IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
JUNE SESSION, 1998

FILED

August 14, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	No. 03C01-9711-CR-00523
Appellee	
	HAMILTON COUNTY
vs.	
	Hon. Sam D. Elliott, Judge
ROBERT E. SMART,	
	(Revocation of Community
Appellant	Corrections)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Rodney E. Stewart, appeals the revocation of his Community Corrections sentence by the Hamilton County Criminal Court. Following revocation, the trial court reinstated the appellant's effective sentence of eight years in the Department of Correction. In this appeal as of right, the appellant argues that the trial court abused its discretion by relying on unreliable hearsay evidence to support the revocation.

After review of the record, we affirm the judgment of the trial court.

Background

On March 25, 1996, the appellant entered guilty pleas to four counts of the sale of cocaine and received an effective eight year sentence. On March 27, 1996, the court placed the appellant in the Hamilton County Community Corrections Program. Six months later, the appellant tested positive for cocaine use which constituted a violation of the "Court's Guidelines and Regulations." The appellant successfully argued that the positive drug screen results arose from "passive inhalation." Although the court initially

revoked the appellant's 'assignment' to Community Corrections, the court reconsidered and reinstated the Community Corrections sentence. Subsequently, in February 1997, as a result of a second positive drug screen and leaving the 'arrest house'[1] without permission, the appellant was again charged with violating conditions of the Community Corrections program. A revocation hearing was held on March 11, 1997.

At the revocation hearing, the State presented the testimony of Brent Gann, the Community Corrections case officer assigned to supervise the appellant. Gann testified that the appellant suffered from a heart condition and was required to take numerous medications. On February 24, Gann, the appellant and Gann's supervisor, Wright, met to discuss the appellant's medical condition and his work status. During this conference, Gann requested a drug screen, but the appellant was unable to provide a specimen as he had completed a drug screen earlier that day at his health care facility. The appellant returned on February 28th and provided a specimen for testing. 'On March the 5th, the drug screen . . . was returned positive for cocaine use.' When confronted with the positive drug screen, the appellant informed Gann that 'there was a possibility that he had, you know, had passive contact with

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[1]At the revocation hearing, the case officer and the trial court referred to the appellant's residence as the 'arrest house.'

[cocaine]." Kane explained that the "cutoff" point is set at 150 nanograms per milliliter to prevent passive intake from resulting in a false positive. Nonetheless, Kane stated that another condition of the Community Corrections program was that the appellant not associate with drug users or be around drugs while they are being used. Kane also testified regarding an additional violation that occurred on March 1st. Specifically, the appellant, "at 1:45 p.m., left the 'arrest house' without permission of the on-call officer and returned at 3:30 p.m." The only witness called by the State was Case Officer, Kane, who introduced into evidence a copy of the lab report from the February 28th drug screen.

In his own defense, the appellant told the court and adamantly denied any use of cocaine. The appellant explained that the positive drug screen was the result of passive intake which occurred the preceding Monday when he was given a ride by his aunt and her boyfriend, who were at the time smoking cocaine. When the appellant realized what they were doing, he demanded to be let out of the car. The appellant further contended that his doctors had been switching his medications; he indicated that the medications could have resulted in a false positive drug screen.

He also asserted that his drug screens completed by his health care facility on February 24 and 28th were negative.

Regarding his unexplained absence from his "arrest house," the appellant stated that he left to pay his telephone bill. While he was out of the house, he telephoned Mr. Stanson, the officer on call, and notified him that he had left the house in order to pay his telephone bill. Mr. Stanson instructed the appellant to immediately return to the house. The appellant essentially conceded that he had never obtained permission before leaving his house.

Based on this evidence, the trial court found that the appellant violated the conditions of his Community Corrections sentence. Specifically, the trial court found that the appellant left his "arrest house" without permission and that he tested positive on a drug screen.

Analysis

In his sole issue, the appellant contends that the trial court abused its discretion by considering unreliable hearsay evidence to justify revoking the appellant's Community Corrections sentence. Specifically, relying on State v. Wade, 863 S.W.2d 418 (Tenn. 1993), the appellant argues that his due process rights were violated in that (1) the lab report was unreliable because the lab technician was not presented as a witness; and (2) Mr. Stanson was not called to testify as to the March statements.

The State responds that the appellant has waived any challenge to this revocation because he failed to include a complete record of the revocation proceedings. Specifically, the State complains that the appellant failed to include the petition for revocation, the report of the Community Corrections case officer, or the lab report. We acknowledge that it is the appellant's duty to ensure that the record on appeal contains all of the evidence relevant to those issues which are the bases of the appeal. State v. Turley, No. 03C01-9608-CR-00322 (Tenn. Crim. App. at Knoxville, Aug. 29, 1997), perm. to appeal denied (Tenn. 1998) (citing Tenn. R. App. P. 24(b); State v. Bayes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993); State v. Gladish, No. 02C01-9404-CC-00070 (Tenn. Crim. App. at Jackson, November 21, 1995), perm. to appeal denied, (Tenn. May 6, 1996)). However, in the present case, it does not appear that these items were ever included as part of the official record. We often insist counsel to prepare a complete record, however, in this instance, we do not find this evidence essential to a fair and complete determination of the issues raised by the appellant on appeal. As such, we elect to proceed with our review.

Although a revocation hearing is characterized as an informal proceeding during which an accused is not entitled to "the full panoply of procedural safeguards associated with a criminal trial," certain basic rights are still required. See Gagnon v. Scarpelli, 411

U.S. 778, 788, 93 S.Ct. 1756, 1761-1762 (1973); Black v. Romano, 471 U.S. 606, 613, 105 S.Ct. 2254, 2258, reh'g denied, 473 U.S. 921, 105 S.Ct. 3544 (1985); Lade, 863 S.W.2d at 408. Due process requires (1) written notice of the violation be provided; (2) disclosure of evidence that supports the alleged violation; (3) the opportunity to be heard and present evidence; (4) the right to confront and cross-examine witnesses; (5) a neutral and detached factfinder; and (6) a written statement by the finder of fact as to the evidence relied on and the reasons for revoking the Community Corrections sentence. Lade, 863 S.W.2d at 408 (citing Gagnon v. Scarpelli, 411 U.S. at 786, 93 S.Ct. at 1761-62)).[1]

In addition to these constitutional safeguards, the State bears the burden, in a revocation proceeding, of establishing the violation(s) alleged in the notice by a preponderance of the evidence. State v. Perkins, 888 S.W.2d 78, 82 (Tenn. 1994). The State may introduce hearsay and documentary evidence at the revocation hearing, provided that the State prove to the satisfaction of the trial court that such evidence is reliable. State v. Ray, No.

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[1] Our supreme court has equated a Community Corrections sentence with one of probation in terms of the same principles being applicable when deciding whether a petition to revoke the sentence was proper. State v. Parker, No. 03C01-9311-CC-00396 (Tenn. Crim. App. at Jackson, Feb. 8, 1994) (citing Perkins, 888 S.W.2d at 81). Thus, the same due process concerns expressed in Lade exist within the revocation of a Community Corrections sentence. If

M1999-01511-CCA-R3-CD (Tenn. Crim. App. at Nashville, Aug. 4, 1999)(citing Wade, 953 S.W.2d at 703-704; State v. Hickey, 875 S.W.2d 697, 698 (Tenn. Crim. App. 1994)). The trial court retains the discretion to determine whether the accused has violated the conditions of the Community Corrections sentence. Harkins, 811 S.W.2d at 82; State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). If the evidence is sufficient to support a violation of the condition(s) and the trial court, exercising its discretion, decides to revoke the Community Corrections sentence, the court must place its findings of fact and the reasons for the revocation on the record. See State v. Hardy, No. 02C01-9508-CC-00174 (Tenn. Crim. App. at Jackson, Feb. 7, 1996); Orr, No. 01C01-9511-CR-00522 (citing Gagnon v. Scarpelli, 411 U.S. at 786, 93 S.Ct. at 1761-62). On appeal, the reviewing court must affirm the trial court's decision absent an abuse of discretion, i.e., "the record contains no substantial evidence to support the conclusion of the trial [court] that a violation of the conditions . . . has occurred." Harkins, 811 S.W.2d at 82.

Again, the appellant, relying upon State v. Wade, alleges a denial of due process. Specifically, the appellant contends that the State, by not presenting the testimony of the lab technician who performed the drug screen or the actual lab report, failed to prove the reliability of that evidence. See Wade, 953 S.W.2d at 704.

However, the trial court did not make a "finding of good cause and proof of reliability of the test report" to justify denying the appellant's right to confront and cross-examine the adverse witness, the lab technician. See Cole, 883 S.W.2d at 618. The State offered no explanation as to why the lab technician was not presented as a witness. Nor did the State present any proof indicating the reliability of the report, e.g., technician's qualifications, method of testing used, scientific reliability of the method used, and whether the testing was conducted under established and reliable procedures. Parker, No. 02C01-9111-CC-00245. See also State v. Gregory, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997) (finding no denial of due process because affidavit admitted to support reliability of lab report). Thus, the results of the drug screen introduced by the Community Corrections case officer must be deemed unreliable. See Parker, No. 02C01-9111-CC-00245 (citing Cole, 883 S.W.2d at 618-619). Accordingly, revocation of the appellant's Community Corrections sentence based upon the February 18th drug screen violated due process under our state constitution. See Parker, No. 02C01-9111-CC-00245.

Even if the trial court's finding of the due process violation regarding the positive drug screen, we find that no such violation is attributed to the second violation, i.e., the appellant's absence from his "arrest house" without permission. Specifically, the appellant

admitted that he had left his house without permission. Only after the appellant had already left the residence did he call the on-duty case officer. Thus, the testimony of Mr. Stanson was unnecessary. The trial court, in its findings of fact, observed:

> Now, it's my understanding from the testimony that he didn't get permission to be out of the arresthouse but he contacted whoever he was out of the arresthouse, he contacted someone and they said go back to the house. That's different than getting permission to leave.

We find that substantial evidence exists indicating that the appellant left the "arresthouse" without permission thereby violating a condition of his Community Corrections sentence. We also believe the record contains sufficient evidence which permitted the trial court to make an intelligent and conscientious decision. Based on the evidence, we conclude that it was within the discretionary authority of the trial judge to revoke the appellant's sentence and require the appellant to serve the sentences in the Department of Correction.

For these reasons, the judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

C O U N S E L :

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J O H N H . P E L L Y , J u d g e

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J O S E P H M . T I P T O N , J u d g e