IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9511-CR-00397**
	)	
Appellee,	)	
	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. SETH NORMAN**
KENNETH W. MARTIN,	)	**JUDGE**
	)	
Appellant.	)	(Probation Revocation)

ON APPEAL FROM THE JUDGMENT OF THE CRIMINAL COURT OF DAVIDSON COUNTY

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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. He argues that the trial court erred by reinstating his sentence. We affirm the judgment of the trial court.

On September 28, 1994 in the Davidson County Criminal Court, the Defendant was convicted of attempted aggravated child abuse. His sentence was suspended, and he was to serve 6 years on probation. The Defendant submitted an application to transfer his probation supervision to Illinois and was accepted in January, 1995.

In a letter dated April 17, 1995, the Defendant's supervising probation officer in Illinois informed his Davidson County probation officer of several violations. On April 21, 1995, a probation violation warrant was issued. The warrant that was issued claimed numerous violations, namely: (1)That the Defendant had engaged in illegal activity; (2) that he was not employed but had reported that he was; (3) that he did not report for his February appointment with his probation officer; and (4) that he tested positive for cocaine and marijuana.

A probation revocation hearing was held after which the trial court revoked the Defendant's probation and reinstated his original six-year sentence. The State offered the Illinois probation officer's letter and testimony by his Davidson County probation officer. The Defendant and his fiancé testified on his behalf.

The record reflects that the Defendant was arrested in Illinois on domestic battery charges after neighbors called the police, although those charges were later dropped. There is evidence that his fiancé reported to the police that he kicked her while she was holding their baby. The probation officer reported the incident to the Illinois Department of Children and Family Services. The record also reflects an outstanding warrant in Illinois for harassing his fiance's parents. The Defendant did not appear at the court date scheduled for April 17, 1995.

The record shows that the Defendant tested positive for cocaine and marijuana, and he admits that he smoked a marijuana cigarette laced with cocaine. When his probation officer arrived at his home and directed him to go to the hospital for a second blood test, the Defendant did not appear at the scheduled time. The Defendant claims he arrived after work for the test, but his probation officer was not at the hospital.

He also completed a report dated March 17, 1995 which he submitted to his probation officer that stated he was working at a pharmacy warehouse, yet he had not worked at that job since March 3, 1995. Finally, the Defendant did not attend his February appointment with his probation officer, but did make the meeting in March.

The State introduced at the hearing evidence that the Defendant reported he was receiving drug treatment, but with further investigation, his probation officer discovered he had not done so. Additionally, the State alleged that the Defendant moved his residence without notifying his probation officer.

The Defendant contends that the State proved only that he had used drugs, but none of the other allegations. He concedes that the trial judge did not abuse his discretion by revoking his probation. However, he does allege that the trial court erred by reinstating his entire sentence, which the Defendant considers to be excessive compared to the magnitude of his probation violation. We disagree.

Both the granting and denial of probation rest in the sound discretion of the trial judge. State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). Moreover, the trial judge has the discretionary authority to revoke probation if a preponderance of the evidence establishes that a defendant violated the conditions of his probation. The trial judge must, however, adduce sufficient evidence during the probation revocation hearing to allow him to make an intelligent decision. Id. The determination made by the trial court, if made with conscientious judgment, is given the weight of a jury verdict and entitled to affirmance. Stamps v. State, 614 S.W.2d 71, 73 (Tenn. Crim. App. 1980), perm. to appeal denied, id. (Tenn. 1981).

When a probation revocation is challenged, the appellate courts have a limited scope of review. For an appellate court to be warranted in finding 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 the trial court acted arbitrarily

or otherwise abused its discretion. State v. Williamson, 619 S.W.2d 145, 146 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1981).

Although the Defendant argues that the only probation violation proved at the hearing was that he used cocaine and marijuana in violation of Rule number 7 of his probation, there was evidence of a number of other violations.[1] Regarding his illegal activity alleged to have violated Rule number 1 of his probation, the State introduced a police incident report about the arrest, and the Defendant and his fiancé both testified that the arrest had occurred. The Defendant's fiancé also corroborated the probation officer's report that the Defendant had a harassment warrant issued against him.

Rule number 4 of the Defendant's probation required him to maintain employment. He maintains that he was working at a maintenance job, but submitted no proof. He did represent in his written report that he was working at a pharmacy warehouse when that job was terminated two weeks prior to his report. The Defendant countered that he had employment elsewhere, but submitted no proof. Finally, the Defendant is alleged to have violated Rule number 6 of his probation by missing his February appointment with his probation officer. He claims he attended the meeting, but there is no documentation that supports this contention.

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[1] The following probation rules were alleged to have been violated:
Rule #1: I will obey the laws of the United States, or any State in which I may be, as well as any municipal ordinances;
Rule #4: I will work at a lawful occupation and support my dependents, if any, to the best of my ability;
Rule #6: I will allow my Probation Officer to visit my home, employment site, or elsewhere, and will carry out all instructions he/she gives, and report to my Probation Officer as given instruction to report.
Rule #7: I will not use intoxicants (beer, whiskey, wine, etc.) Of any kind to excess, or use or have in my possession narcotic drugs or marijuana.

The Defendant claims that these allegations have not been proved, yet he has made representations that corroborate the State's list of violations. We are mindful that these need not be proved beyond a reasonable doubt, but by a preponderance of the evidence. We cannot say that the trial court abused its discretion, because there is substantial evidence of a number of violations of the Defendant's probation.

The Defendant also asserts that the State's introduction of evidence that he represented that he was obtaining drug treatment, when he was not, and that he failed to report a change of address are inappropriate grounds on which to revoke probation because they were not listed on his revocation warrant. He cites State v. Roger McCormick, No. 01C01-9312-CR-00437, Sumner County (Tenn. Crim. App., Nashville, Oct. 13, 1994), which held that the use of additional probation violations of which the defendant had no notice constituted a due process violation. Id. at 6. We agree that consideration of these new allegations was error. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) mandates that to satisfy due process, a defendant is entitled to written notice of alleged probation violations. 411 U.S. at 786, 93 S.Ct. at 1762; see State v. Wade, 863 S.W.2d 406, 408 (Tenn. 1993).

However, we must consider whether, absent the use of inappropriate additional violations, there was substantial evidence to support the trial court's decision. As noted before, there is ample evidence of numerous violations alleged in the warrant upon which the trial court could base its revocation of probation. Therefore, any error by the court in considering this additional

evidence is harmless. We cannot, then, conclude that there was an abuse of discretion.

When a trial judge grants a suspended sentence, that judge demonstrates a certain amount of confidence that the Defendant will lead a lawful life. When the Defendant's subsequent actions violate that confidence, certainly the trial judge again exercises discretion in whether or not the suspended sentence should be revoked. Davenport v. State, 214 Tenn. 468, 474, 381 S.W.2d 276, 279 (1964); Thompson v. State, 198 Tenn. 267, 269, 279 S.W.2d 261, 262 (1955). The Defendant's subsequent actions may indicate that the initial decision to suspend the sentence was a mistake. All probationers are deemed to be on notice that they are not to engage in unlawful activity or otherwise conduct themselves inconsistently with good citizenship if they are granted probation instead of incarceration. Roberts v. State, 546 S.W.2d 264, 265 (Tenn. Crim. App. 1976).

The evidence shows that in a brief, three-month period in which the Defendant was supervised in Illinois, his tenure there was fraught with violations. It is obvious that the trial judge made a conscientious decision that the Defendant had a poor prognosis for maintaining a lawful life while on probation.

We now consider whether the reinstatement of the Defendant's six-year sentence is excessive. A trial court is vested with the statutory authority to "revoke 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(d). Furthermore, when probation is revoked, "in such cases

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).

Clearly, the trial judge had the authority to reinstate the Defendant's six-year sentence to be served in confinement. There is evidence that the Defendant not only used drugs, but that he had other violations as well. In addition, because the Defendant did not provide this court with the complete record, including the transcript of relevant prior proceedings, the original judgment, sentence and other relevant documents, we are unable to conduct a thorough and meaningful review of all the factors leading to the trial court's decision to impose the full sentence. Under these circumstances, we cannot conclude that reinstatement of the original sentence was in error.

Accordingly, the judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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JOSEPH M. TIPTON, JUDGE