IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

SEPTEMBER SESSION, 1996

ALEJANDROS GAUNA,
APPELLANT

VS.

C.C.A. NO. 01C01-9512-CC-00422
MAURY COUNTY
HONORABLE WILLIAM B. CAIN
(PROBATION HEARING)

STATE OF TENNESSEE,
APPELLEE

FOR THE APPELLANT

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OPINION FILED: _____

AFFIRMED

L. T. LAFFERTY, SPECIAL JUDGE

OPINION

The appellant, Alejandros Gauna, has appealed as of right from a judgment of the trial court of the Circuit Court of Maury County in revoking the appellant's probation. The appellant presents two issues for consideration: (1) the trial court committed error in allowing hearsay statements of a Georgia probation officer, who was not present, into evidence at a revocation hearing; and (2) the trial court erred in ordering the appellant to serve the remainder of his sentence and not considering an alternative sentence. After a review of the record in this cause the trial court is affirmed.

The salient facts in this cause are on November 2, 1992, the appellant, Alejandros Gauna, pled guilty to the included offense of sexual battery before the Circuit Court for Maury County, Tennessee. The appellant was sentenced to two years in the Tennessee Department of Correction and placed on immediate supervised probation. According to the testimony of probation officer, Laurie Wade, Tennessee Department of Probation, at the revocation hearing of September 12, 1995, the appellant was allowed to transfer supervision to Hickman County, Tennessee, his place of residence. In May of 1993, the appellant was granted permission by the Department of Probation to transfer supervision, via interstate compact agreement, to Effingham County, Georgia. Under this agreement Georgia would assume the responsibility to supervise the appellant's period of probation. During the fifteen (15) months of appellant's probation, he was transferred twice and was allowed interstate travel in pursuit of employment as a truck driver. In February 1994, Ms. Wade was put on notice, via correspondence from Georgia, that the appellant had moved from his local address, without knowledge or permission of Judy Zittrouer, Georgia probation officer. The supervision was returned to Tennessee for consideration of an arrest warrant. In addition to absconding, the appellant had been questioned by Georgia authorities concerning allegations of child rape and molestation. Pursuant to a request of Ms. Wade, the Circuit Court for Maury County issued an arrest warrant for the appellant on March 1, 1994. The appellant was arrested in Texas in July of 1995 and agreed to be extradited back to Tennessee.

On September 12, 1995, the trial court held a hearing to determine the validity of the State's allegation of absconding. At this hearing, Ms. Wade testified as to the asserted violations of probation communicated to her by a Georgia probation officer via written correspondence and orally. The appellant objected to this testimony, that is the admissibility of these oral statements and documentary evidence, on the basis of hearsay, thus violating the confrontation clause of the Tennessee Constitution. The trial court overruled these objections.

CONFRONTATION ISSUE

The proper standard for review for a probation revocation on appeal is abuse of discretion. *State v. Harkins*, 811 S.W.2d 79 (Tenn. 1991). In order for this Court to find an abuse of discretion on the trial court's discretion, it must be established that the record contains no substantial evidence to support the conclusion of the trial court that a violation of the conditions of probation has occurred. *Harkins, supra*. At the revocation hearing, the State offered two out of court statements which were objected to by the appellant's attorney. As to the molestation testimony, the trial court did not consider this testimony in his decision stating there was too little information regarding the charge with no subsequent conviction. TRH, page 5. Since the trial court did not consider this testimony in making its decision, any error would be harmless.

The second "hearsay" statement concerned the documents and letters received by Ms. Laurie Wade in her official capacity as the original probation officer for the appellant. It is clear from the record that the appellant was aware of the reporting procedures in Georgia were the same as Tennessee. The appellant's attorney made timely objections to the information in the Georgia letters on the basis that such testimony violated his right to confront the witnesses offering proof against him. Both the U.S. Supreme Court and the Supreme Court of Tennessee have established that a defendant is afforded minimum due process rights including a conditional right to confront witnesses against him in a probation revocation hearing. *Gagno v. Scarpelli*, 93 S.Ct. 1756 (1973). Our Supreme Court adopted and expounded upon this idea in *State v. Wade,* 863 S.W.2d

406 (Tenn. 1993). In *Wade, supra,* the Supreme Court adopted a two-prong test to determine the admissibility of a drug test deemed to be "hearsay." The Court held that the test should be excluded because there was no showing of good cause as to why the testing official could not be there, and there was no way to assume the reliability of the test. *ID* at 410. This same issue was addressed by the Tennessee Court of Criminal Appeals in *State v. Ricker*, 875 S.W.2d 687 (Tenn. Cr. App. 1994). Judge Tipton speaking for this Court held:

> "In considering the future impact of *Wade*, we note that the Supreme Court relied in large measure upon *Wilson v. State*, 70 Md. App. 527, 521 A2d 1257 (1987). In *Wilson* the court concluded that the trial court's specific finding that it would be cost prohibitive to call an out-of-state technician to testify constituted good cause for not requiring the technician's personal appearance. It quoted from *Gagon v. Scarpelli, supra,* with cautionary note about a probationer's right to cross-examine:
>
> 'An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. Petitioner's greatest concern is with the difficulty and the expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey v. Brewer*, 92 S.Ct. 2593 (1972) intend to prohibit use where appropriated of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence'."

Thus, there is not an absolute ban on the presentation of hearsay at a probation hearing. The law recognizes that the very nature of a probation revocation hearing may necessitate a lesser degree of formality and inflexibility than a criminal prosecution where guilt or innocence will be decided. *Black v. Romano*, 105 S.Ct. 2254 (1985). Now we must determine did the admissibility of the Georgia letters or documents violate the two-prong test of *Wade*? The first question is whether or not there was good cause shown as to why the Georgia probation officer could not be in court. The trial court when making its ruling stated that interstate agreements would be impossible to operate were every out-of-state official required to appear and testify at the revocation hearings. While this is not an individual finding of good cause as to why this particular official could not be in court, it can be considered a valid argument in showing that the very nature of interstate agreements make live testimony often impractical. Special consideration should be given to the idea that interstate transfer for the purpose of supervised probation complies with the goals of the sentencing act of 1989. In this case the appellant chose to transfer to Georgia, under the same Tennessee conditions, to maintain employment. The appellant

acknowledge he understood the obligation to report to Georgia officials as if he had remained in Tennessee. We believe the trial court's finding of good cause in this case is sufficient under the language of *Ricker, supra.*

The second question is one of reliability. Even if good cause is shown, the trial court, under *Wade*, must find that the evidence offered is reliable. In this case the State established that the appellant left Georgia without permission. The facts are not in dispute. The appellant, himself, explains that he left Georgia without permission, went to Texas and eventually to Mexico for his grandmother's funeral. Therefore, the appellant's own testimony proved the reliability of the information provided in the Georgia probation officer's letter. *State v. Richardson*, Blount County, No. 03C01-9503-CR-0005 Tenn. Crim. App. filed at Knoxville, August 7, 1995.

Finally, the State argues that even if the documents are hearsay, they could be properly allowed under the Tennessee Rules of Evidence, 803(6) exception to hearsay. This rule requires an authentication of these Georgia documents through the testimony of "custodian or other qualified witness." We hold the TRE 803(6) Records of Regularly Conducted Activity hearsay exception would not apply to the facts in this record. We believe that such documents would more properly be admitted into evidence under TRE Rule 803(8) Public Records and Reports. This rule states:

> "Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of public offices or agencies setting forth the activities of these office or agency or matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement officers."

The Interstate Compact Agreement is silent on the issue, but it is reasonable to believe that the reports of probation officers in other states would be given the same weight as the reports of Tennessee probation officers. Probation papers, once filed in court, become matters of public knowledge. There is substantial evidence in the record that the Georgia letters are reliable and thus the second prong of *Wade* has been satisfied. The trial court's ruling is affirmed.

ALTERNATIVE SENTENCING

The appellant would argue that he is entitled to an alternative sentence in lieu of incarceration and the trial court committed error in failing to consider such alternatives. While the appellant did break a condition of this probation by not reporting and going to Mexico to visit a sick grandmother, he would argue that the measure of his noncompliance is slight under the circumstances. The appellant would further argue that he was on probation for a long period of time and was still a suitable candidate for alternative relief. Upon rendering its judgment, the trial court did not set out in the record any reasons for rejecting the request for alternative sentences. Therefore the standard of review is *de novo* without a presumption of correctness. Tenn. Code Anno. § 40-35-401(d). *State v. Jones*, 883 S.W.2d 597 (Tenn. 1994). Ordinarily for a *de novo* review by this Court we would have the benefit of the evidence at the sentencing hearing, the pre-sentence report, the principles of sentencing and arguments for sentencing alternatives, the nature and characteristics of the criminal activity, any mitigating and enhancement factors, any statements made by the appellant in his own behalf and the appellant's potential for rehabilitation or treatment. Tenn. Code Anno. § 40-35-103 and § 40-35-210 (1996 & 1996 Supp.). Thus we must look at the entire record to determine if the appellant is entitled to a second consideration for alternative relief.

The first four considerations were applied by the trial court at the granting of the appellant's application for probation. Thus this Court will consider if any mitigating and enhancement factors, any testimony made by the appellant in the revocation hearing and

did the appellant meet his burden any further potential for rehabilitation or treatment. The Court finds in mitigation the appellant went to see a sick grandmother in Mexico, returned to Texas and voluntarily returned to Tennessee to resolve the matter. As to enhancement the Court finds the appellant willfully violated the generous conditions of probation in absconding to Texas without notice to his probation officer, left the country and was missing for 18 months. As to the appellant's potential for rehabilitation or

treatment, the appellant is not a suitable candidate for alternative sentencing in that "measures less restrictive than confinement has recently been applied unsuccessfully to the appellant," Tenn. Code Anno. § 40-35-103 (1)(C). The appellant's deliberate violation of the conditions of probation outweighs any consideration of further alternative sentencing. The Court would note with a strong degree of probability that the appellant will receive his request for alternative sentencing, that is probation, under Tenn. Code Anno. § 40-35-501(a)(3). We find the trial court was correct in its decision.

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L. T. LAFFERTY, SPECIAL JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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PAUL G. SUMMERS, JUDGE