

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1998 SESSION

FILED

February 10, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
Appellee)
)
vs.)
)
KENDALL WARREN,)
)
Appellant.)

No. 03C01-9804-CC-00145

Blount County

Honorable D. Kelly Thomas, Jr., Judge

(Revocation of Probation)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

JAMES CURWOOD WITT, JR.
JUDGE

OPINION

The defendant, Kendall Warren, pled guilty to four counts of the sale of cocaine on July 28, 1992 and received an effective eight-year sentence as a Range I offender. The trial court ordered him to serve the first ninety days in confinement and then placed the defendant on intensive probation. In December, 1993, the defendant was transferred from intensive to regular probation.

On June 6, 1996, the defendant's probation officer filed a violation of probation report alleging that he had tested positive for cocaine in a drug screen on May 26, 1995, that he had been in arrears on his probationary fees and other financial obligations stemming from his convictions, and that he still owed more than 50 hours of community service. The report also indicated that he had reported as required to his probation officer, that he had maintained full time employment and was supporting a family that included four children, and that he had completed a substance abuse counseling program in 1993. The trial court ordered that the defendant spend the weekends in jail until he had completed his community service and had paid \$340 in restitution.¹ After his release, he was required to pay fifty dollars per pay period toward fines, fees, and costs.

On February 20, 1998, the defendant again tested positive for cocaine, and the probation officer filed a second violation report. In a second test, just days before the hearing, the defendant again tested positive for cocaine. At the hearing, the officer testified that the defendant had admitted the use of cocaine and had participated in a drug assessment. The results of the assessment indicated that the defendant needed further treatment for his

¹ The order permitted the defendant to perform community service during the time he was incarcerated.

substance abuse problem and recommended that he enroll in a program at Blount Memorial Hospital. When the defendant learned that many of the meetings were in the evening, he declined to participate because he feared that he would lose his job which required him to work evenings. The defendant had been employed at Intermedia Cable since April, 1995, and was earning approximately \$2,000 per month. The officer also testified that, although the defendant had not made much headway on paying the amount he was in arrears, he made a substantial effort to make the current payments as required. Because the defendant was supporting four children in his household as well as making child support payments, the officer did not believe he would ever be able to pay the amount he was in arrears. The probation officer did not recommend revocation of the defendant's probation but asked that the court order him to attend a drug treatment program. He suggested that if the court found revocation appropriate, the court consider placing the defendant in CAPP, a Community Corrections program. The defendant put on no proof.

At the conclusion of the hearing, the trial court found that the defendant had violated his probation by using cocaine and had used cocaine as recently as one week prior to the hearing. The trial judge concluded that, "[i]f Mr. Warren doesn't want to involve himself in treatment so he can get a hold of his drug addiction, then the Court has no choice at all other than to revoke his probation." He then revoked the defendant's probation and ordered him to serve the original eight-year sentence in the Department of Correction.

In this appeal, the defendant does not argue that the trial court abused its discretion in revoking his probation. He concedes that he violated the conditions of probation by using cocaine. However, he contends that the trial court erred in refusing to consider him for placement in the Community Corrections program. He points out that he had made great strides during the six years he was on probation. He supported his family and was a contributing

member of society. Because his drug abuse problem could be more appropriately treated in the community, he argues that the trial court erred by ordering him to serve his sentence in confinement.

Once a trial court finds a probation violation by a preponderance of the evidence, the court has the discretion to revoke probation and order the execution of the original judgment. Tenn. Code Ann. § 40-35-310 (1997). We must determine whether the trial court abused its discretion in ordering this probationer to serve his entire sentence in light of the nature of his violations. See, e.g., State v. Leach, 914 S.W.2d 104, 107 (Tenn. Crim. App. 1995) (where defendant has new charges pending, trial court did not abuse its discretion in ordering the defendant to be incarcerated); State v. Johnny Ray Christman, No. 01C01-9405-CC-0178, slip op. at 5 (Tenn. Crim. App., Nashville, Mar. 30, 1995) (trial court's refusal to place the defendant in community corrections is not an abuse of discretion even where violations are not most severe possible); State v. Darrell Wilson, No. 02C01-9207-CR-00167, slip op. at 6-7 (Tenn. Crim. App., Jackson, Oct. 27, 1993) (trial court did not abuse its discretion in failing to consider community corrections for positive drug test and missing appointments), perm. app. denied (Tenn. 1994); State v. Aaron Switzer, No. 03C01-9211-CR-00380, slip op. at 3 (Tenn. Crim. App., Knoxville, July 23, 1993) (trial court did not act arbitrarily in imposing original sentence).

Although this defendant has never been convicted of an act of violence and does not have an extensive criminal record, he has twice violated his conditions of probation by ingesting cocaine. The fact that he meets the minimum requirements for community corrections sentencing does not mean that he is entitled to a community corrections sentence as a matter of right. State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). The trial judge has the statutory authority to order the defendant to serve the entire sentence in confinement upon violation of probation. Tenn. Code Ann. § 40-35-310, -311(d)

(1997). In many ways, this defendant's record on probation is exemplary; however, he has demonstrated that he is unable or unwilling to put his drug-related past firmly behind him. Although we encourage trial judges to consider community corrections and other creative alternatives to incarceration in similar scenarios, we cannot find that the trial court abused his discretion in confining this defendant.

Accordingly, we affirm the judgment of the trial court.

JAMES CURWOOD WITT JR., Judge

CONCUR:

DAVID G. HAYES, Judge

JERRY L. SMITH, Judge