Hunter, 1 S.W.3d 643, 644 (Tenn. 1999); see Tenn. Code Ann. § 40-35-310 (2003); Tenn. Code Ann. § 40-35-311(e) (2003); Tenn. Code Ann. § 40-35-308(c) (2003). The defendant has the right to appeal the revocation of his probation and entry of his original sentence. Tenn. Code Ann. § 40-35-311(e). Upon a finding of a violation, the trial court is vested with the statutory authority to “revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered” Tenn. Code Ann. § 40-35-311(e); Hunter, 1 S.W.3d at 646 (holding that the trial court retains the discretionary authority to order the defendant to serve his or her original sentence in confinement). Furthermore, when probation is revoked, “the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension” Tenn. Code Ann. § 40-35-310. The trial judge retains the discretionary authority to order the defendant to serve the original sentence. See State v. Duke, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995).

The decision to revoke probation is in the sound discretion of the trial judge. State v. Kendrick, 178 S.W.3d 734, 738 (Tenn. Crim. App. 2005); State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). The judgment of the trial court to revoke probation will be upheld on appeal unless there has been an abuse of discretion. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). To find an abuse of discretion in a probation revocation case, the record must be void of any substantial evidence that would support the trial court’s decision that a violation of the conditions of probation occurred. Id.; State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978); State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). Proof of a probation violation is sufficient if it allows the trial court to make a conscientious and intelligent judgment. State v. Milton, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984). In reviewing the trial court’s finding, it is our obligation to examine the record and determine whether the trial court has exercised a conscientious judgment rather than an arbitrary one. Mitchell, 810 S.W.2d at 735.

In this case, the Defendant admitted a violation of the terms of probation. This alone is substantial evidence of record to support the trial court’s revocation order. See State v. Michael Emler, No. 01C01-9512-CC-00424, 1996 WL 691018, at *2 (Tenn. Crim. App., at Nashville, Nov.

27, 1996) (holding where the defendant admits a violation of the terms of probation, revocation by the trial court is neither arbitrary nor capricious), *no Tenn. R. App. P. 11 application filed*. We understand the Defendant's contention that he should not be made to serve his entire original sentence because he only technically violated his probation. In our view, after exercising a conscientious judgment as to whether or not a Defendant has violated the terms of a probated sentence, the trial court must also exercise a conscientious rather than arbitrary judgment as to an appropriate disposition.

We conclude that the trial court did not abuse its discretion in this case. The Defendant knew and understood that the terms of his probation included completing anger management classes, completing eight hours of community service per month, paying court costs, and reporting monthly to his probation officer. The Defendant, however, admits that he did not complete his anger management classes and that he stopped reporting to his probation officer. Further, he admits that he performed a total of eight hours of community service during a one year period of time and that he did not pay any money towards costs. We conclude that, based upon the evidence presented, the trial court has exercised a conscientious judgment rather than an arbitrary one when it ordered the Defendant to serve the balance of his sentence in prison. Therefore, the Defendant is not entitled to relief on this issue.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we affirm the trial court's judgment.

ROBERT W. WEDEMEYER, JUDGE