

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
APRIL SESSION, 1995

FILED

October 19, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee)

vs.)

TERRY LEE HINTON,)

Appellant)

No. 03C01-9502-CR-00033

HAMBLEN COUNTY

Hon. **James E. Beckner**, Judge

(Probation Revocation)

For the Appellant:

Greg W. Eichelman
Office of Public Defender
Third Judicial District
1609 College Park Drive, Box 11
Morristown, TN 37813-1618

For the Appellee:

Charles W. Burson
Attorney General and Reporter

George P. Linebaugh
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

C. Berkeley Bell, Jr.
District Attorney General

John T. Dugger
Asst. District Attorney General
510 Allison Street
Morristown, TN 37814

OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

_____The appellant, Terry Hinton, appeals from an order entered by the Criminal Court of Hamblen County which resulted in the revocation of his probation. The appellant contends that the trial court erred in revoking his probation.

After a review of the record, we affirm the judgment of the trial court.

On November 11, 1992, the appellant pled guilty to two counts of aggravated burglary, two counts of theft of property, and one count of setting fire to personal property. The trial court ordered that the sentences be served concurrently, resulting in an effective sentence of six years with the Tennessee Department of Correction. The appellant remained incarcerated for approximately nine months. On August 24, 1993, the appellant was placed on probation pursuant to Tenn. Code Ann. § 40-20-206 (1990). The appellant signed the Certificate of Probation, acknowledging that he understood the terms of his release and agreed to comply with the conditions of probation.

On October 20, 1994, a probation violation warrant was issued for the appellant's arrest. The affidavit attached to the warrant alleged that the appellant had violated the conditions of his probation in the following respects:

- [1] Mr. Hinton does not report as instructed. He does not contact the office to reschedule his appointment.
- [2] Mr. Hinton currently owes supervision fees for March-September, 1994.
- [3] Mr. Hinton's last restitution payment, made by check, was returned by the bank.
- [4] Mr. Hinton has failed to perform any of his community service work while on probation.

The affidavit was signed by Melinda Barker-Mutchmore, the appellant's probation officer.

The appellant was arrested, and, on November 19, 1994, the trial court conducted a hearing to determine whether his probation should be revoked. The appellant was the only witness at the hearing. During the course of the hearing, the appellant admitted that he had committed all four violations alleged in the warrant, but offered explanations which, he contends, justify his noncompliance. First, the appellant, who is employed part-time and is a full-time student, stated that he could not find community service work that coincided with his schedule. Yet, the appellant admitted that his probation officer had given him an opportunity to perform his community service the previous summer when he was not attending classes. He was unable to explain why he did not avail himself of this opportunity. Second, the appellant claimed that his failure to report to his probation officer stemmed from a misunderstanding concerning his reporting schedule. Third, the appellant testified that he had incurred substantial debts that he had not reported to his probation officer. Therefore, he found it difficult to pay supervision fees and restitution. At the conclusion of the hearing, the trial court revoked the appellant's probation.

A trial court may revoke a defendant's probation whenever it finds by a preponderance of the evidence that the defendant has violated the conditions of his probation. Tenn. Code Ann. § 40-35-311(d)(1990). A preponderance of the evidence is that evidence sufficient to allow the judge to make a "conscientious and intelligent" decision. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991); State v. Smith, No. 01C01-9501-CR-00006 (Tenn. Crim. App. at Nashville, July 11, 1995). The judgment of the trial court will not be disturbed on appeal absent an abuse of discretion. Id. In order for a reviewing court to find that a trial court abused its discretion, the record must contain no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred. Id.

We conclude that material evidence exists to justify the trial court's decision. Again, at the probation revocation hearing, the appellant admitted that he had violated the terms of his probation. The appellant contends that because his violations were the result of his busy schedule, financial difficulties, and a misunderstanding, they do not warrant the revocation of his probation. However, as already mentioned, the appellant turned down an opportunity to perform community service that did not conflict with his schedule. Moreover, as to the alleged misunderstanding concerning the appellant's reporting schedule, the credibility of witnesses at a probation revocation hearing is to be determined by the trial judge. State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). Finally, the United States Supreme Court has, indeed, observed that, when a probationer has made all reasonable efforts to pay a fine or restitution, it is fundamentally unfair under the due process clause of the Fourteenth Amendment to revoke probation without considering whether adequate alternative methods of punishing him are available. Bearden v. Georgia, 461 U.S. 660, 672-673, 103 S.Ct. 2064, 2073 (1983). See also State v. Dye, 715 S.W.2d 36, 39-40 (Tenn. 1986); State v. Reynolds, No. 01C01-9309-CC-00306 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn.), cert. denied, ___ U.S. ___, 115 S.Ct. 278 (1994). However, "the Bearden court carefully distinguished this limitation on the imprisonment of indigents from the situation where a defendant was 'somehow responsible' or 'at fault in failing to pay' an imposed fine or restitution." Dye, 715 S.W.2d at 40.

Clearly, the appellant's conduct does not reflect a good faith effort to pay fees and restitution. Indeed, the trial judge observed that the appellant's conduct reflects a "course of manipulation." The appellant failed to pay supervision fees for seven of the fourteen months he was on probation. His last restitution payment, made by check, was returned by the bank. The sole explanation offered by the appellant at the hearing was the bald assertion that he had

incurred substantial debts. Yet, the appellant failed to inform his probation officer of these debts, or otherwise work with his probation officer to ensure payment of restitution and fees.

Probation is a privilege. State v. Williams, No. 03C01-9301-CR-00011 (Tenn. Crim. App. at Knoxville, February 24, 1994). Probation has also been described as an "act of grace," State v. Duff, No. 02C01-9307-CR-00152 (Tenn. Crim. App. at Jackson, June 28, 1995), and the "largess of the law." Stiller v. State, 516 S.W.2d 617, 620 (Tenn. 1974). We conclude that the trial judge did not abuse his discretion by revoking this privilege.

Accordingly, the judgment of the trial court is affirmed.

David G. Hayes, Judge

CONCUR:

David H. Welles, Judge

John A. Turnbull, Special Judge