IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1996 SESSION

FILED

July 29, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9606-CC-00225
	)	
	)	McMinn County
v.	)	
	)	Honorable Mayo L. Mashburn, Judge
	)	
JACKIE CROWE,	)	(Probation Revocation)
	)	
Appellant.	)	

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Jackie Crowe, appeals as of right from the revocation of his probation by the McMinn County Criminal Court. He contends that the trial court abused its discretion by revoking his probation. We affirm the trial court.

In 1988, the defendant pled guilty to two counts of sexual battery and received consecutive five-year sentences. The sentences were suspended and probation imposed after he served one year in community corrections. One of the conditions of his probation required that he obey the laws of the United States or any state in which he was located. On December 6, 1994, he was arrested on fourteen charges of rape and fourteen charges of incest. He was later indicted on nine charges of rape and nine charges of incest. The record reflects that a mistrial was declared on the trial of these charges on December 6, 1995, because the jury was unable to reach a verdict.

On January 3, 1996, a hearing was held on whether the defendant had violated the conditions of his probation. The state relied completely on the evidence presented at the trial of the rape and incest allegations, which ended in a mistrial. It requested the trial judge to take judicial notice of the testimony presented at the mistrial, to which the judge responded that it was not necessary for him to take judicial notice as he had heard the testimony himself. No transcript of the December 6, 1995 trial was offered into evidence at that time.[1] The defendant called two witnesses, the only two witnesses to testify at the probation revocation hearing.

The first witness was Richie Kenlan, who had been the defendant's probation officer from April 7, 1989, when the defendant was placed on probation, to

[1]A partial transcript of the December 6, 1995 trial has been included in the record on appeal with the transcript of the probation violation hearing on appeal, both being approved by the trial court as part of the trial court record in this case.

October 29, 1994, when the defendant moved to Meigs County. He testified that the defendant did everything that Mr. Kenlan asked him to do, and he had received no complaints about the defendant while the defendant was under his supervision. He further testified that the defendant and his family kept him well-informed about what the defendant was doing while the defendant was under his supervision.

Mark Tomlinson also testified. He was the defendant's probation officer at the time of his arrest and filed the affidavit of violation of probation against the defendant, which alleged that the defendant was in violation of one of the conditions of his probation, that he would obey the laws of the state. Mr. Tomlinson testified that this affidavit was based upon the defendant's being charged with fourteen counts of rape and fourteen counts of incest. He testified that the defendant was not in violation of any other condition of his probation.

At the conclusion of the hearing, the trial judge revoked the defendant's probation. In so doing, he made the following finding:

> Now having considered all of the evidence presented during the course of the trial of the defendant pertaining to the offenses involving Natasha Freeman, which of course resulted in a mistrial, I find by even more than a preponderance of the evidence that the defendant has committed offenses of rape and incest on the person of Natasha Freeman as set out in counts one through 18 of this indictment, ...
>
> And thus I find that he has violated the terms of his probation and accordingly the Court hereby revokes the defendant's probation and hereby orders the defendant to serve the sentence originally imposed upon him.

It is within the trial court's discretion to revoke the defendant's probation if it finds by a preponderance of the evidence that the defendant has violated a condition of his probation. T.C.A. §§ 40-35-310, -311(d); State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). For an appellate court to find an abuse of discretion and

reverse a trial court's revocation of probation, it must be demonstrated 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. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991).

In Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1761 (1973), the United States Supreme Court held that a probationer's due process rights when a state attempts to remove his probationary status and have him incarcerated. Gagnon, 411 U.S. at 785-86, 93 S. Ct. at 1761-62. A probationer's due process rights include:

> (1) written notice of the claimed violations of probation;
>
> (2) disclosure to the probationer of evidence against him or her;
>
> (3) opportunity to be heard in person and to present witnesses and documentary evidence;
>
> (4) the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation;
>
> (5) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
>
> (6) a written statement by the fact finders as to the evidence relied on and reasons for revoking probation.

Gagnon, 411 U.S. at 786, 93 S. Ct. 1761-62; Practy v. State, 525 S.W.2d 677, 680 (Tenn. Crim. App. 1974).

The defendant argues that the only evidence presented against him was the trial judge's memory of the evidence presented at the mistrial of the rape and incest allegations. He argues that this made the judge a witness rather than the arbiter of the facts, and that such calls into question the trial court's neutrality and detachment and violates the defendant's right to confront and cross-examine adverse witnesses and his right to disclosure of the evidence against him. He also argues that the trial court

violated his right to a written statement as to the evidence relied on and the reasons for revoking probation.

The state responds that the evidence of the defendant's probation violation was disclosed to him when it was presented at trial, at which time the defendant had ample opportunity and sufficient motive to cross-examine the witnesses. The state argues that the trial judge properly took judicial notice of facts that he had learned through the legal procedure in which he played a neutral role. The state also argues that the combination of the oral findings made from the bench, the admittedly sparse order, and the warrant for violation of probation satisfy the requirement of a written statement of the evidence relied on and the reasons for probation revocation.

Initially, we note that the trial court may take judicial notice of any fact that is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Tenn. R. Evid. 201. A court may take judicial notice of facts in an earlier proceeding in the same case, and the final action taken in the case. Pruitt v. State, 460 S.W.2d 385, 395 (Tenn. Crim. App. 1970). However, judicial notice in such cases has been applied, for instance, to recognize the previous conviction and the record on direct appeal in considering a post-conviction petition, Trolinger v. Russell, 446 S.W.2d 538, 542 (Tenn. Crim. App. 1969), a finding that a defendant is a habitual offender, Pruitt, 460 S.W.2d at 395, or a proceeding for a writ of habeas corpus, State ex rel. Leighton v. Henderson, 448 S.W.2d 82, 89 (Tenn. 1969). In Trolinger, the court commented that the trial court "took judicial notice of all of its prior judgments, records, etc., as a matter of fact." 446 S.W.2d at 542.

Considering the use of judicial notice in these cases and the requirement that judicial notice only be taken of facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,

the credibility of the witnesses or the weight of their testimony are not proper subjects for judicial notice. In this case, the trial court went beyond recognizing that the witnesses had testified to particular facts. He considered the credibility of witnesses who had not testified in the immediate proceeding and whose credibility had not been previously established by judgment or jury verdict. When he did so, he moved out of the realm of judicial notice and became, in effect, a witness in the proceeding. A trial court may not take judicial notice of facts based on personal knowledge. State ex rel. Newsome v. Henderson, 424 S.W.2d 186, 188 (Tenn. 1968).

In Vaughn v. Shelby Williams of Tenn., Inc., 813 S.W.2d 132 (Tenn. 1991), the trial court considered extrajudicial observations of the plaintiff before trial in deciding the extent of the plaintiff's vocational disability. In his memorandum opinion, he stated that he had previously had an opportunity to view the plaintiff several times before the trial in various locations and that, "You can't always tell how disabled a person is by just observing him; anyway, this man looks and walks a little better than death warmed over." Vaughn, 813 S.W.2d at 133. The supreme court vacated the judgment and remanded for a new trial with a different judge, concluding that the judge became a witness to the proceedings, which is forbidden by Rule 605. The supreme court went on to state that there was good reason to forbid this kind of behavior, as it interferes with the trial court's appearance of impartiality and parties may be unwilling to vigorously cross-examine the judge or may not get an opportunity to cross-examine the judge at all. Id. at 134. Thus, the trial judge's ultimate findings in the present case came from his own recollection of the rape trial evidence, a questionable procedure at best.

We note that in a probation violation hearing, reliable hearsay is permitted. Practy, 525 S.W.2d at 680. If the transcript of the December 6, 1995 hearing had been offered into evidence, it would have had considerable indicia of

reliability. The witnesses' testimony was taken in compliance with the law at another hearing in a proceeding involving the same parties and subject matter, and the defendant had both an opportunity and a similar motive to develop testimony by cross-examination. See Tenn. R. Evid. 804(b)(1). In the circumstances of this case, though, it was his memory of the testimony, not the transcript, upon which the trial judge relied.

However, the deciding factor is that the defendant did not object at the revocation hearing to the trial court's consideration of the rape trial testimony. In fact, the defendant also requested the court to consider testimony from the same trial. "A party cannot witness misconduct on the part of the court, await the result of the verdict, and then, if it is against him or her, object to the alleged misconduct." State v. Tune, 872 S.W.2d 922, 930 (Tenn. Crim. App. 1993). In other words, by not objecting to the trial court's procedure, while even adopting the same procedure, the defendant cannot now complain of that process. See T.R.A.P. 36(a).

Regarding the defendant's claim that the trial court failed to satisfy his due process requirement of a written statement of the evidence relied on and the reasons for revoking probation, this court has held that authentication of a verbatim transcript of a probation revocation hearing, containing the trial court's oral findings, substantially complies with this requirement. State v. Delp, 614 S.W.2d 395, 397 (Tenn. Crim. App. 1980). Although the trial court's findings of fact in this case were not nearly as extensive as that of the trial court in Delp, who made three-and-a-half pages of findings, we believe that the warrant for violation of probation, the authenticated verbatim transcript, and the order of revocation, in combination, substantially complied with the requirement for a written statement of findings.

In reviewing the record before us, we conclude that the trial court acted within its discretion by revoking the defendant's probation. The trial court is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

_____
Paul G. Summers, Judge

_____
John K. Byers, Senior Judge