

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1998 SESSION

FILED

January 29, 1999

Cecil W. Crowson
Appellate Court
Clerk

STATE OF TENNESSEE,

00127

Appellee,

VS.

BOBBY SIMMONS,

Appellant.

)

)

)

)

)

)

)

)

)

C.C.A. NO. 01C01-9803-CC-

MAURY COUNTY

HON. ROBERT L. JONES,
JUDGE

(Probation Revocation)

FOR THE APPELLANT:

FOR THE APPELLEE:

GREGORY D. SMITH
Contract Appellate Defender
One Public Square, Suite 321
Clarksville, TN 37040
(On Appeal)

CLAUDIA JACK
District Public Defender

WILLIAM C. BRIGHT
Asst. Public Defender
128 North Second St.
P.O. Box 1208
Pulaski, TN 38478
(At Hearing)

JOHN KNOX WALKUP
Attorney General & Reporter

CLINTON J. MORGAN
Asst. Attorney General
Cordell Hull Bldg., 2nd Fl.
425 Fifth Ave., North
Nashville, TN 37243-0493

MIKE BOTTOMS
District Attorney General

LEE BAILEY
Asst. District Attorney General
10 Public Square
Columbia, TN 38401

OPINION FILED: _____

A F F I R M E D

J O H N H . P E A Y ,
Judge

O P I N I O N

On July 29, 1996, the defendant pled guilty to five counts of forgery, four counts of passing worthless checks, and one count of driving on a suspended license. The defendant received an effective sentence of three years to be served on probation. On February 9, 1998, a probation revocation hearing was held where the defendant was found to have violated the terms of his probation. The court then ordered the defendant to serve the original three year sentence in the Tennessee Department of Correction. The defendant now appeals.

After a review of the record and the applicable law, we find no merit to the defendant's appeal and thus affirm the judgment of the court below.

The defendant was sentenced to three years on probation for his involvement with the forging of checks belonging to State Painting Company. The terms of his probation included the following: the defendant would refrain from the use or possession of any narcotic drugs or marijuana, the defendant would pay all required probation fees, the defendant would pay all court-ordered expenses and fees on a consistent basis, and the defendant would maintain and/or provide verification of employment on a consistent basis. At the probation revocation hearing, the defendant's probation officer testified that on July 8, 1997, and November 25, 1997, the defendant tested positive for the use of marijuana. The probation officer also testified that the defendant had failed to pay his probation fees and had failed to provide proof that he had been paying his court expenses and fees. In addition, the probation violation report included

in the record indicates that the defendant failed to maintain and/or provide verification of his employment to his probation officer on a consistent basis.

The defendant concedes that there were several probation violations. However, the defendant contends that the trial court erred in not placing him on intensive probation, Community Corrections, or some other form of alternative sentencing. This Court has held that an accused, already on probation, is not entitled to a second grant of probation or another form of alternative punishment. State v. James Moffit, No. 01C01-9010-CC-00252, Williamson County (Tenn. Crim. App. filed April 4, 1991, at Nashville); State v. Jimmie L. Allen, No. 02C01-9509-CR-00286, Shelby County (Tenn. Crim. App. filed April 28, 1997, at Jackson). It is also well established that the trial court has the authority to revoke a defendant's probation and to impose the original sentence on the defendant. T.C.A. § 40-35-310, -311 (1997). The Tennessee Supreme Court has held that

a trial judge may revoke a sentence of probation or a suspended sentence upon a finding that the defendant has violated the conditions of his probation or suspended sentence by a preponderance of the evidence. T.C.A. § 40-35-311. The judgment of the trial court in this regard will not be disturbed on appeal unless it appears that there has been an abuse of discretion.

State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991)(citing State v. Williamson, 619 S.W.2d 145, 146 (Tenn. Crim. App. 1981)). If the record contains substantial evidence to support the trial court's conclusion that a probation violation has occurred, no abuse of discretion will be found. Harkins, 811 S.W.2d at 82.

In the case at bar, the defendant concedes that he violated his probation. The defendant

not only used marijuana, but he failed to pay court costs and probation fees.¹ In addition, the defendant has been afforded many opportunities in the past in the form of probation and suspended sentences to better his situation. The appellant's criminal history dates back to 1977 and consists of three counts of driving with a revoked license, two counts of driving while under the influence, four various traffic offenses, one count of reckless driving, and one weapons offense. This does not include the five counts of forgery, four counts of passing worthless checks, and one count of driving on a suspended license for which the defendant was on probation when the warrant was issued for violation of probation in this case. As such, we conclude that the trial court did not abuse its discretion in reinstating the defendant's original three year sentence and ordering the sentence to be served in the Tennessee Department of Correction.²

Accordingly, we affirm the judgment of the court below.

JOHN H. PEAY, Judge

CONCUR:

¹ As the defendant points out, a defendant's inability to pay should not be used as the sole basis upon which to revoke probation as set out in State v. Dye, 715 S.W.2d 36, 40 (Tenn. 1986). However, as the defendant here has violated other conditions of his probation, this contention is without merit. In addition, the defendant has failed to show good cause why he has not complied with the condition of his probation to pay court-ordered fees and probation fees. Id.

² Although the defendant correctly contends that a trial court must not revoke probation for arbitrary reasons, revoking probation when a defendant has violated several probation conditions is not arbitrary by any means.

GARY R. WADE, Presiding Judge

JERRY L. SMITH, Judge