IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 26, 2023

STATE OF TENNESSEE v. CHRISTOPHER KIRK STACK

Appeal from the Criminal Court for Knox County
No. 113818 Steven W. Sword, Judge

No. E2022-01755-CCA-R3-CD

The Defendant, Christopher Kirk Stack, appeals from the Knox County Criminal Court's probation revocation of the six-year sentence he received for his guilty-pleaded conviction for attempted aggravated sexual battery. On appeal, the Defendant contends that the trial court abused its discretion by revoking his probation and ordering him to serve the remainder of his sentence in confinement. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER and JILL BARTEE AYERS, JJ., joined.

Julia Anna Trant, Knoxville, Tennessee, for the appellant, Christopher Kirk Stack.

Jonathan Skrmetti, Attorney General and Reporter; Edwin Alan Groves, Jr., Assistant Attorney General; Charme P. Allen, District Attorney General; and Ashley McDermott, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On August 29, 2018, the Defendant was indicted for aggravated sexual battery, after an incident involving the two-year-old victim. On August 15, 2019, the Defendant pleaded guilty to attempted aggravated sexual battery, at which time he received a six-year sentence to be served on probation. The Defendant agreed to undergo a psychosexual evaluation and to follow the recommendations of the report, and he was prohibited from possessing and viewing pornography. The Defendant was placed on the sexual offender registry and on community supervision for life. The guilty plea hearing transcript is not included in the record.

A February 25, 2021 probation violation warrant alleged that the Defendant committed two sexual offender registration violations, that he was suspended from sexual-offender-specific treatment for violating group rules, that he failed to make progress in treatment, and that he failed to pay group fees. On September 2, 2021, the Defendant "submitted" to the probation violations, and the trial court continued the revocation hearing to October 28, 2021. However, on October 15, 2021, the probation violation warrant was amended to include allegations that the Defendant violated the sexual offender registry by operating an "unregistered electronic ID (Facebook account)" and that he failed to submit to a drug screen. On October 28, 2021, the Defendant submitted to the probation violations alleged in the original and amended warrants, and the court continued the revocation hearing. On January 14, 2022, the court revoked the Defendant's probation but returned him to probation with the special condition prohibiting the Defendant from accessing the internet. This probation revocation hearing transcript is not included in the record.

An October 21, 2022 probation violation warrant alleged that the Defendant committed two sexual offender registration violations by having an unregistered email address and by having an unregistered telephone number. These probation violation allegations are the subject of the present appeal.

At the November 17, 2022 revocation hearing, probation officer Jimmy Wayland testified that he had supervised the Defendant since July 2021. Mr. Wayland stated that on October 8, 2022, he and his partners conducted home searches pursuant to standard supervision policies. He said that although the Defendant reported being homeless, he went to the area the Defendant was known to frequent. Mr. Wayland said he saw the Defendant, who held an object that appeared to be a cell phone. Mr. Wayland stated that when the Defendant saw the probation and parole car, the Defendant placed the object in his pocket in an apparent attempt to hide it. Mr. Wayland stated that he approached the Defendant and conducted a "pat-down" search. Mr. Wayland said that he asked the Defendant to empty his pockets onto the trunk of the car. Mr. Wayland said that the Defendant complied "with no problem" and that the Defendant placed two cell phones, one of which was a "smartphone," and a portable charger on the trunk.

Mr. Wayland testified that the Defendant was prohibited from having internet access as a special condition of his probation. Mr. Wayland said that he monitored the Defendant's special conditions periodically, discussing them with the Defendant to ensure the Defendant remained in compliance. Mr. Wayland said that although the Defendant was not told he was prohibited from possessing a smartphone, he was told that he could not have internet access. Mr. Wayland explained to the Defendant that Mr. Wayland's interpretation of the special condition was that the Defendant "should not" possess a smartphone because it had internet access. Mr. Wayland recalled that in January 2022, he and the Defendant discussed the Defendant's smartphone and that he provided the

Defendant with the opportunity to obtain a cell phone without internet access. Mr. Wayland said that between January and October 2022, the Defendant periodically "affirmed" that he did not have access to the internet and that he remained in compliance with the special conditions of his supervision.

Mr. Wayland testified that on October 8, 2022, at the time of the search, he examined the smartphone the Defendant placed on the trunk, that the phone had internet access, and that the Defendant had communicated with other people by way of text message and email. Mr. Wayland said he saw a long chain of emails dating to August 2022. Mr. Wayland stated that as a requirement of the sexual offender registry, the Defendant was required to register his email addresses and telephone numbers but that the email address and telephone number associated with the smartphone had not been registered. Mr. Wayland said that he took photographs of the smartphone and "established a timeline of use" and that he told the Defendant to report to the probation office the next day. Mr. Wayland said that the Defendant reported to the probation office as directed and that the Defendant admitted to possessing a smartphone and acknowledged violating the trial court's order by accessing the internet.

Mr. Wayland reviewed the Defendant's supervision history for the trial court. The Defendant had previous "sanctions" for failing to register a cell phone in October 2019, which was two months after being placed on probation. As a result of the violation, the Defendant was placed on a curfew restriction for ninety days, during which time, the Defendant's roommate possessed an "electronic ID" in the Defendant's name. In February 2020, drug paraphernalia was found in the Defendant's home, and he received a ninety-day curfew restriction, which Mr. Wayland described as increased supervision. In September 2020, the Defendant failed to report for the strong risk and reeds assessment, for which he received a ninety-day curfew restriction. On January 22, 2021, the Defendant was in possession of an "unregistered electronic ID, a Facebook account that he had not registered." On February 4, 2021, the Defendant was suspended from sexual offender treatment because he violated the group rules, failed to make progress in treatment, and failed to pay group fees. On February 24, 2021, the Defendant was charged with two counts of violating the sexual offender registry for failing to report a material change in employment and for failing to register an electronic ID. As a result of the charges and probation violation, the Defendant was taken into custody and released on bond in July 2021. Two weeks later, the Defendant was unable to produce a sample for a drug screen, which constituted a refusal, pursuant to policy.

Mr. Wayland testified that on August 27, 2021, he received a tip that the Defendant was operating an unregistered electronic ID and unregistered Facebook account. Mr. Wayland requested the Defendant report to the probation office, and a search of the Defendant's cell phone showed another Facebook account the Defendant had not

registered. Mr. Wayland said that the account had been active since the Defendant's release in July 2021. Mr. Wayland said that on September 10, 2021, the Defendant failed to meet with a forensic social worker. Mr. Wayland said that in January 2022, the Defendant's probation was revoked and that the Defendant was returned to supervision with the added condition that he not have access to the internet. Mr. Wayland said that the Defendant underwent the strong risk and needs assessment after being returned to supervision and that the Defendant had a high score for violence. Mr. Wayland said that in January 2022, the Defendant was instructed to enroll in and to attend the probation office's job readiness class but that he failed to follow instructions, which resulted in a sixty-day sanction of increased reporting. Mr. Wayland believed that the Defendant was not amenable to probation because of his inability or unwillingness to follow the rules.

On cross-examination, Mr. Wayland testified that his review of the email and website histories of the cell phone he obtained from the Defendant on October 8, 2022, did not reveal any unlawful content.

Justin Flatt testified for the defense that he co-owned a restaurant at which the Defendant had worked as a cook for six months, with five- to ten-hour shifts. Mr. Flatt said the Defendant was dependable, hardworking, and an asset to the business. Mr. Flatt said that although the Defendant did not own a car and did not have a permanent home, the Defendant had never been late to work. Mr. Flatt said the Defendant walked or traveled by bus. Mr. Flatt knew the Defendant was on the sexual offender registry but said the Defendant had never made him feel threatened or uncomfortable. Mr. Flatt was unaware of the factual basis underlying the Defendant's conviction. On cross-examination, Mr. Flatt stated that he had seen the Defendant possess a cell phone and that he did not know the Defendant was prohibited from accessing the internet.

At the close of the proof, the Defendant did not dispute violating the conditions of his release. He argued, though, that restricting the Defendant from all internet access, including social media, was unconstitutional pursuant to *North Carolina v. Packingham*, 582 U.S. 98 (2017). After reviewing *Packingham*, the trial court concluded that the case was distinguishable from the present case in that *Packingham* involved a statute prohibiting every person placed on the sexual offender registry from having internet access to social media. The court stated that the Defendant's case involved a rule of probation and that caselaw reflected prohibiting internet access was a permissible condition of probation. The prosecutor noted for the court that during the Defendant's police interview with Detective Huddleston, the Defendant "explain[ed] that he had an issue with watching pornography." The prosecutor, likewise, noted the Defendant admitted that he used his cell phone daily to watch pornography on various internet websites and that after the incident with the victim, during which "he had the child touch his penis," he watched pornography. The prosecutor

argued that the internet restriction in this case was relevant to the facts and circumstances of the offense. The trial court agreed.

The trial court determined by a preponderance of the evidence that the Defendant violated the conditions of his probation by having internet access. The court acknowledged that, generally, it was difficult to "get by" without internet access but stated that based upon the conviction offense for which the Defendant was on probation, the special condition was reasonably related to the public interest of protecting minors. The court stated that the conviction offense provided the Defendant with the opportunity to serve the sentence on probation. The court noted that the plea agreement was a compromise based, in part, upon the victim's being too young to testify at a trial. The court found that the Defendant had violated the conditions of his release "at least a dozen times" and that the court had "tried everything." Although the court commended the Defendant for his employment, the court said the violations had spanned three years. The court found that the Defendant was unwilling or unable to follow the rules of probation. The court revoked the Defendant's probation and ordered him to serve the remainder of his sentence in confinement. This appeal followed.

The Defendant contends that the trial court erred by determining that he violated the conditions of his release and by ordering him to serve the remainder of his sentence in confinement. The Defendant's sole argument centers around the trial court's prohibiting him from internet access. He argues that a complete prohibition against internet access violated his constitutional right to freedom of speech and that, as a result, his probation should not have been revoked on this basis. The State responds that the Defendant's constitutional claim is waived for failing to challenge it at the time the trial court imposed the internet restriction. The Defendant did not address the State's argument by responding in a reply brief. *See* T.R.A.P. 27(c) (reply briefs).

"On appeal from a trial court's decision revoking a defendant's probation, the standard of review is abuse of discretion with a presumption of reasonableness so long as the trial court places sufficient findings and the reasons for its decisions as to the revocation and the consequence on the record." *State v. Dagnan*, 641 S.W.3d 751, 759 (Tenn. 2022). An abuse of discretion has been established when 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. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980); *see State v. Shaffer*, 45 S.W.3d 553, 554 (Tenn. 2001); *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978). A finding of abuse of discretion "'reflects that the trial court's logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved in a particular case.'" *Shaffer*, 45 S.W.3d at 555 (quoting *State v. Moore*, 6 S.W.3d 235, 242 (Tenn. 1999)).

When a trial court determines that a defendant's probation must be revoked, the court must then decide upon an appropriate consequence. *Dagnan*, 641 S.W.3d at 757. A separate hearing is not required, but the court must address the issue on the record in order for its decision to be afforded the abuse of discretion with a presumption of reasonableness standard on appeal. *Id*. at 757-58.

After revoking a defendant's probation, the trial court may return a defendant to probation with modified conditions as necessary, extend the period of probation by no more than one year upon making additional findings, order a period of confinement, or order the defendant's sentence into execution as originally entered. T.C.A. §§ 40-35-308(a), (c) (Supp. 2022), -310 (Supp. 2022). "In probation revocation hearings, the credibility of witnesses is for the determination of the trial judge." *Carver v. State*, 570 S.W.2d 872, 875 (Tenn. Crim. App. 1978) (citing *Bledsoe v. State*, 387 S.W.2d 811, 814 (Tenn. 1965)).

The record reflects that on August 15, 2019, the Defendant was placed on probation and that eighteen months later, he did not contest the allegations at the first probation violation proceeding. In relevant part, the Defendant acknowledged that he operated an unregistered Facebook account, which violated the conditions of his supervision. As a result of the violation, the trial court revoked the Defendant's probation but returned the Defendant to supervision with the additional special condition that the Defendant be prohibited from accessing the internet. The record before this court does not contain this probation violation hearing transcript and, as a result, we are unable to determine whether the Defendant challenged the special condition at the time it was imposed at the revocation hearing. In any event, the Defendant did not appeal the court's imposition of the special condition. It was not until the present probation violation proceeding that the Defendant raised his challenge to the special condition, which was the basis for revocation. He argues on appeal that a complete prohibition from internet access violates his constitutional right to freedom of speech. He relies solely upon *Packingham*, 582 U.S. at 101-09, in which the United States Supreme Court determined that a statute prohibiting sexual offenders from accessing social networking websites "where the sex offender knows that the site permits minor children to become members or to create or maintain a personal" webpage violated the First Amendment. *Packingham* does not involve a probation revocation proceeding, but rather a prosecution and a conviction for violating a criminal statute.

We first consider whether a defendant waives the ability to challenge the validity of a condition of probation if raised for the first time after probation revocation proceedings have commenced. This appears to be an issue of first impression, as our appellate courts have not been asked to consider this issue directly. However, this court has previously questioned whether a defendant is permitted to challenge the validity of a condition of probation after probation has been revoked. *See State v. William A. Marshall*, No. M2001-02954-CCA-R3-CD, 2002 WL 31370461, at *6 (Tenn. Crim. App. Oct. 14, 2002)

("Although . . . conditions of probation must be 'reasonable and realistic' and may not be so 'stringent as to be harsh, oppressive, or palpably unjust,' this proposition is supported uniformly by cases in which the defendant appealed the terms of the probation *at the time* the probation was imposed, not after the probation was revoked.") (emphasis in original) (quoting *Stiller v. State*, 516 S.W.2d 617, 620 (Tenn. 1974)).

In *William A. Marshall*, the defendant challenged, in relevant part, a special probation condition as "unduly harsh or burdensome." 2002 WL 31370461, at *6. This court expressed "doubt whether the defendant may wait until a revocation has been declared before he attacks the reasonableness of the probation condition, at least when the circumstances of the performance of the condition are known or foreseeable at the time of imposition." *Id*. The court nonetheless determined that the defendant "knew what to expect" when the trial court imposed the condition of a four-year sexual offender treatment program and that completion of the program was foreseeable within the allotted time. *Id.* at *6-7.

Likewise, in *State v. Charles Randall Hutcheson*, No. 01C01-9311-CC-00407, 1994 WL 456383, at *2 (Tenn. Crim. App. Aug. 23, 1994), a panel of this court determined that a challenge to a probation revocation on the ground that the condition the defendant participate in the sexual offender program was harsh, oppressive, and palpably unjust came "too late" and should have been raised at the time the condition was imposed at sentencing. The court ultimately, though, determined that the condition was an "appropriate condition" of probation. *Id*.; *see State v. Leonard Giles, Jr.*, No. M2013-01037-CCA-R3-CD, 2014 WL 1174458, at *4-5 (Tenn. Crim. App. Mar. 24, 2014) (noting that the defendant did not challenge a special condition of probation after sentencing but nonetheless considering, after probation was revoked, whether the trial court abused its discretion by imposing the special condition). *But see State v. Norman D. Carrick*, No. W2010-01415-CCA-R3-CD, 2012 WL 5907460 (Tenn. Crim. App. Nov. 27, 2012) (determining, without consideration of the timing of the challenge and after the trial court revoked the defendant's probation, that the special condition of probation that the defendant not possess more than two dogs in his home was reasonably related to his sentence and not unduly restrictive or impermissible).

A defendant's conditions of probation "must be reasonable and realistic and must not be so stringent as to be harsh, oppressive or palpably unjust. The defendant has a right to appellate review to seek relief from, or modification of such conditions." *Stiller*, 516 S.W.2d at 620; *see* T.C.A. § 40-35-303(d)(9) (A trial court may require a defendant to "[s]atisfy any other condition reasonably related to the purpose of the offender's sentence and not unduly restrictive of the offender's liberty or incompatible with the offender's freedom of conscience, or otherwise prohibited by this chapter[.]").

A "defendant in a criminal case may appeal from the length, range or the manner of service of the sentence imposed by the sentencing court," and in such cases, the appeal "shall be taken within the same time and in same manner as other appeals in criminal cases." T.C.A. § 40-35-401(a) (2019). Tennessee Rule of Appellate Procedure 3(b) provides for an appeal as of right by a defendant who seeks review of a sentence. In an appeal as of right, a notice of appeal is required to be filed with the clerk of the appellate courts within thirty days after the date of entry of the judgment from which the defendant seeks appellate review. T.R.A.P. 4(a). Although a notice of appeal is not jurisdictional, the failure to timely appeal the imposition of a sentence may result in waiver of appellate review if not waived by the appellate court in the interest of justice. *Id*.

In determining whether a defendant is permitted to challenge the validity of a probation condition after revocation proceedings have commenced, we think *Commonwealth v. Jennings*, 613 S.W.3d 14 (Ky. 2020), is instructive. The defendant in *Jennings* pleaded guilty to various violations of the sexual offender registration statute, and he received probation with the condition that he was prohibited from accessing the internet. *Id*. at 15. The defendant was later charged with violating the sexual offender registration act by accessing social media websites, and a probation revocation proceeding commenced on the basis that the defendant was arrested for a new criminal offense and that the defendant violated the special probation condition prohibiting him from accessing the internet. The criminal charges were ultimately dismissed pursuant to *Packingham*, but the revocation proceedings continued on the sole basis that the defendant violated the conditions of probation by accessing the internet. The trial court determined that the defendant violated the condition of his release but returned the defendant to probation after four months' confinement. The defendant appealed, asserting that the internet restriction violated his constitutional rights. *Id*. at 16-17. However, the Kentucky Supreme Court determined that it did not need to consider whether the internet prohibition was appropriate or constitutional because the defendant "failed to timely contest the allegedly offending probation restriction." *Id*. at 17. The court noted that the defendant did not appeal the probation order which included the condition, did not object to the condition as being invalid, and did not seek to modify the probation condition before the probation revocation proceedings commenced. *Id*. The court concluded that the defendant's challenge was untimely, precluding any consideration of the merits. *Id*.

We agree that appellate review of a sentence, including a probation condition, should be required at the time the sentence is imposed. *See, e.g.*, *State v. Matheny*, 884 S.W.2d 480 (Tenn. Crim. App. 1994) (challenging at the time of sentencing the probation condition that the defendant participate in community corrections probation); *State v. Bouldin*, 717 S.W.2d 584 (Tenn. 1986) (challenging at the time of sentencing the condition of probation that the defendant surrender a vehicle to the police department for storage during the probationary period); *State v. Gaines*, 622 S.W.2d 819 (Tenn. 1981)

(challenging at the time of sentencing the condition of probation that the defendant serve five consecutive weekends in confinement at the county jail); *State v. Toni S. Davis*, No. E2012-00495-CCA-R3-CD, 2013 WL 2253963 (Tenn. Crim. App. May 22, 2013) (challenging a special condition of probation as unreasonable after the grant of probation), *perm. app. denied* (Tenn. Sept. 10, 2013); *see State v. Johnson*, 980 S.W.2d 410 (Tenn. Crim. App. 1998); *State v. Robert Lewis Herrin*, No. M1999-00856-CCA-R3-CD, 2001 WL 166364 (Tenn. Crim. App. Feb. 9, 2001). Accepting the conditions of probation and failing to challenge the conditions at the time of imposition is fatal to a request for relief after probation revocation proceedings have commenced.

Moreover, even if a defendant chooses not avail himself to appellate review of a sentence, including a probation condition, our statutes provide for the ability to seek modification or removal of a condition of probation. *See* T.C.A. § 40-35-308. During the term of probation, a defendant may file an application to modify or remove a condition of probation, which would provide a mechanism for challenging alleged constitutional infringements of a probation condition. *Id*. at (a)(1), (2); *see, e.g., State v. Monica Rankin*, No. M2011-01849-CCA-R3-CD, 2012 WL 3255087, at *11 (Tenn. Crim. App. Aug. 9, 2012) (appealing the trial court's sentencing order, including the denial of "variance request" from the special probation condition prohibiting internet access).

Based upon the foregoing, we conclude that the proper time to challenge the validity of a probation condition is at the time the condition is imposed by the trial court and, if necessary, seek timely appellate review pursuant to the Tennessee Rules of Appellate Procedure. If appellate review is not sought at the time the probation condition is imposed, nothing in our statutes prohibits a defendant from seeking the removal of a condition or the modification of a condition during the probationary period and before revocation proceedings commence. However, we conclude that a defendant is time-barred from challenging the validity of a condition of probation after probation revocation proceedings have commenced. To conclude otherwise would encourage noncompliance of a trial court probation order only to permit a defendant to argue later upon revocation that a condition for which revocation is sought was invalid or unconstitutional. *See United States v. Nielsen*, No. 21-8087, 2022 WL 3226309, at *5 (10th Cir. Aug. 10, 2022) ("The rule barring a challenge to a condition of release at the revocation hearing is a specific application of a more general proposition that court orders are to be obeyed.").

As it relates to the present case, the record reflects that the Defendant was aware of the internet prohibition at the time the trial court imposed it in January 2022, and Mr. Wayland and the Defendant periodically discussed the restriction between January and October 2022, at which times the Defendant affirmed that he did not have internet access and remained in compliance with the special conditions of his release. The record does not contain the transcript of this probation revocation hearing at which the trial court imposed

the restriction. Although we are unable to determine whether the Defendant challenged the validity of the condition at the time of imposition, the record is clear that he did not seek appellate review of the condition or seek a modification or removal of the condition before the present revocation proceeding commenced. We note that *Packingham*, the legal basis upon which the Defendant now seeks relief, was released in 2017 but that the Defendant did not challenge the probation condition on this basis until after the present probation revocation proceeding commenced on October 21, 2021. The Defendant likewise failed to avail himself of the statutory authority permitting him to seek the removal or modification of the probation condition. Therefore, the Defendant is barred from now challenging the validity of the probation condition prohibiting internet access.

Although we have concluded that a defendant must challenge the validity of a probation condition at the time of imposition, we now consider, in the event of further appellate review, whether the Defendant would be entitled to relief if he were not time-barred from seeking relief. We conclude that even if the Defendant were permitted to challenge the validity of the probation condition at the revocation hearing, the Defendant has prepared an inadequate record which precludes appellate review. The Defendant has failed to include the guilty plea hearing transcript, which provided the factual circumstances of the offense and the trial court's reasoning for its sentencing determinations, and the transcript of the first probation revocation hearing, at which the special condition was imposed. The Defendant has the burden of preparing a fair, accurate, and complete account of what transpired in the trial court relative to the issues raised on appeal. *See, e.g.*, *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983). This included the obligation to have a transcript of the evidence or proceedings prepared. *See* T.R.A.P. 24(b). "When the record is incomplete, or does not contain the proceedings relevant to an issue, this [c]ourt is precluded from considering the issue." *State v. Miller*, 737 S.W.2d 556, 558 (Tenn. Crim. App. 1987). Likewise, "this [c]ourt must conclusively presume that the ruling of the trial court was correct in all particulars." *Id*.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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ROBERT H. MONTGOMERY, JR., JUDGE