IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

APRIL 1999 SESSION

FILED

May 18, 1999

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9806-CR-00245**
Appellee,	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. FRANK G. CLEMENT, JR.,**
DOUGLAS FLINT DILLARD,	)	**JUDGE**
	)	
Appellant.	)	(Revocation of Probation)

FOR THE APPELLANT:

JAMES ROBIN McKINNEY, JR.
214 Second Ave., North
Suite 103
Nashville, TN 37201

FOR THE APPELLEE:

JOHN KNOX WALKUP
Attorney General & Reporter

LUCIAN D. GEISE
Asst. Attorney General
John Sevier Bldg.
425 Fifth Ave., North
Nashville, TN 37243-0493

VICTOR S. JOHNSON, III
District Attorney General

GEORGE BONDS
Asst. District Attorney General
222 Second Ave., North
Suite 500
Nashville, TN 37201

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

After being convicted for driving under the influence, second offense, the defendant was sentenced to eleven months, twenty-nine days, with forty-five days to be served in jail and the balance on probation. The defendant was also prohibited from driving a motor vehicle for two years and ordered to pay a six hundred dollar ($600) fine. Ten months later, a probation violation warrant was issued. Following a revocation hearing, the defendant's probation was revoked and he was ordered to serve 120 days in jail. He now appeals, arguing that the trial court abused its discretion in revoking his probation. Finding no merit to the defendant's claim, we affirm.

The evidence at the revocation hearing established that Susan Cunningham met with the defendant while he was serving his original term of forty-five days in jail. At that time, she explained to him that he must attend alcohol treatment in order to comply with the terms of his probation. She told him to call the Safety Center when he was released. She also gave him paperwork for a licensed provider of alcohol treatment, but told him he could receive treatment elsewhere. She noted that the defendant had an "uncooperative attitude."

Jeri Holladay, the defendant's probation officer, unsuccessfully tried to contact the defendant when he was released from jail in early April 1997. She did not hear from him until late April when he called her to ask whether he could forego alcohol treatment or paying his fine because he had epilepsy and could not work. Ms. Holladay told the defendant to send her medical proof of his disability. In May, the defendant called Ms. Holladay again, and again, she told him to send her medical proof of his disability. Ms. Holladay sent the defendant a "first alert" memorandum, explaining that she had yet to receive medical documentation and if she did not, she would initiate revocation proceedings since he had not registered for alcohol treatment.

In June, Ms. Holladay received a doctor's letter that reflected the defendant could not work full-time because he suffered from epileptic seizures. The letter did not state that the defendant's medical disability prevented him from attending an alcohol treatment program. Two weeks later, the defendant called Ms. Cunningham and told her that he could not participate in an alcohol treatment program because he could not afford the cost. Ms. Cunningham instructed him to register anyway. Since

the defendant had apparently moved out of town, she also told him he could attend a treatment program elsewhere, but if he did, he would also need to attend seventy-two Alcoholic Anonymous meetings. Ms. Holladay sent the defendant another detailed memorandum stressing the importance of beginning alcohol treatment and stating that the defendant must contact her within ten days or face revocation proceedings. Seven weeks passed. In August, Ms. Holladay received another doctor's letter reflecting that the defendant's medical condition prevented employment, but again not stating that his medical condition would preclude or interfere with alcohol treatment.

Instead of contacting Ms. Holladay, the defendant called Ms. Cunningham in late August. Ms. Cunningham told the defendant he had not given a reason for failing to attend alcohol treatment and that he needed to either register with the Safety Center for no-cost treatment or provide a doctor's letter stating his medical condition prevented him from attending treatment.

In September and October, Ms. Holladay sent the defendant two more memoranda reiterating that the defendant must begin treatment. The defendant did not respond. In November, Ms. Holladay sent a final memorandum to the defendant, giving him three weeks to document that he began treatment or else face revocation proceedings. In December, when the defendant failed to comply, she filed a request for probation violation for noncompliance with treatment, and a probation violation warrant was issued.

In January, the defendant called Ms. Cunningham to tell her he was again contacting his doctor. Later that month, he scheduled an appointment to complete his registration and paperwork for treatment. He met with Ms. Cunningham the day prior to the revocation hearing, and during that meeting, the defendant disclosed he was a veteran. Based on this, and because the defendant had expressed numerous medical and financial issues and was concerned about where he would live, Ms. Cunningham recommended he seek in-patient treatment at the VA hospital in Nashville. The defendant responded "that he still didn't understand why he needed to do this and that."

At the conclusion of the revocation hearing, the trial court stated he was "totally unconvinced" that the

defendant's "alleged illness" and "alleged financial inability" prevented him from attending alcohol treatment. The trial court noted he routinely waives the cost of alcohol treatment and would have done so in the defendant's case if he was financially unable to attend treatment. The trial court accredited the testimony of Ms. Cunningham and Ms. Holladay, stating that they "went several extra miles" trying to get the defendant to comply with the terms of his probation. Based on this, the trial court revoked the defendant's probation and ordered him to successfully complete the New Avenues alcohol treatment program while serving a 120 day sentence in jail. The trial court judge also stated that once the defendant successfully completed the New Avenues program, he would then entertain a motion for a reduced, modified, or suspended sentence.

When a trial judge finds that a probationer has violated the conditions of his or her probation, the trial judge has the authority to revoke probation. See T.C.A. § 40-35-310. The existence of a violation need only be supported by a preponderance of the evidence. T.C.A. § 40-35-311(e).

Moreover, in revocation hearings, the credibility of the witnesses is for the determination of the trial judge. Bledsoe v. State, 215 Tenn. 553, 387 S.W.2d 811, 814 (1965); State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). On review the findings of the trial judge have the weight of a jury verdict. Delp, 614 S.W.2d 398; Carver v. State, 570 S.W.2d 872, 875 (Tenn. Crim. App. 1978). We will not disturb the judgment of the trial judge in the absence of an abuse of discretion. For this Court to find an abuse of the trial court's discretion, the defendant must demonstrate "that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred." State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991).

Here, the defendant appears to contend that Ms. Holladay testified he complied with the terms of his probation, but this contention is wholly disputed by the record, which shows that Ms. Holladay did everything she could to encourage and accommodate the defendant, but that the defendant simply avoided treatment. He also claims the trial court abused its discretion

in revoking his probation because the "proof was quite evident" he "was unable to financially or medically complete alcohol treatment." To the contrary, the undisputed proof at the revocation hearing showed that the defendant was repeatedly told he could attend treatment at no cost and that the defendant never provided proof that his medical condition prevented him from attending treatment. The defendant also claims that once he became aware a warrant was issued against him, he "took all necessary measures" to comply with the terms of his probation. Even if that was true, the defendant should have complied with the terms of his probation during the nine months before a warrant issued.

In a related argument, the defendant attempts to compare the fees required for alcohol treatment to restitution, arguing that his failure to attend alcohol treatment was not willful because he did not have the financial ability to pay the necessary fees. The defendant even contends that once he knew he could obtain alcohol treatment without cost to him, "he immediately inquired about the program at the Veteran's Administration Hospital for his alcohol treatment." We need not address the defendant's comparison of treatment fees to restitution because even assuming the analogy was sound, the record fails to support the defendant's claims. The record contains no evidence that the defendant was financially unable to pay the necessary treatment fees; the record reflects only that the defendant told Ms. Cunningham and Ms. Holaday he could not afford the fees. As early as June 1997, the defendant was specifically instructed how he could attend treatment at no cost, but he made no attempt to take advantage of that option. Instead, he stalled for six months and made a last-ditch effort to avoid revocation only after a warrant issued against him.

In short, the trial court did not abuse its discretion or act arbitrarily in revoking the defendant's probation. To the contrary, substantial evidence exists to support the trial court's decision. Accordingly, we affirm the revocation order.

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DAVID H. WELLES, Judge

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J. CURWOOD WITT, JR., Judge