



# OPINION

The Defendant, Larry Massey, appeals as of right pursuant to Rule 3, Tennessee Rules of Appellate Procedure. He pleaded guilty on August 7, 1995 to theft of property over one thousand dollars (\$1000)<sup>1</sup> and was granted judicial diversion pursuant to Tennessee Code Annotated section 40-35-313. He was to serve four years on probation and pay restitution of fifteen hundred dollars (\$1500) to the victim and two thousand dollars (\$2000) in fines and court costs. Upon the successful completion of the terms of his probation, the charges were to be dismissed and his record expunged. After a hearing on January 16, 1996, the trial court revoked his probation and ordered four years of supervised probation with 120 days to be served in the county jail, fifteen hundred dollars (\$1500) restitution and two thousand dollars (\$2000) in fines and court costs. The Defendant presents two issues in this appeal: (1) That the trial court erred in revoking his probation; and (2) that the trial court erred in ordering him to serve 120 days incarcerated. We affirm the judgment of the trial court.

The Defendant was charged with theft of property over one thousand dollars (\$1000) after he received a check for fifteen hundred dollars (\$1500) for work he was scheduled to do. He testified that he builds custom waterfalls and had contracted to construct one for the victim. He never completed the work and this criminal action was filed. He was granted judicial diversion and his probation was later revoked because of several violations of the probationary terms. He contends that the trial court erred in revoking his probation.

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<sup>1</sup>Tenn. Code Ann. § 39-14-103.

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).

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. 1981).

The State presented evidence that the Defendant had violated several provisions of his probation. James Holder, his probation officer, testified at the hearing. Holder stated that the Defendant was required to meet face-to-face with him and had done so except for the month of November, 1995. The Defendant spoke with him several times by phone, but never had the required meeting. The Defendant did meet with Holder on December 5, 1995.

Holder also learned that the Defendant had been arrested on a bad check charge and did not inform him of the arrest. Holder testified that he was required to report any arrests immediately. There was also evidence that the Defendant had changed his address and not told his probation officer. In addition, he had paid nothing toward his required restitution or for the fines and court costs. Finally, there was evidence that the Defendant was in arrears in the amount of eighteen thousand seven hundred ninety-five dollars (\$18,795) for child support. He had recently paid twenty-one hundred dollars (\$2100) in child support. He had been held in criminal contempt for failure to pay and posted a cash bond of two thousand dollars (\$2000) with money he borrowed from his sister to avoid going to jail.

The Defendant testified and offered reasons for his failure to abide by the probationary terms. He explained that he became severely ill with Crohn's disease in November, 1995 and was hospitalized for nine days. He stated that this prevented him from meeting with the probation officer. He stated that his illness had prevented him from working and thus, he could not pay any of the money due the court. He also said that he did not report his arrest because he was waiting to inform his probation officer in person. The Defendant alleged that he made payments of restitution and court costs, but neither he nor the court had a record of any payments. He testified that he sold his home and moved in with his sister to make it more feasible to make payments. However, no payments had been received after he moved.

The trial court determined that the evidence supported a finding that the Defendant had violated the terms of his probation. The trial judge acknowledged that the Defendant had been disabled by his illness and this made it difficult to

make payments. However, she noted that there was no evidence of any payments to the court although the Defendant had some income and was able to secure funds for other purposes. It was apparent that the Defendant failed to make his meeting in November, failed to report a new arrest, and failed to report his new address. We cannot conclude that the trial judge abused her discretion in revoking the Defendant's probation.

The Defendant also asserts that the trial court erred in ordering him to serve 120 days in jail, and argues that straight probation is the proper sentence in this case. When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

A defendant who “is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” Tenn. Code Ann. § 40-35-102(6). Our sentencing law also provides that “convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation, shall be given first priority regarding sentences involving incarceration.” Tenn. Code Ann. § 40-35-102(5). Thus, a defendant sentenced to eight years or less who is not an offender for whom incarceration is a priority is presumed eligible for alternative sentencing unless sufficient evidence rebuts the presumption. However, the act does not provide that all offenders who meet the criteria are entitled to such relief; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. See State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. Tenn. Code Ann. § 40-35-103(3) - (4). The court should also

consider the potential for rehabilitation or treatment of the defendant in determining the sentence alternative. Tenn. Code Ann. § 40-35-103(5).

The Defendant was convicted of theft of property, a Class D felony, and was therefore eligible for alternative sentencing. The trial court sentenced him to four years of supervised probation with 120 days to be served in the county jail, fifteen hundred dollars (\$1500) restitution and two thousand dollars (\$2000) for fines and court costs. The trial court found one mitigating factor, that the Defendant neither caused nor threatened bodily injury in the commission of the offense. Tenn. Code Ann. § 40-35-113(1). The court also applied one enhancement factor, that the Defendant abused a position of private trust. Tenn. Code Ann. § 40-35-114(15). He was sentenced to the minimum two-year sentence as a Range I offender, all suspended except 120 days. The Defendant does not contest the determination of the sentence, but argues that he should have received straight probation.

However, a trial court may consider the facts and circumstances of the case when determining alternative sentences. The trial court ordered split confinement for the Defendant in conformance with the sentencing principles. See Tenn. Code Ann. §§ 40-35-104(c)(4); 40-35-306(a). The trial court considered that the Defendant had been granted judicial diversion and failed to comply with the terms of probation. The Defendant also demonstrated a lack of compliance with child support payments as well as having a new arrest for passing a bad check. She noted that the Defendant had a history of complying only when necessary to keep him out of jail. Thus, the trial court concluded that in order to avoid depreciating the seriousness of the offense, with the

Defendant's past failure at compliance and lack of rehabilitation, a term of confinement was necessary. See Tenn. Code Ann. § 40-35-103(1)(B),(C), (5).

The trial court gave due consideration to the required sentencing principles. The sentence imposed by the trial court retains a presumption of correctness. We do not find anything in the record sufficient to warrant reversal of the trial court's judgment. This issue has no merit.

Accordingly, we affirm the judgment of the trial court.

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DAVID H. WELLES, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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CURWOOD WITT, JUDGE