

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

FILED

AT KNOXVILLE

June 3, 1999

APRIL 1999 SESSION

Cecil Crowson, Jr.
Appellate Court
Clerk

STATE OF TENNESSEE,

Appellee,

VS.

NANCIE ELLEN WALKER,

Appellant.

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NO. 03C01-9808-CR-00301

SULLIVAN COUNTY

HON. R. JERRY BECK,
JUDGE

(Probation Revocation)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

JOE G. RILEY,
JUDGE

OPINION

The defendant, Nancie Ellen Walker, appeals as of right the order of the Sullivan County Criminal Court revoking her intensive probation and requiring her to serve the balance of an eight-year sentence in the Tennessee Department of Correction. On appeal, she claims the trial court erred in refusing to either reinstate probation or consider other community-based alternative sentencing. Finding no merit to these assertions, we AFFIRM the judgment of the trial court.

FACTS

On December 21, 1995, in a state of intoxication, defendant shot Joy Mallicote. She was indicted for attempted first degree murder, and on June 16, 1997, pled guilty to attempted second degree murder, a Class B felony.

The trial court sentenced defendant to the minimum sentence of eight years. The trial court conducted a probation hearing, after which, at the behest of defendant, her counsel, and the victim, it agreed to place defendant on a very intensive supervised probation program in lieu of incarceration. Additionally, the court imposed several strict conditions upon defendant as part of a comprehensive rehabilitation plan. In particular, defendant agreed to completely abstain from the consumption of alcohol.

On June 3, 1998, in violation of her probation, defendant consumed alcohol and ingested a large quantity of her prescription medication in an apparent attempt to end her own life. She then called 9-1-1 and was taken to the emergency room for treatment. The ER notified defendant's treating psychiatrist, Dr. Michael Harris, who examined defendant the next day and committed her to an in-patient treatment facility for further observation. After assuring himself that defendant was no longer suicidal, he authorized her release and enrolled her in an out-patient intensive rehabilitation program to aid with the treatment of her alcohol addiction.

Dr. Harris' testimony regarding defendant's probation violation indicated that, notwithstanding her psychological problems and addiction to alcohol, he believed defendant to be treatable in a non-incarceration setting. However, he also

acknowledged defendant's history of failing to follow through with treatment; that her behavior can be unpredictable when she drinks alcohol with medication; and that the combination of alcohol and prescription drugs was also central in the commission of the original offense.

In her own testimony, defendant admitted the violation of probation, but asked the court to consider the circumstances surrounding the violation. Namely, she claimed that up until that time, she remembered very little about the original offense, and the recent and sudden return of those memories caused her relapse. Furthermore, while trying to comport with the alcohol rehabilitation terms of her probation, the Alcoholics Anonymous sponsor provided her with alcoholic beverages. Defendant asserted that given another chance, she could succeed on a probationary or community corrections program.

In reaching its decision, the trial court recognized its reasons for agreeing to intensive probation originally: (1) the community support enjoyed by defendant; (2) the desire to address defendant's psychological and addiction problems in a non-incarceration setting; and (3) the strict terms of the proposed plan which would allow defendant to remain in the community. Nevertheless, the court noted that its attempt to allow defendant to receive treatment without incarceration failed. Furthermore, it rejected the notion that defendant could succeed in another community-based program, such as community corrections, where she had failed on intensive probation.

The court revoked defendant's probation and ordered her to serve the eight-year sentence incarcerated.

REVOCAION OF PROBATION / CONFINEMENT

Revocation of probation is subject to an abuse of discretion standard of review, rather than a *de novo* standard. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). Discretion is abused only if the record contains no substantial evidence to support the conclusion of the trial court that a violation of probation has occurred. *Id.*; State v. Gregory, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997). Proof of a

violation need not be established beyond a reasonable doubt, and the evidence need only show that the trial judge exercised a conscientious and intelligent judgment, rather than acting arbitrarily. Gregory, 946 S.W.2d at 832. Once the trial court finds “that the appellant has violated the conditions of [her] probation and suspension by a preponderance of the evidence, the trial judge shall have the right . . . to revoke the probation . . . and cause the defendant to commence the execution of the judgment as originally entered” Tenn. Code Ann. § 40-35-311(d).

In this case, there is a clear basis for revocation in that the defendant admitted her violation. Moreover, we conclude the trial court committed no error in its determination that defendant stood no greater chance of successful rehabilitation in a community-based alternative sentence program, than she did while on the intensive probation program established by the court.

CONCLUSION

Based upon the foregoing, the judgment of the trial court is AFFIRMED.

JOE G. RILEY, JUDGE

CONCUR:

JERRY L. SMITH, JUDGE

NORMA McGEE OGLE, JUDGE