

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1999 SESSION

FILED
December 16, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee,)
)
 VS.)
)
 GEORGE CANTRELL III,)
)
 Appellant.)

NO. M1998 00104 CCA R3 CD

WILLIAMSON COUNTY

HON. DONALD P. HARRIS,
JUDGE

(Probation Revocation)

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OPINION FILED: _____

REVERSED AND REMANDED

JOE G. RILEY, JUDGE

OPINION

On October 17, 1995, defendant pled guilty to two counts of forgery. That same day, the trial court sentenced defendant to concurrent four year sentences, with the sentences to be suspended and defendant placed on probation after 150 days of confinement. The trial court subsequently revoked defendant's probation and ordered him to serve his original sentence. Defendant challenges the reinstatement of his original sentence, raising the following issue: whether the trial court erred in its determination that it had no authority to determine whether the revocation would run concurrently or consecutively to an unrelated sentence previously imposed in a different judicial district. We conclude that a revoking court has the authority to determine whether its revoked sentence will run concurrently or consecutively to a sentence previously imposed for an offense committed while on probation. Thus, we **REVERSE** the judgment of the trial court and **REMAND** for further proceedings.

I. BACKGROUND

The record indicates that defendant pled guilty and was sentenced in this case on October 17, 1995, in Williamson County. On February 14, 1997, Defendant's probation officer prepared a probation violation report in which he alleged that Defendant had violated his probation by failing to report and by failing to pay required fees. On March 21, 1997, a probation violation warrant was filed. The warrant was not executed until March 30, 1998.

On July 24, 1998, prior to the revocation hearing in Williamson County, defendant entered a plea of guilty in the Coffee County Criminal Court to a charge of aggravated vehicular homicide. That same day, Defendant was sentenced to a term of fifteen years in the Tennessee Department of Correction. In addition, the

sentence was ordered to run consecutively to “[a]ll other sentences previously imposed.” The judgment made no specific reference to the instant Williamson County case in which defendant was on probation.

A review of the Williamson County probation revocation hearing conducted on September 8, 1998, indicates that both the state and defense counsel proceeded upon the assumption that the Coffee County conviction would be a basis for the revocation. The only evidence offered by the state was a certified copy of the Coffee County conviction. The defendant voiced no objection and agreed to the revocation with the only issue being whether the revocation would run concurrently or consecutively to the Coffee County sentence. Both the state and defense counsel recognized the trial court’s authority to determine whether the revocation would run concurrently or consecutively to the previously imposed Coffee County sentence. However, at the close of the hearing, the trial court stated the revocation warrant only alleged the failure to report and pay fees and did not include the Coffee County conviction. The trial court then determined it had no authority to decide whether the revocation would run concurrently or consecutively to the previously imposed Coffee County sentence. The trial court subsequently entered an order that revoked defendant’s probation and reinstated his original sentence without any mention of the Coffee County sentence.

II. ANALYSIS

Defendant contends that the trial court erred when it determined it had no authority to determine whether the revocation should run concurrently with the sentence that was previously imposed in the Coffee County case. We agree with defendant’s contention.

A.

Defendant argues that under Tenn. Code Ann. § 40-35-310, the trial court had the authority to order the revocation in this case to run concurrently with the previously imposed sentence in the Coffee County case. The state concedes the trial court erred in finding it did not have the discretion to order concurrent sentences. We agree.

Tenn. Code Ann. § 40-35-310 provides:

The trial judge shall possess the power, at any time within the maximum time which was directed and ordered by the court for such suspension, after proceeding as provided in § 40-35-311, to revoke and annul such suspension, and in such cases the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension, and shall be executed accordingly; provided, that in any case of revocation of suspension on account of conduct by the defendant which has resulted in a judgment of conviction against the defendant during the defendant's period of probation, the trial judge may order that the term of imprisonment imposed by the original judgment be served consecutively to any sentence which was imposed upon such conviction.

Id. (emphasis added). The emphasized language provided the trial court with the authority to order the sentence in this case to run either concurrently or consecutively to the Coffee County sentence.

We are unable to agree that the revocation was based only on the failure to report and pay fees. Although the revocation warrant listed only the failure to report and pay fees, the warrant was filed in March 1997. The Coffee County conviction did not occur until July 1998, and the revocation was heard in September 1998. Although the state could have sought a formal amendment to include the Coffee County conviction, the actual notice and agreed revocation, as opposed to formal written notice, authorized the trial court to consider the Coffee County conviction as a basis for revocation. See State v. James C. Wolford, C.C.A. No. 03C01-9708-CR-00319, Hamilton County (Tenn. Crim. App. filed February 18, 1999, at Knoxville), *perm. to app. denied* (Tenn. September 20, 1999)(citations omitted). Both the state and the defendant assumed the Coffee County conviction served as a basis for revocation. Therefore, as the state concedes, the trial court clearly had

the authority, pursuant to Tenn. Code Ann. § 40-35-310, to determine whether its sentence should run concurrently or consecutively to the Coffee County sentence.

B.

Regardless, the trial court still had authority to determine concurrent/consecutive sentencing even if the revocation was based only upon the failure to report and pay fees. The trial court relied upon State v. Jagath N. Parachuri, C.C.A. No. 01C01-9706-CC-00233, Williamson County (Tenn. Crim. App. filed July 23, 1998, at Nashville). The procedural history in Parachuri was extremely unique, and we understand the trial court's confusion about its holding. However, Parachuri is distinguishable and irrelevant to this case.

In Parachuri, Williamson County imposed a probated sentence on May 15, 1995. Subsequently in 1995, Davidson County also imposed a probated sentence. Parachuri then committed a triggering offense in Davidson County to which he pled guilty in May 1996.

In June 1996, Davidson County revoked Parachuri's probation based upon the triggering offense. In March 1997, Williamson County also revoked probation based upon the triggering offense and ran its revoked sentence consecutively to the revoked 1995 Davidson County offense. We noted the concurrent/consecutive nature of the 1995 Williamson County and 1995 Davidson County sentences had already been determined by Davidson County at its 1995 sentencing. Therefore, Williamson County was not at liberty to change the concurrent/consecutive nature of those 1995 sentences upon revocation.

Parachuri did not address the sole issue presently before this court: whether a revoking court has the authority to run its revoked sentence concurrently/consecutively to a sentence previously imposed for an offense committed while on probation. We conclude it does. In fact, this Court expressly

recognized in Parachuri that the revoking court had run its sentence concurrently with the offense committed while on probation. *Id.*, slip op. at 8.

Although Tenn. Code Ann. § 40-35-310 expressly addresses concurrent/consecutive sentencing based upon an offense triggering the revocation, we do not believe the legislature intended to limit the revoking court's authority relating to other offenses committed while on probation for which the defendant has already been sentenced. The Sentencing Commission Comments to Tenn. Code Ann. § 40-35-310 expressly provide:

The trial judge retains the authority to direct that the original sentence be served consecutively or concurrently to any sentence which was imposed for a conviction while placed on probation supervision.

Id. (emphasis added.) See also State v. Duncan Johnson, C.C.A. No. 02C01-9211-CC-00256, Gibson County (Tenn. Crim. App. filed August 4, 1993, at Jackson) (using language similar to Sentencing Commission Comments).

C.

We recognize that Coffee County did have the authority to run its sentence consecutively to the *probationary sentence* previously imposed by Williamson County. See State v. Malone, 928 S.W.2d 41, 44 (Tenn. Crim. App. 1995). However, under Malone, the effect of the Coffee County consecutive sentence was a stay of the Williamson County probationary sentence which would not recommence until completion of the Coffee County incarceration sentence. *Id.*

Williamson County, the revoking court, then had the authority at its subsequent revocation hearing to determine the manner of service of its revoked sentence in relation to the previously imposed Coffee County sentence committed while on probation. Otherwise, the Coffee County court would have no way of knowing at the time of its sentencing whether the defendant would effectively serve only its 15-year sentence or an additional four years of confinement depending upon what the Williamson County court did in the future. Such a result is contrary

to common sense and would deprive Williamson County of sentencing “based upon all that has gone before.” State v. Arnold, 824 S.W.2d 176, 178 (Tenn. Crim. App. 1991).

Furthermore, as previously discussed, Williamson County could determine concurrent/consecutive sentencing if it relied upon the Coffee County conviction as the basis for its revocation. See Tenn. Code Ann. § 40-35-310. To conclude that Williamson County would be deprived of this discretion simply because it did not rely upon the Coffee County conviction as a basis for revocation does not appear logical.

D.

Although the state concedes error, it contends defendant was not prejudiced since defendant’s extensive criminal record qualifies him for consecutive sentencing. However, the trial court did not consider the issue of concurrent/consecutive sentencing. The trial court is in a better position than this court to determine this issue.

CONCLUSION

Based upon our review of the record, we **REVERSE** and **REMAND** to the trial court for further proceedings consistent with this opinion. Upon remand, the trial court shall determine whether the revocation shall run concurrently or consecutively to the Coffee County sentence.

JOE G. RILEY, JUDGE

CONCUR:

THOMAS T. WOODALL, JUDGE

L.T. LAFFERTY, SENIOR JUDGE