

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY SESSION, 1996

**FILED**  
April 26, 1996  
Cecil W. Crowson  
Appellate Court Clerk

STATE OF TENNESSEE, )

Appellee, )

VS. )

RAYMOND THOMAS, )

Appellant. )

C.C.A. NO. 01C01-9507-CC-00214

ROBERTSON COUNTY

HON. JAMES E. WALTON  
JUDGE

(Probation Revocation)

ON APPEAL FROM THE JUDGMENT OF THE  
CIRCUIT COURT OF ROBERTSON COUNTY

FOR THE APPELLANT:

MICHAEL R. JONES  
Public Defender  
  
FRED W. LOVE  
Assistant Public Defender  
19th Judicial District  
109 South Second Street  
Clarksville, TN 37040

FOR THE APPELLEE:

CHARLES W. BURSON  
Attorney General and Reporter  
  
GEORGE LINEBAUGH  
Assistant District Attorney  
450 James Robertson Parkway  
Nashville, TN 37243-0493  
  
JOHN CARNEY  
District Attorney General  
  
DENT MORRISS  
Assistant District Attorney General  
507 Public Square  
Springfield, TN 37172

OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

The Defendant appeals as of right from the judgment of the trial court which found him to be in violation of the terms of his probation. The Defendant argues that the trial judge failed to exercise conscientious judgment and abused his discretion. We disagree and affirm the judgment of the trial court.

On November 19, 1993, the Defendant was found guilty of assault and sentenced to eleven months and twenty-nine days in the county jail. The jail time was suspended and the Defendant was placed on probation. One of the conditions of the Defendant's probation was that he pay costs and restitution. He was ordered to make monthly payments of twenty-five percent of his gross income.

On November 4, 1994, a probation violation warrant was issued against the Defendant. The warrant alleged that the Defendant had violated the terms of his probation because he had made no payments toward costs or restitution. After conducting an evidentiary hearing on the warrant, the trial court found that the court clerk had received from the Defendant not even a "single, solitary penny." The court revoked the Defendant's probation and ordered his sentence served in confinement. It is from this order of the trial court that the Defendant appeals.

In deciding whether a condition of probation has been violated, a trial judge need not find that a violation has been proved beyond a reasonable doubt, but rather that the preponderance of the evidence establishes the violation. Tenn. Code Ann. § 40-35-311(d). Thereafter, the record must show that the trial judge has exercised conscientious judgment in making the decision rather than acting arbitrarily. Stamps v. State, 614 S.W.2d 71, 73 (Tenn. Crim. App. 1980) perm. to appeal denied, id.

(Tenn. 1981). "In reviewing the findings of the trial judge, the judgment of the trial court is given the weight of a jury verdict." Id.

Once a violation has occurred, the decision of whether to revoke a suspended sentence rests in the sound discretion of the trial judge. State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). The trial judge has a duty at probation revocation hearings to adduce sufficient evidence to allow him to make an intelligent decision. Id.

For an appellate court to be warranted in finding that a trial judge erred in determining that a violation has occurred, it must be established that the record contains no substantial evidence to support the conclusion of the trial judge. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). If the violation is so supported by the record, the judgment of the trial court revoking probation will not be disturbed on appeal unless it appears that there has been an abuse of discretion.

At the hearing on the probation violation warrant, the Defendant's probation officer testified that the Defendant had repeatedly reported that he was paying restitution through payroll deduction at his place of employment. The probation officer determined that the court clerk was receiving no payments from the Defendant and asked the Defendant to verify that he was having money deducted from his pay. The Defendant never provided any verification. The assistant personnel manager at the Defendant's place of employment stated that the company had no record that the Defendant had made any request to deduct anything from his pay.

The Defendant testified that he requested his employer to deduct twenty-five percent of his pay as a "garnishment" of his check to go toward restitution. He said that he thought his employer had taken money from his pay for restitution. The Defendant presented no evidence to verify or corroborate his testimony that some amount had

been deducted from his pay to go toward his costs and restitution. The Defendant did write a check to the court clerk for three hundred dollars in April of 1995, but an execution was levied on the Defendant's bank account before the check could clear the bank. The court clerk verified that nothing had been paid toward the Defendant's costs or toward restitution.

The Defendant argues that because he attempted to comply with the court's order by asking his employer to deduct twenty-five percent from his paycheck, he was not in willful violation of the terms of his probation. Although the Defendant argues that his failure to make restitution was caused by his indigency, the record clearly establishes that the Defendant did not pay anything toward his costs or restitution during a considerable length of time while he was gainfully employed. The Defendant's own testimony at the hearing on the probation violation warrant supports the trial court's finding that the Defendant did not make a "sincere effort" to comply with the court's order. The Defendant's argument that the trial court judge abused his discretion would be much stronger if there was any evidence in this record from which we could conclude that the Defendant paid even a small portion of what he was ordered.

We cannot conclude that this record contains no substantial evidence to support the finding of the trial judge that a violation of the conditions of the Defendant's probation has occurred. We also cannot conclude that the trial judge abused his discretion when he revoked the Defendant's probation.

The judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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JOSEPH M. TIPTON, JUDGE