

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER 1997 SESSION

**FILED**

October 2, 1997

Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

VICTOR LOFTON,

Appellant.

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NO. 02C01-9611-CC-00427

GIBSON COUNTY

HON. DICK JERMAN, JR., JUDGE

(Revocation-Community Corrections)

**FOR THE APPELLANT:**

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OPINION FILED: \_\_\_\_\_

JUDGMENT MODIFIED

JOE G. RILEY,  
JUDGE

## OPINION

This is an appeal from the revocation of a community corrections sentence in which defendant's sentence was increased from two (2) years to three and one-half (3 ½) years. Defendant raises two issues for our review:

- (1) whether the trial court erred in increasing the sentence, and
- (2) whether the trial court erred in failing to award defendant proper credit for the time he was on community corrections.

We agree with defendant's argument in both respects and modify the sentence.

## PROCEDURAL HISTORY

\_\_\_\_\_ Defendant pled guilty on February 27, 1995, to burglary and theft and was placed on probation for a term of two (2) years. On June 26, 1995, the trial court revoked defendant's probation and ordered him to serve his two (2) year sentence in the Tennessee Department of Correction (TDOC). On September 18, 1995, the trial court entered an order modifying the sentence to community corrections for a period of two years.

On December 4, 1995, community corrections petitioned for a violation capias alleging defendant failed to report to his case officer on numerous occasions and failed to comply with house arrest requirements. These violations were admitted by the defense. The informal revocation proceeding consisted only of the unsworn statements of the case officer that the violation was for "not staying at home and not coming to meetings" and that the defendant "did right" for only about a week. The court then announced that defendant was re-sentenced to three (3) years and six (6) months in TDOC. There are no findings in the record to support the increased sentence. The whole proceeding is encompassed in twenty-six (26) lines of transcription. Defendant was given only ten (10) days credit for his time in the community corrections program, although he had been on the program eighty-nine (89) days prior to the filing of the revocation proceeding.

On June 12, 1996, counsel moved for correction of the revocation order to allow defendant credit for the additional days defendant was on community corrections. The trial court denied the motion and found that defendant was on the community corrections program from September 18, 1995, until the violation petition was filed on December 15, 1995 (89 days). However, the court went on to find that the defendant's service while with community corrections was "satisfactory" for only ten (10) days and refused to award additional credit.

## I.

Upon revocation of a community corrections sentence, the trial court has the authority to increase the sentence. State v. Griffith, 787 S.W.2d 340 (Tenn. 1990); Tenn. Code Ann. § 40-36-106(e)(4) (Supp. 1996). However, the record must include specific findings of fact based upon a hearing conducted pursuant to the Tennessee Criminal Sentencing Reform Act. State v. Ervin, 939 S.W.2d 581, 583 (Tenn. Crim. App. 1996). The fact that this Court reviews the sentence *de novo* does not relieve the trial court from complying with these statutory mandates. State v. Gauldin, 737 S.W.2d 795, 798 (Tenn. Crim. App. 1987). In the case *sub judice*, the trial court did not conduct a sentencing hearing and made no findings to justify the increased sentence.

Ordinarily, this Court would remand to the trial court for a new sentencing hearing. State v. Ervin, 939 S.W.2d at 584. However, this Court also has the authority to direct the entry of an appropriate sentence. Tenn. Code Ann. § 40-35-401(c)(3). The latter option appears more appropriate under the circumstances.

There was no evidence presented to the trial court which would justify an increase in the sentence. Accordingly, our *de novo* review indicates the original sentence should be reinstated.

## II.

Defendant contends the trial court erred in failing to grant him credit for the full period he was on community corrections until the filing of the revocation proceeding. We agree. Upon revocation from the community corrections program, a defendant is entitled to credit for “any time actually served in any community-based alternative to incarceration.” Tenn. Code Ann. § 40-36-106(e)(4) (Supp. 1996); see State v. Tommy E. Patty, C.C.A. No. 03C01-9208-CR-00283 (Tenn. Crim. App. filed July 13, 1993, at Knoxville); State v. Reginald Searcy, C.C.A. No. 01C01-9205-CC-00153 (Tenn. Crim. App. filed November 12, 1992, at Nashville); State v. Randy A. Thomas, C.C.A. No. 01C01-9102-CR-00042 (Tenn. Crim. App. filed December 5, 1991, at Nashville). The granting of the credit is statutorily mandated and is not discretionary. We are constrained to agree with the trial judge’s prophetic comment:

I think probably the Court of Appeals is probably going to say you’re entitled to credit even though you didn’t do what you said you would do and even though you didn’t successfully complete their program. . . .

Accordingly, defendant is entitled to seventy-nine (79) additional days of credit for a total of eighty-nine (89) days from September 18, 1995, to December 15, 1995.

### **CONCLUSION**

The judgment of the trial court is modified to reflect a sentence of two (2) years as well as an additional seventy-nine (79) days of credit for a total of eighty-nine (89) days for the time defendant was on the community corrections program. This case is remanded for immediate entry of a modified judgment consistent with this opinion.

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**JOE G. RILEY, JUDGE**

**CONCUR:**

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**JOE B. JONES, PRESIDING JUDGE**

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**DAVID H. WELLES, JUDGE**