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Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 10, 2023

STATE OF TENNESSEE v. GREGORY L. NELSON

Appeal from the Circuit Court for Dickson County
No. 22CC-2018-CR-127 David D. Wolfe, Judge

No. M2023-00311-CCA-R3-CD

The Defendant, Gregory L. Nelson, appeals the trial court's revocation of his eight-year sentence for unlawful possession of a weapon by a convicted felon. On appeal, he argues that the trial court erred by fully revoking his probation and ordering him to serve the remainder of his sentence in confinement. Following our review, we affirm the judgment of the trial court.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and JOHN W. CAMPBELL, SR., JJ., joined.

Matthew T. Mitchell, District Public Defender, for the appellant, Gregory L. Nelson.

Jonathan Skrmetti, Attorney General and Reporter; Brooke A. Huppenthal, Assistant Attorney General; and J. Lee Willoughby and Kayla McBride, District Attorneys General Pro Tempore, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

According to the affidavit of complaint, on February 24, 2018, a police officer encountered the Defendant at Charlotte Market and found a "small silver pistol" in the Defendant's pocket. Thereafter, on September 11, 2020, the Defendant pleaded guilty to unlawful possession of weapon by a convicted felon, a Class B felony. *See* Tenn. Code Ann. § 39-17-1307(b). Following a sentencing hearing on March 16, 2021, the trial court imposed an eight-year sentence, which was suspended to supervised probation.

A. Probation Violation Reports and Warrants

On September 1, 2021, the Defendant's probation officer, Angel Niamtu, submitted a probation violation report in this case. Officer Niamtu amended the violation report on February 16, 2022, and again on April 25, 2022. Officer Niamtu's violation reports noted the following history of supervision for the Defendant.

On March 17, 2021, Officer Niamtu completed the Defendant's "Phase I intake virtually." On March 25, 2021, after "Phase II intake [was] completed successfully," the Defendant signed a voluntary admission that he used cocaine on or about March 19, 2021. Thereafter, as a sanction for the positive drug screen at intake, the Defendant was referred to a forensic social worker for a STRONG-R assessment. The social worker completed the assessment and found the Defendant to be "low risk" requiring "minimum supervision." Also, on May 10, 2021, an "A&D assessment" was completed, but "no recommendations [were] given."

On August 5, 2021, Officer Niamtu, who did not have a valid phone number for the Defendant, attempted a home visit. Officer Niamtu spoke with the Defendant's sister and left instructions with her for the Defendant "to report to the office at 8:30 a.m. the following day for a drug screen and [to] call with a valid telephone number for contact." On August 9, 2021, the Defendant was administered a drug screen, and he tested positive for amphetamines, methamphetamine, cocaine, and marijuana. The Defendant also signed a voluntary admission to using cocaine and marijuana the previous day. The Defendant was "to seek outpatient treatment with Freedom Recovery." Lab testing later confirmed the positive test results.

According to Officer Niamtu, on September 21, 2021, the Defendant reported that "he would be entering treatment in Castalion Springs," and the Defendant was instructed "to book in on his violation of probation." Officer Niamtu received confirmation on September 24, 2021, that the Defendant was admitted to Buffalo Valley for treatment and that he had a tentative discharge date of October 24, 2021. Thereafter, on September 27, 2021, Officer Niamtu received notice that the Defendant had left treatment at Buffalo Valley against staff advice, "citing he had items stolen from him." Though the "staff offered to replace [the] allegedly stolen cigarettes," the Defendant chose to leave anyway. "He was instructed to book in on his violation and did not."

On October 1, 2021, Officer Niamtu received documentation that the Defendant had been admitted to Mirror Lake Recovery on September 30, 2021, and that he had a tentative discharge date of October 29, 2021. The Defendant sent Officer Niamtu a text message on

October 29, 2021, stating that he had completed Mirror Lake Recovery and Anger Management, but Officer Niamtu did not receive any further documentation to that effect. Thereafter, on November 1, 2021, the Defendant sent a text message stating that “he was having a tooth pulled and would book in on his violation of probation this day.” Officer Niamtu instructed the Defendant “to drop off his certificates for Mirror Lake and Anger Management at the office before going to the jail.” According to Officer Niamtu, the Defendant “did not book in or provide his documentation.”

On November 16, 2021, Officer Niamtu scheduled a home visit with the Defendant for the following day and reminded the Defendant to provide his treatment verification. The Defendant reported to Officer Niamtu that he had been in Cookeville, although he had not received permission to travel out of the county.

On February 15, 2022, Officer Niamtu attempted a home visit. After receiving no response from inside the home, Officer Niamtu left a card instructing the Defendant to report to the office the following day at 10:30 a.m. The Defendant failed to report on February 16 as instructed. The Defendant sent a text message to Officer Niamtu “acknowledging his missed home visit and reporting his relapse.” The Defendant advised that he was going to have two teeth pulled on February 17 and that he would report to jail on February 21 “to book in on his violation.”

On March 8, 2022, Officer Niamtu attempted to contact the Defendant by text message, but the Defendant did not respond. On April 1, 2022, Officer Niamtu received a fax from Mirror Lake Recovery advising that the Defendant had been admitted on March 30, 2022, and that he had a projected discharge date of April 29, 2022.

In addition, according to Officer Niamtu, the Defendant had failed to provide proof of any legal employment since April 14, 2021, and he had failed to report since August 9, 2021. Officer Niamtu noted that the Defendant had failed to pay towards his outstanding balances of \$902 in “court costs/fees/fines” and \$1,470 in “probation fees.” Officer Niamtu further noted that the Defendant had obtained a new domestic assault charge in Dickson County for conduct occurring on or about September 17, 2021.

Based upon this history of supervision, Officer Niamtu sought and obtained three separate warrants for the Defendant’s arrest. The September 3, 2021 warrant alleged that the Defendant violated Rule 1 of his probation by testing positive on August 8, 2021, for amphetamines, methamphetamine, cocaine, and marijuana; and Rule 9 by failing to pay his court “costs/fees/fines” and his probation fees. The February 22, 2022 warrant alleged that the Defendant violated his probation in the following ways: (1) Rule 5 based upon his

November 16, 2021 admission that he left Dickson County without permission; and (2) Rule 6 by his failure to be present for a home visit on November 16, 2021, his failure to report to the office as instructed on February 16, 2022, his failure to provide verification of completion for Mirror Lake Recovery and Anger Management, and his failure to “book in on his violation warrant” as instructed. The April 29, 2022 warrant alleged that the Defendant violated his probation in the following ways: (1) Rule 1 based upon his arrest for domestic assault committed on or about September 17, 2021; (2) Rule 4 by failing to provide proof of any legal employment since April 14, 2021; (3) Rule 5 based upon his failure to be present for a home visit on February 15, 2022; and (4) Rule 6 by failing to report to the probation office as instructed on February 16, 2022, failing “to book in on his violations as instructed,” and “consistently fail[ing] to make contact with [his probation] officer the first week of each month as instructed for reporting instructions.”

On April 18, 2022, the Defendant, while in Mirror Lake Recovery, was arrested on the first two probation violation warrants. The April 25, 2022 warrant was served on the Defendant while he was in custody. Counsel was appointed for the indigent Defendant.

B. Probation Revocation Hearing

The trial court held a probation revocation hearing on February 6, 2023. At the outset of the hearing, the Defendant conceded that he violated his probation by “failing a drug test.” The Defendant acknowledged that he tested positive for methamphetamine on August 8, 2021. The Defendant seemingly disputed the remaining violations. He testified that he was never informed that he could not leave the county. He testified that, as he understood it, Mirror Lake Recovery should have sent documentation of his October 29, 2021 program completion directly to his probation officer. The Defendant also indicated that his domestic assault charge was dismissed.

When the Defendant was asked if he needed “help with drugs,” the Defendant said, “[Y]es, sir, I have had problems with drugs I mean I don’t do meth. . . . [A]t the time I failed for meth, you know, I had pretty much given up on my life really. I didn’t care pretty much whether I lived or died. I was going through some things.” The Defendant explained that at that time, he had recently lost an aunt, an uncle, and a best friend and was not “in [his] right frame of mind.” He said that he regretted using methamphetamine, that he should not have done it, and that it was “just a stupid mistake.” In addition, the Defendant testified that he had “taken clean urine to pass this drug test” but that instead of using the urine, he admitted to his probation officer that he had used drugs and what he had been going through. The Defendant requested “a second chance” from the trial court and

asked the trial court to consider partial revocation. The Defendant asserted that he had “always completed probation.”

On cross-examination, the Defendant acknowledged that he had participated in a treatment program at three different facilities. The Defendant explained that though he left Buffalo Valley due to theft of his cigarettes, he went directly to Mirror Lake and did not “stay on the streets.” The Defendant asserted that he had “been successful” at treatment in the past because he had “stayed clean and out of jail for [fifteen] months.” The Defendant admitted that he had failed to “book in” for his probation violations, but he indicated that he had discussed this with Officer Niamtu and that they had agreed for him to return to treatment. The Defendant also submitted that every time Officer Niamtu contacted him, he responded.

At the conclusion of the hearing, the trial court reviewed the Defendant’s presentencing report. The trial court noted that the first time the Defendant received probation was in July 2009 when he was sentenced to three years for aggravated assault. The trial court then recounted the Defendant’s many arrests during his probation for this offense—domestic assault, child abuse and neglect, driving on a revoked or suspended license, aggravated criminal trespass, and public intoxication—and his four previous admissions to violating his probation. As a consequence for revocation of this previous sentence, the Defendant was allowed to attend and complete an in-patient rehabilitation program, but he failed to complete the program at Safe Harbor and failed to return to jail.

In issuing its ruling, the trial court noted that the Defendant had “been given multiple” chances “to turn [his] life around,” to no avail. The trial court, based upon its review of the Defendant’s criminal history, concluded that the Defendant: (1) was not a first-time offender and was “experienced in the criminal system”; (2) had been given chances at probation in the past, which he violated; (3) had participated in rehabilitation programs; and (4) had “exhausted every opportunity . . . given to him unsuccessfully.” As a result, the trial court concluded that there was “no reason to believe that [the Defendant] should be granted any other opportunities or any other considerations other than to revoke him to serve his sentence in its entirety with credit for time serve[d].”

The trial court entered an order to that effect fulling revoking the Defendant’s probation, and the Defendant filed a timely notice of appeal. The case is now before us for our review.

II. ANALYSIS

On appeal, the Defendant argues that the trial court erred by ordering him to serve the remainder of his sentence in confinement. He asks this court to reverse the trial court's ruling "as the sentence imposed was not the least severe measure necessary" and requests "an opportunity to be furloughed to Drug Court." The State responds that the trial court "correctly revoked the [D]efendant's probation and ordered him to serve the remainder of his sentence following a meaningful review of the record."

Appellate courts review a trial court's revocation of probation decision for an 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 consequences on the record." *State v. Dagnan*, 641 S.W.3d 751, 759 (Tenn. 2022). "A trial court abuses its discretion when it applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party." *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010). If a trial court fails to state its findings and reasoning for the revocation on the record, appellate courts may conduct a de novo review if the record is sufficiently developed, or the appellate court may remand the case for the trial court to make such findings. *Dagnan*, 641 S.W.3d at 759 (citing *State v. King*, 432 S.W.3d 316, 324 (Tenn. 2014)).

Probation revocation is a two-step consideration requiring trial courts to make two distinct determinations as to (1) whether to revoke probation and (2) what consequences will apply upon revocation. *Dagnan*, 641 S.W.3d at 757. No additional hearing is required for trial courts to determine the proper consequences for a revocation. *Id.* The trial court's findings do not need to be "particularly lengthy or detailed but only sufficient for the appellate court to conduct a meaningful review of the revocation decision." *Id.* at 759 (citing *State v. Bise*, 380 S.W.3d 682, 705-06 (Tenn. 2021)).

"The trial judge may enter judgment upon the question of the charges as the trial judge may deem right and proper under the evidence adduced before the trial judge." Tenn. Code Ann. § 40-35-311(d)(1). "If the trial judge finds by a preponderance of the evidence that the defendant has violated the conditions of probation and suspension of sentence, then the court may revoke the defendant's probation and suspension of sentence, in full or in part, pursuant to § 40-35-310." *Id.* Notwithstanding subdivision (d)(1), the probation statute provides for two categories of probation violations, technical and non-technical, with differing penalties for both. *State v. Walden*, No. M2022-00255-CCA-R3-CD, 2022 WL 17730431, at *3 (Tenn. Crim. App. Dec. 16, 2022).

The following are classified as non-technical violations: a defendant's commission of a new felony or a new Class A misdemeanor, a zero tolerance violation as defined by the department of correction community supervision matrix, absconding, or contacting the defendant's victim in violation of a condition of probation. Tenn. Code Ann. § 40-35-311(e)(2). Once a trial court determines that a defendant has committed a non-technical violation of probation, the trial court may: (1) order confinement for some period of time; (2) cause execution of the sentence as it was originally entered; (3) extend the defendant's probationary period not exceeding one year; (4) return the defendant to probation on appropriate modified conditions; or (5) resentence the defendant for the remainder of the unexpired term to a sentence of probation. *See id.* §§ 40-35-308(c); -310; -311(e)(2).

Here, the trial court's application of the first step of *Dagnan* is not in dispute. The Defendant admitted at the revocation hearing that he had violated the terms of his probation by testing positive for methamphetamine on August 8, 2021, and only wished to be heard on the appropriate consequence for his violation. *See State v. Johnson*, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999) (concluding that the defendant's concession that he was a frequent user of marijuana while on probation supported the trial court's conclusion that a violation of probation occurred); *see also State v. Brewster*, No. E2021-00793-CCA-R3-CD, 2022 WL 2665951, at *4 (Tenn. Crim. App. July 11, 2022) (explaining that a defendant's stipulation to a probation violation supports revocation), *no perm. app. filed*.

As to the second step of *Dagnan*, trial counsel acknowledged at the revocation hearing "that meth is a zero tolerance offense" and that the Defendant was "aware that having tested positive for meth that this [was] something that he certainly [was] going to get violated on and be guilty of." Due to the non-technical nature of the violation, the trial court was statutorily authorized to order the Defendant to serve the remainder of his sentence in incarceration. *See* Tenn. Code Ann. § 40-35-311(e)(2).

A trial court may, in determining the appropriate consequence for a probation violation, consider "the number of revocations, the seriousness of the violation, the defendant's criminal history, and the defendant's character." *Dagnan*, 641 S.W.3d. at 759 n.5. The record in the present case reflects that the court analyzed the evidence and made findings regarding the facts and circumstances as they informed its decision regarding the appropriate consequence for the violation. In rendering its decision to revoke the Defendant's probation in full, the trial court considered the Defendant's past criminal history, including his multiple violations of a past probationary sentence and his previous failed attempts at drug treatment. These facts indicate that measures less restrictive than confinement were unsuccessful for the Defendant and reflect poorly on the Defendant's

potential for rehabilitation. *See* Tenn. Code Ann. § 40-35-103(1)(C) and (5). Accordingly, the trial court acted within its discretion.

III. CONCLUSION

Accordingly, the Defendant is not entitled to relief, and the judgment of the trial court is affirmed.

KYLE A. HIXSON, JUDGE