

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1999 SESSION

<p>F I L E D</p> <p>May 26, 1999</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

STATE OF TENNESSEE,)
)
 Appellant,)
)
v.)
)
JERRY ELAM,)
)
 Appellee.)

C.C.A. No. 02C01-9807-CC-00204

Madison County

Honorable Whit Lafon, Judge

(State Appeal)

FOR THE APPELLANT:

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OPINION FILED: _____

REVERSED AND REMANDED

JAMES C. BEASLEY, SR., SPECIAL JUDGE

O P I N I O N

On October 19, 1994, the Madison County grand jury returned six two-count indictments against the defendant, Jerry Elam, charging him with sales and deliveries of cocaine, Class C felonies. On September 18, 1995, the defendant entered pleas of guilty to six counts of sale of cocaine in return for an agreed sentence of six years on each count, concurrent, to be served by eleven months and twenty-nine days in confinement followed by intensive probation for five years and one day. The defendant was fined a total of \$12,000, but the judgments entered on September 20, 1995, reflect that the defendant was "declared indigent for fines except \$1,000." The defendant was ordered "[t]o pay fine, costs and restitution at [the] rate of \$50/month." On December 4, 1997, the defendant was arrested on a warrant for violation of his probation and apparently held in custody until his revocation hearing on May 19, 1998. In orders dated June 15, 1998, and June 30, 1998, the trial court revoked the defendant's probation upon time served since his arrest on December 4, 1997, a total of 167 days. The defendant was released from jail and ordered to complete forty hours of community service work within forty days, after which he would be placed on unsupervised probation.¹ The court further found the defendant to be indigent as to all fines, costs, and supervision fees. The state appeals, arguing that the trial court acted arbitrarily in removing the defendant from supervised probation and releasing him

¹The defendant was discharged from active supervision on September 9, 1998 by order filed September 17, 1998.

from his obligation to pay fees, fine, and costs and that such actions constitute an abuse of discretion.

For the reasons stated herein, we reinstate the fine, fees, and costs and remand for limited probationary supervision.

Special conditions of probation ordered by the trial court required the defendant to submit to monthly drug screens and perform 100 hours of community service work. Additionally, the probation order required the defendant to pay the \$1,000 fine, costs, and restitution at the rate of \$50 per month. On September 9, 1998, the defendant was transferred from intensive to regular probation because there was no intensive program available in Gibson County where he resided. Probation violation reports were filed on August 8, 1996, and July 14, 1997, alleging that the defendant had failed to pay his fine, court costs, and probation fees.

At the defendant's revocation hearing, Nancy Richardson of the Tennessee Department of Correction, testified that the defendant had not paid anything on his fine and court costs and had made no payment on his probation fees since July, 1996. Richardson further stated that "other than working," the defendant had done what he was supposed to do while on probation.

When the trial judge inquired as to whether or not the defense would present proof, the defendant spoke out and said, "I was working. I had just started working." The defendant was then placed under oath and the following occurred:

THE DEFENDANT: Well I would just like to say, I will start making my payments. I had got a job.

THE COURT: What kind of job you got?

THE DEFENDANT: I was working for -- brick laying.

THE COURT: How much you get?

THE DEFENDANT: I was making \$6.00 an hour.

THE COURT: All right.

THE DEFENDANT: And I was working down at Trenton City Jail. Fay Dodd, she went in. I didn't go in and make the call myself.

THE COURT: Well let me ask you this question. You haven't paid your fine and costs; is that right?

THE DEFENDANT: Yes, sir.

THE COURT: You have paid them?

THE DEFENDANT: No, sir, I haven't.

THE COURT: Do you have any money?

THE DEFENDANT: No, sir, not right now, but I can --

THE COURT: All right, here's what I'm going to do. I'm going to revoke his probation to time served, and I find him indigent as to fine and costs and future probation fees.

And I'll tell you what I'm going to do, I'm going to do this, ma'am, and I want you to supervise him.

I'm going to give you 40 hours of community service work, and if you finish that in 40 days, I'm going to put you on unsupervised probation.

MR. BROWN: Your Honor, just for the record --

THE COURT: Now if he doesn't, ma'am, if he don't --

Now you better do it because this means a lot to you, and I would assume that the reason you hadn't paid is because you don't have money, and so --

All right, what are you going to say, General?

MR. BROWN: Your Honor, I was just going to object. He says he has a job. He works as a brick layer, and he does have money, and the State does object to placing him on unsupervised probation since he has a six-year sentence.

THE COURT: Note your exception.

MR. BROWN: Thank you, Your Honor.

THE COURT: Keep your seat. This means you don't have to report to a probation officer. If you get in any trouble, you'll be violated just like you were for not reporting to her. You understand?

THE DEFENDANT: Yes, sir.

The trial court gave no reason nor offered any explanation in support of the action taken, but rather sua sponte removed the defendant from probationary supervision and relieved him from his obligation to pay the fine and costs adjudged against him. This was in spite of the fact that the defendant had specifically agreed to pay the fine and costs as a condition of his negotiated guilty plea and his grant of probation. Furthermore, the trial court inexplicably disregarded and rejected the defendant's offer to pay.

As a general rule, a trial court's judgment becomes final thirty days after its entry, unless a timely notice of appeal or specific pretrial motion is filed. Tenn. R. App. P. 4(a) and (e). Once the judgment is final, the trial court generally loses jurisdiction to amend it. State v. Moore, 814 S.W.2d 381, 382 (Tenn. Crim. App. 1991). However, Tenn. Code Ann. § 40-24-102 provides:

The several courts in which a cause is finally adjudged are authorized, either before or after final judgment, for good cause, to release the defendants or any one (1) or more of them, from the whole or any part of fines or forfeitures accruing to the county or state. (emphasis added).

Acknowledging the power of the trial court to reduce, suspend, or release fines, our Supreme Court has made it clear that such action is subject to appellate review. State v. Bryant, 805 S.W.2d 762, 765-66 (Tenn. 1991).

Although the trial court found the defendant "indigent as to fine and costs and future probation fees," there is no statutory or decisional authority to support the proposition that a trial court must waive the court costs upon a finding of indigence. The decision of whether to waive court costs rests within the discretion of the trial court. State v. Black, 897 S.W.2d 680, 683 (Tenn. 1995). The Supreme Court went on to observe that a defendant may be indigent at the time of conviction, yet the trial court might find that he or she may have the means of paying the costs in the future. A rule requiring the trial court to waive court costs upon a finding of a defendant's indigence would categorically prohibit the state from subsequently recovering those costs and would be contrary to the stated legislative intent that such finding of indigence "shall not bar the subsequent recovery from, or on account of, the defendant of any costs, fees, taxes or other charges authorized, imposed or prescribed by law in connection with such case." Black, 897 S.W.2d at 683 (citing Tenn. Pub. Acts 1980, ch. 625 (emphasis included)).

Tennessee Code Annotated § 40-35-308 (a) states as follows:

During the term of probation supervision, the sentencing court, on its own motion, or on application of a probation and parole officer, district attorney general or the defendant, may:

- (1) Modify any condition;
- (2) Remove a condition; or
- (3) Release the defendant from further supervision.

Clearly under the above authorities, the actions complained of were within the discretionary authority of the trial court.

The state argues that the trial court abused its discretion and acted arbitrarily in removing the defendant from supervised probation and relieving him from making payments toward fines, fees, and costs. On the other hand, the defendant avers that the trial judge "exercised conscientious judgment in making these decisions" and thus did not abuse his discretion.

For an appellate court to be warranted in finding an abuse of discretion in a probation revocation case, it must be established 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).

We will first address the issue relative to the fine, fees, and costs. As we understand his ruling, the trial judge not only removed the payment of the fine, fees, and costs as a condition of probation, but also effectively relieved the defendant from those obligations adjudged against and agreed to by the defendant as part of the guilty pleas.

From our search of the entire record, we are unable to find any substantial evidence to support the conclusion of the trial court that the defendant should be relieved of these financial obligations. The 32-year-old defendant had been in jail 167 days at the time of the hearing. When the trial judge asked, "Do you have any money?", the defendant replied, "No,

sir, not right now , but I can --." Based on this statement alone, the trial court, sua sponte, found the defendant indigent as to the fine, costs, and future fees. The only other proof on this issue shows that the defendant had obtained a "brick laying" job paying \$6.00 an hour. He told the court that he could and would start making his payments. There is no proof as to any assets or financial obligations which would affect the defendant's ability to make monthly payments.

From our careful review of the entire record, we are unable to find any substantial evidence supporting the decision of the trial judge releasing the defendant from his obligation to pay the fine, fees, and costs. Accordingly, we reverse the trial court and reinstate the judgment against the defendant for the \$1,000 fine and the adjudged costs. Likewise, we reinstate as a condition of probation the payment of the fine, costs, and fees. As to the removal of the defendant from probationary supervision, we find evidence, including the testimony of the probation officer, which would support a finding that the trial court exercised conscientious judgment, rather than acting arbitrarily, in making this decision. However, our reinstatement of the fine, fees, and costs requires, and we direct, such probationary supervision as required to enforce this condition of probation.

JAMES C. BEASLEY, SR., SPECIAL

JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

JOE G. RILEY, JUDGE