

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 21, 2009

STATE OF TENNESSEE v. SHAMAR RAFAEL LEWIS

**Direct Appeal from the Circuit Court for Dickson County
Nos. CR8277, CR8662, and CR8664 Larry J. Wallace, Judge**

No. M2008-02294-CCA-R3-CD - Filed September 11, 2009

The Defendant, Shamar Rafael Lewis, pled *nolle contendre* to two counts of casual exchange of a controlled substance and pled guilty to two counts of sale of less than .5 grams of a controlled substance, and the trial court sentenced him to probation. While on probation, probation violation warrants were issued for the Defendant. A hearing was held, and the trial court revoked the Defendant's probation and ordered the Defendant to serve his sentences in the Tennessee Department of Correction. On appeal, the Defendant claims that the trial court abused its discretion by failing to consider a "less restrictive alternative" to confinement. After a thorough review of the record and the applicable law, we conclude that the trial court properly exercised its discretion. Accordingly, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, J.J., joined.

Dawn S. Kavanagh, Ashland City, Tennessee, for the Appellant, Shamar Rafael Lewis.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Cameron L. Hyder, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; Carey J. Thompson, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Background

On May 31, 2006, the Petitioner pled *nolle contendre* to two counts of casual exchange of a controlled substance in case number CR8277. The trial court sentenced him to two consecutive sentences of eleven months and twenty-nine days on probation. On April 12, 2007, the Defendant's

probation officer filed a probation violation affidavit alleging that the Defendant tested positive for marijuana and cocaine, which violated a rule of his probation. On May 17, 2007, the Defendant pled guilty in both case number CR8662 and case number CR8664 to one count of sale of cocaine, less than .5 grams. The trial court, considering those cases together, sentenced him to concurrent sentences of six years of probation. On August 17, 2007, the Defendant's probation officer for cases CR8662 and CR8664 filed an affidavit alleging that the Defendant violated the terms of his probation by not reporting and by testing positive for marijuana and cocaine. On November 28, 2007, the Defendant waived a hearing and admitted the probation violations listed for all of his cases. The trial court considered the probation violation reports filed against the Defendant and subsequently reinstated the Defendant to probation. For case CR8277, the trial court extended the Defendant's probation for one year, and for cases CR8662 and CR8664, the trial court required the Defendant to complete drug and alcohol treatment.

On March 27, 2008, the Defendant's probation officer for case CR8277 executed another probation violation affidavit alleging that the Defendant violated the terms of his probation by not reporting, not making payments, and not showing proof of enrollment or completion of the court-ordered drug and alcohol treatment. On May 28, 2008, a probation violation report was filed with respect to cases CR8662 and CR8664, alleging that the Defendant failed to report to his probation officer, failed to pay the required fees, and failed to submit a DNA sample. The Defendant subsequently admitted that he violated his probation in all three cases, and he waived a hearing. The trial court then revoked the Defendant's probation in all three cases. On September 12, 2008, by agreed order, the Defendant was allowed to withdraw his admission that he violated his probation. The trial court then held a hearing to determine whether the Defendant had violated the terms of his probation.

B. Hearing

At the hearing to determine whether the Defendant violated his probation, the following evidence was presented: Kerry Monsue, one of the Defendant's probation officers, testified that she supervised his probation beginning in November 2008 on cases CR8662 and CR8664. She testified that she signed an affidavit alleging the Defendant violated his probation because he had failed to report for several months, he failed to pay all the fees that he owes, and he failed to provide a biological sample. Referring to the fees, she stated that he owed \$460 in probation costs. Monsue said the current probation violation warrant was the second one issued for the Defendant. She recounted that his first probation violation affidavit alleged he failed to report to his probation officer. She explained that the trial court found the Defendant violated his probation and that the court reinstated his probation with the additional requirement for him to complete drug and alcohol treatment. Monsue said that she had not yet received verification of the Defendant's completion of the treatment.

Anita McCord, the Defendant's probation officer for case number CR8277, testified that she filed a second probation violation affidavit. She said that the Defendant violated three terms of his probation: he did not report; he did not pay the fees he owed; and he did not complete the drug and

alcohol treatment required.

The Defendant testified that, in July 2008, he waived a hearing on the probation violation warrants and that he admitted violating his probation. He testified he then withdrew his admission. The Defendant stated that, instead of having his probation reinstated, he wanted the trial court to sentence him to community corrections and a different drug treatment program. He felt that the programs he was supposed to attend did not provide him with the support he needed, such as counseling and medical attention.

On cross-examination, the Defendant admitted that he did not go to the court-mandated drug and alcohol treatment program and that he did not pay his court costs and fines. He explained that he did not attend treatment because he “was going back and forth to probation and taking care of [his] kids and just everything. [He] believe[d he] just had too much on [his] plate.” The Defendant maintained that he would like to receive drug treatment. On redirect examination, the Defendant said that he can pay his child support and rent and that he would be able to pay for an alcohol-detection bracelet. On recross-examination, the Defendant said that he paid McCloud \$100 every time he reported to her. He then said he paid her that amount perhaps twice.

McCloud was called to testify again, and she said that the Defendant had not paid her every time he reported to her. She also said that sometimes he paid her less than \$100 and that sometimes he paid nothing.

After hearing the evidence presented, the trial court concluded that the Defendant violated his probation and ordered him to serve the balance of his sentence in confinement. It is from this judgment that the Defendant now appeals.

II. Analysis

The Defendant argues that the trial court abused its discretion when it ordered the Defendant to serve the entire balance of his sentence in confinement. He claims that the trial court should have considered less-restrictive alternatives, and he specifically seeks an extended period of probation or a sentence of community corrections. The State argues that the trial court did not abuse its discretion when it revoked the Defendant’s probation and ordered service of the sentences in confinement. Moreover, the State argues, a community corrections sentence is not available to a defendant after the revocation of probation.

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. T.C.A. § 40-35-311(e) (2006). 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 T.C.A. §§ 40-35-308, -310, -311 (2006). The defendant has the right to appeal the revocation of his probation and

entry of his original sentence. T.C.A. § 40-35-311(e). After finding 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” *Id.*; accord *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” T.C.A. § 40-35-310.

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). This Court will uphold a trial court’s judgment to revoke probation unless the trial court abused its 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).

After hearing the evidence presented, the trial court revoked the Defendant’s probation and ordered him to serve the remainder of his sentence while incarcerated. The trial court found that the Defendant violated his probation when he failed to comply with terms (6) (that the Defendant report to his probation officer), (9) (that the Defendant pay all fees), and (10) (a special condition that the Defendant complete a drug and alcohol treatment) of his probation in case number CR8277. The trial court stated that the Defendant “has had ample opportunity in the past with these other warrants [a]nd therefore, the Court finds that his probation needs to be fully revoked and serve the balance of his sentence.”

In this case, we conclude that the trial court was within its discretion to revoke the Defendant’s probation. The Defendant’s release on probation included the following conditions:

6. I will . . . report to my Probation Officer as instructed

. . . .

9. I agree to pay all required fees to the Supervision and Criminal Injuries fund unless waived by appropriate authorities. Additionally, if so ordered by the court, I will pay all imposed fines, court costs, and restitution.

10. I will observe any special conditions imposed by the Court.

. . . .

In case CR8277, the trial court, after the Defendant violated his probation in that case for the first

time, imposed the special condition that the Defendant's probationary period was extended by one year. In cases CR8662 and CR8664, the trial court imposed the special condition that the Defendant complete drug and alcohol treatment after the Defendant's initial violations. The Defendant admitted that he did not report to his probation officers, as required. He additionally admitted that he did not pay all of the fees he was required to pay and that he did not attend the required drug and alcohol treatment program. Furthermore, Monsue, the Defendant's probation officer for cases CR8662 and CR8664, testified that the Defendant had failed to report to her for several months and that he still owed \$460 in probation costs. McCord, the Defendant's probation officer for case CR8277, testified that the Defendant did not report to her as required, did not pay the fees he owed, and did not complete the drug and alcohol treatment required.

Additionally, we conclude that the trial court appropriately ordered the Defendant to serve his sentence in confinement. The record indicates that the Defendant had previously violated his probation but was allowed to remain on probation rather than serve his sentence in prison. The Defendant was given more than one opportunity to comply with the conditions of a probated sentence and failed to do so. We conclude the trial court did not abuse its discretion, and the Defendant is not entitled to relief on this issue.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgments of the trial court.

ROBERT W. WEDEMEYER, JUDGE