

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs June 27, 2023

FILED

08/09/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. DONNIE MARQUIS THARPE

Appeal from the Criminal Court for Knox County
No. 118184 Kyle A. Hixson, Judge

No. E2022-01304-CCA-R3-CD

The Defendant, Donnie Marquis Tharpe, appeals from the Knox County Criminal Court's probation revocation of the five-year, split-confinement sentence he received for his guilty-pleaded convictions for aggravated assault and evading arrest. On appeal, the Defendant contends that the trial court abused its discretion by denying his request for a continuance and 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 ROBERT W. WEDEMEYER and ROBERT L. HOLLOWAY, JR., JJ., joined.

Joseph A. Sadighian, Knoxville, Tennessee, for the appellant, Donnie Marquis Tharpe.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Assistant Attorney General; Charme P. Allen, District Attorney General; and Willie Lane, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On November 9, 2020, the Defendant pleaded guilty to aggravated assault and evading arrest, at which time he received an effective five-year, split-confinement sentence, with six months to be served and the balance on probation. A June 9, 2021 probation violation warrant alleged that on June 6, 2021, the Defendant committed the offenses of aggravated assault and two counts of vandalism. On June 23, 2021, the warrant was amended to include the allegation that the Defendant tested positive for marijuana on June 14, 2021, and that the Defendant admitted to the drug use. On September 1, 2021, the probation violation warrant was dismissed, and the Defendant was returned to probation, which was scheduled to expire on November 9, 2025.

A September 30, 2021 probation violation warrant alleged that the Defendant failed to comply with instructions that he should not have any contact with the aggravated assault victim and that he violated the conditions of an order of protection by having contact with the victim. The warrant was later amended to include the allegations that the Defendant committed the offenses of vandalism and intimidation on December 5, 2021; that he had absconded from supervision; and that he committed the offenses of aggravated stalking, driving while his license was revoked, theft, and possession of cocaine. On April 7, 2022, the trial court revoked the Defendant's probation and ordered him to serve six months in confinement, after which he was returned to probation.

A July 14, 2022 probation violation warrant alleged that the Defendant had committed another offense of aggravated stalking. The warrant was later amended to include that the Defendant had absconded from supervision and had failed to allow his probation officer to perform a home visit. The warrant was amended, again, to include allegations that the Defendant had committed the offenses of aggravated domestic assault, two counts of driving while his license was revoked, and evading arrest. These probation violation allegations are the subject of the present appeal.

At the August 23, 2022 revocation hearing, the defense made an oral motion to continue the hearing on the basis that counsel was appointed to represent the Defendant in the revocation proceedings on August 18, 2022. Counsel argued that although he had reviewed the court file and had spoken to the Defendant, counsel did not think he had been given adequate time to have "a handle . . . on all the facts and everything that's going on here to go forward." Counsel said that a preliminary hearing in connection with the new charges would occur later in the day and requested a postponement until after the criminal case "was heard." Counsel stated that he intended to request a continuance of the preliminary hearing, as well. The State opposed the motion and stated that the victim of the new criminal charges was present for the revocation hearing. The trial court noted the statute reflected that the court should render prompt findings regarding a defendant's guilt or innocence of a probation violation and determined that "there had been adequate enough time to prepare for this." The court stated that it was not practical to postpone revocation hearings until the underlying criminal charges were resolved. The court noted the different standards of proof applicable to probation violations and criminal convictions and denied the motion.

LaTonya Lattimore testified that on July 23, 2022, she and her six-year-old granddaughter went to a beauty salon, where Misty Moore was her beautician. Ms. Lattimore stated that while Ms. Moore washed her hair, the Defendant walked inside the salon and yelled at Ms. Moore, "I told you I was going to get you." Ms. Lattimore said that the Defendant grabbed Ms. Moore's hair, struck Ms. Moore on the face with his fist more than ten times, and dragged Ms. Moore. Ms. Lattimore said that she attempted to

stop the Defendant from striking Ms. Moore but that the Defendant grabbed a metal chair and struck Ms. Moore's side with it approximately six times as Ms. Moore lay on the floor. Ms. Lattimore recalled that Ms. Moore moaned during the attack due to the pain. Ms. Lattimore said the Defendant ran from the salon when she took the chair from him. She recalled that after the attack, Ms. Moore had a "knot" on her head, along with scratches and bruises on her body. Ms. Lattimore said that she called 9-1-1 and that paramedics transported Ms. Moore to the hospital for treatment. On cross-examination, Ms. Lattimore stated that she had seen the Defendant "numerous times" before the attack.

The trial court determined by a preponderance of the evidence that the Defendant violated the conditions of his probation. The court credited Ms. Lattimore's testimony in its entirety and determined, based upon her testimony, that the Defendant assaulted Ms. Moore with a chair, which the court thought had been used as a deadly weapon. The court revoked the Defendant's probation. The court reviewed the Defendant's supervision history and noted that he had been ordered to serve six months in confinement for a previous violation. The court ordered the Defendant to serve the remainder of his sentence in confinement based upon the "egregious facts" and the Defendant's "unconscionable" willingness to "perpetrate this violent attack" against Ms. Moore. This appeal followed.

I. Motion for a Continuance

The Defendant contends that the trial court abused its discretion by denying his motion to continue the probation revocation hearing. He argues that the denial deprived him of the opportunity to prepare a defense and of due process of law. The State responds that the court did not abuse its discretion by denying the motion. We agree with the State.

"[A] motion for a continuance is addressed to the sole discretion of the trial judge," and the judge's decision "will not be disturbed in the absence of a clear showing of gross abuse of his discretion to the prejudice of the defendant." *Baxter v. State*, 503 S.W.2d 226, 230 (Tenn. Crim. App. 1973). It is the appealing party's burden to show how the trial court's decision was prejudicial. *Id.* The critical inquiry "is whether one has been deprived of his rights and whether an injustice has been done." *Id.* As a result, the record must reflect that "the denial of the requested continuance 'denied the defendant a fair trial or that the result of the trial would have been different.'" *State v. Vaughn*, 279 S.W.3d 584, 598 (Tenn. Crim. App. 2008) (quoting *State v. Odom*, 137 S.W.3d 572, 589 (Tenn. 2004)).

The record reflects that the defense sought a continuance because counsel did not think he had been given adequate time to review the case. Counsel had reviewed the trial court file and had spoken to the Defendant. Counsel also represented the Defendant in the underlying criminal charges. Counsel intended to seek a continuance at the preliminary hearing in general sessions court and sought a postponement of the revocation hearing until

the criminal case had been “heard.” The trial court denied the motion because statutory authority reflected that the court should render a prompt resolution of violation allegations, because counsel had adequate time to prepare for the revocation hearing, and because it was impractical to postpone revocation hearings until underlying criminal charges were resolved.

A defendant’s “right to due process is not violated when the trial court denies a continuance of the revocation proceedings until the disposition of the pending criminal charges.” *State v. Michael Pierre Adams*, No. E2010-00083-CCA-R3-CD, 2010 WL 4324302, at *3 (Tenn. Crim. App. Nov. 1, 2010); *see State v. Billy Eugene Cook, Jr.*, No. M2018-00246-CCA-R3, 2019 WL 3202732, at *3 (Tenn. Crim. App. July 16, 2019). A court is required only “to find that the violation of probation occurred by a preponderance of the evidence,” not beyond a reasonable doubt. *State v. Reams*, 265 S.W.3d 423, 430 (Tenn. Crim. App. 2007); *see* T.C.A. § 40-35-311(e) (Supp. 2022). The Defendant was provided with notice of the probation violation allegations, and he was provided the opportunity to present evidence in his defense and to cross-examine Ms. Lattimore, whose testimony was credited by the court. The court found that the Defendant’s attorney had adequate time to review the court file and speak with the Defendant before the hearing. The evidence presented at the hearing was straightforward. The Defendant failed to establish that he was denied a fair hearing or that the outcome of the hearing would have been different had the motion been granted. *See Vaughn*, 279 S.W.3d at 598; *Odom*, 137 S.W.3d at 589. As a result, we conclude that the court did not abuse its discretion by denying the Defendant’s motion for a continuance. He is not entitled to relief on this basis.

II. Probation Revocation

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 State counters that the court did not abuse its discretion. We agree with the State.

“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)).

If the trial court failed to memorialize its reasons for the revocation decision on the record, the appellate court may either conduct a de novo review, provided the record is developed sufficiently for such review, or it may remand the case to the trial court with instructions to make appropriate findings. *Dagnan*, 641 S.W.3d at 759.

When a trial court determines that a defendant’s probation must be revoked, the court must then decide upon an appropriate consequence. *Id.* 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*, 215 Tenn. 553, 387 S.W.2d 811, 814 (Tenn. 1965)).

The record reflects that the trial court conducted an appropriate review of the facts and circumstances of the Defendant’s case, and we afford the court the presumption of reasonableness to which it is entitled, in view of its having made sufficient findings on the record. Ms. Lattimore’s credited testimony reflects that the Defendant engaged in a brutal attack against Ms. Moore, who required medical attention as a result of the Defendant’s violent conduct. Having placed the Defendant on probation after serving six months in confinement from the original sentencing and having returned the Defendant to probation after ordering a limited period of confinement following a previous probation violation, the court was unpersuaded that the Defendant would succeed if he were returned to probation. The previous violation involved the Defendant’s violating an order of protection and his stalking of the aggravated assault victim. The Defendant received the benefit of being returned to probation after serving six months in confinement, but approximately two months later, he engaged in a violent attack against Ms. Moore in the presence of Ms. Lattimore and her six-year-old granddaughter. For this repeat violation, the court made thorough findings of fact and conclusions of law which reflect its determination that the Defendant would be unsuccessful if given an additional opportunity to remain on probation.

As a result, we conclude that the trial court acted within its discretion by revoking the Defendant's probation and by ordering him to serve the remainder of his sentence as a consequence of his probation violation. The Defendant's egregious criminal behavior while on probation and his refusal to comply with the conditions of his release demonstrated that he was not a suitable candidate for another return to probation. He is not entitled to relief on this basis.

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

ROBERT H. MONTGOMERY, JR., JUDGE