

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1997 SESSION

FILED

May 16, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

*

C.C.A. # 01C01-9605-CR-00215

Appellee,

*

WILSON COUNTY

VS.

*

Hon. J. O. Bond, Judge

DANNY L. PHILLIPS,

*

(Probation Revocation)

Appellant.

*

For Appellant:

For Appellee:

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Danny L. Phillips, pled guilty to one count of burglary. The trial court imposed a three-year sentence to be served on probation. A few months later, at the conclusion of a revocation proceeding, the trial judge ordered the defendant to serve one year of split confinement in jail, with the remainder of the sentence to be served on probation. The defendant concedes that he violated the terms of his probation. His sole issue on appeal is whether the trial court erred by imposing the jail term rather than the sentence of three years in the Department of Correction.

While on probation, the defendant had pled guilty to charges that he assaulted the person who informed authorities about the burglary. The defendant had received a sentence of eleven months, twenty-nine days for the assault, with all but forty-five days suspended. The trial court made the following observation:

Well, what am I suppose to do ... if somebody's prosecuted [the defendant,] he goes out here and tries to beat ... them after the court date? There is only one thing I can do son, you're going to sit up there in jail. I'm going to give you at least a year split-confinement and you're going to stay there. We can't put up with that. ... One year, split. Bring him back after regular probation at the end of that time.

The order modifying the service of the sentence provided that the defendant serve one year of "split confinement in Wilson County jail and be released back to state probation."

The defendant insists that : (1) once probation is revoked, there is no authority for the court to sentence the defendant to anything other than the original sentence; (2) he might be denied the opportunity to earn credit for good behavior while in custody; and (3) the effect of the sentence was to usurp the power of the parole board.

When a probation revocation is challenged, the appellate courts have a limited scope of review. If the trial judge finds by a preponderance of the evidence "that the defendant has violated the conditions of his probation," probation may be revoked. Tenn. Code Ann. § 40-35-311(d). The Sentencing Commission Comments to Section 40-35-310 provide that "[u]pon revocation, the original sentence imposed can be placed into effect." The determination by the trial court, if conscientiously made, is entitled to an affirmance; the record must merely demonstrate that there is substantial evidence to support its conclusions. State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980); see also State v. Williamson, 619 S.W.2d 145, 147 (Tenn. Crim. App. 1981). Once the trial court finds a probation violation, "the trial judge shall have the right by order duly entered upon the minutes of [the] court, to revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered, or otherwise in accordance with § 40-35-310" Tenn. Code Ann. § 40-35-311(d).

The trial court was authorized to order the defendant to serve the entire sentence in TDOC; instead, the trial court ordered one year of split-confinement before the defendant would be placed back on probation. In our view, the trial court has the power to do this under Tenn. Code Ann. § 40-35-308, which provides as follows:

(a) During the term of probation supervision, the sentencing court, on its own motion, or on application of a probation officer, district attorney general or the defendant, may:

- (1) Modify any condition;
- (2) Remove a condition; or
- (3) Release the defendant from further supervision

(b) The court may not make the conditions of supervision more onerous than those originally imposed, except pursuant to a revocation proceeding as provided

by law.

(c) Notwithstanding the actual sentence imposed, at the conclusion of a probation revocation hearing, the court shall have the authority to extend the defendant's period of probation supervision for any period not in excess of two (2) years.

This case is similar to State v. Joseph Allen Tackett, No. 01C01-9310-CC-00343 (Tenn. Crim. App., at Nashville, June 30, 1994). In Tackett, the defendant was placed on probation after serving 120 days. Following a probation revocation hearing, the trial court ordered the defendant to serve sixty days in jail, pay the costs of incarceration, and continue on probation for an additional two years. Id., slip op. at 2. This court held that Tenn. Code Ann. § 40-35-308 gave the trial court the authority to order the defendant to serve sixty days in jail, rather than imposing service of the entire sentence in custody of TDOC. Id., slip op. at 3-4.

Our court has previously held that "[t]he [t]rial [j]udge may revoke probation, and may impose any penalty less than or equal to that sentence originally imposed upon the probationer." State v. Melvin Griffin, No. 01C01-9503-CC-00090, slip op. at 2 (Tenn. Crim. App., at Nashville, Nov. 16, 1995). In imposing the sentence, "the [t]rial [c]ourt is entitled to exercise its sound discretion, which will not be overturned except where it is shown that the [t]rial [j]udge acted arbitrarily." Id. See also State v. Perry Eugene Wallace, No. 01C01-9306-CC-00171, slip op. at 5-6 (Tenn. Crim. App., at Nashville, Dec. 2, 1993) (noting the trial court is authorized under Tenn. Code Ann. § 40-35-308 to order the service of an additional ten days upon finding a probation violation). Thus, the trial judge in this case had the authority to order the defendant to serve one year of split confinement before placing him back on probation.

We next consider whether this practice unfairly denied the defendant sentence credits, thus requiring him to serve more time in the county jail than he would serve were he incarcerated under the custody of TDOC. The Court of Appeals addressed a similar contention in France v. Bradley, 922 S.W.2d 118 (Tenn. App. 1995), app. denied (Tenn. 1996). In that case, an inmate alleged he was denied equal protection because he was assigned to a place of confinement where he could not earn sentence reduction credits by serving time in a work program. Id. at 119. The court rejected the argument outright:

Under the United States Constitution, it has been repeatedly held that a prisoner has no constitutional right to incarceration in a particular institution.

Plaintiff cites no authority that the rule is otherwise under the Tennessee Constitution, and none is found by this court.

A prisoner has no constitutional right to receive sentence credits.

Petitioner cites no statute granting him a substantive right to confinement where sentence credits may be earned, and none is found by this [c]ourt.

Id. (citations omitted).

We also find the defendant's contention that the trial court has usurped the parole board's authority to be without merit. Section 40-35-212, Tenn. Code Ann., empowers the trial court with considerable discretion in imposing a sentence and specifically confers jurisdiction over the trial court in instances like this: "Unless the defendant receives a sentence in the department, the court shall retain full jurisdiction over the manner of the defendant's sentence service." Tenn. Code Ann. § 40-35-212(c).

Finally, we confirm our belief that a defendant has no right to reject probation in favor of a TDOC sentence. In State v. Estep, 854 S.W.2d 124, 125

(Tenn. Crim. App. 1992), the defendant, "believing that probation and Community Corrections may be more onerous than confinement in the penitentiary, ask[ed our] court to reverse the grant of probation and order the execution of the ... sentence." This court concluded that "[a] defendant has no right to reject probation or any other means of alternative sentencing in order to accept the imposition of a Department of Correction sentence." Id. at 127. "The assessment of the appropriate sentence, alternative or otherwise, is the responsibility of the trial judge." Id.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Judge

CONCUR:

David G. Hayes, Judge

Curwood Witt, Judge