IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs February 1, 2023

STATE OF TENNESSEE v. FREDRICK MUNN

Appeal from the Criminal Court for Shelby County
Nos. C2003232, 20-01880 James M. Lammey, Judge

No. W2022-00675-CCA-R3-CD

Fredrick Munn, Defendant, appeals from the Shelby County Criminal Court's order revoking his probation and ordering him to serve his original three-year sentence in confinement. Upon review, we reverse the judgment of the trial court and remand for a new revocation hearing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed and Remanded

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and KYLE A. HIXSON, JJ., joined.

Kaitlin Beck, Assistant Public Defender (at trial); Harry E. Sayle III (on appeal), Memphis, Tennessee, for the appellant, Fredrick Munn.

Jonathan Skrmetti, Attorney General and Reporter; Andrew C. Coulam, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; and Justin Prescott, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts

According to the Board of Probation and Parole's "Probation Order," Defendant was convicted on October 16, 2020,[1] of aggravated assault and sentenced to three years to be served on probation. On September 23, 2021, the Tennessee Department of Correction

[1] The record does not contain a judgment of conviction, and the Probation Order relates only to case number 20-01880.

filed a Petition for Revocation of Suspension of Sentence[2] ("the Petition") alleging that Defendant had violated conditions of probation in the following manner: (1) that Defendant had "open warrants" issued on May 14, 2021, for unlawful possession of a weapon and July 18, 2021, for attempted first degree murder and employing a firearm with intent to commit a felony; (2) that Defendant failed to obtain lawful employment; (3) that Defendant failed to report to his probation officer; (4) that Defendant failed to provide a current and valid address; and (5) that Defendant had contact with one of the victims of the aggravated assault.

On April 11, 2022, the court held a revocation hearing, at which Defendant was represented by an Assistant Public Defender ("Assistant PD").

The State called as a witness, Ianesha White, a "probation officer 2" with the State Department of Correction, Probation and Parole, who served as "an intake probation officer, supervising and monitoring offenders," including Defendant. Ms. White testified that Defendant "reported as instructed" at the "Crump location," until he "caught the new arrest" on June 7, 2021. She testified that she had no contact with Defendant after April 2021, despite attempts to contact him through home visits on June 14 and 16 and by phone on June 19.

During cross-examination, the Assistant PD asked Ms. White about an apparent typographical mistake on Defendant's arrest warrant, and the prosecutor objected that the question was "outside the bounds of the absconsion." The trial court sustained the objection, ruling that it was "irrelevant" "to whether or not [Defendant] absconded[.]" The following exchange occurred:

> [Assistant PD]: . . . Judge, correct me if I'm wrong . . . we're not going to talk about the basis number – how he violated Rule Number One with open warrants because those are not – that's not relevant to the hearing today.
>
> THE COURT: Not unless you want to make it relevant. It's not relevant. She's called to the stand for what reason, State? So he absconded?
>
> [Prosecutor]: Testify about the absconsion.
>
> THE COURT: Okay. So that's what they're particularly keying on.

The Assistant PD asked Ms. White about Defendant's failure to obtain lawful employment, and she stated that Defendant had not provided any proof of employment and

[2] The petition relates to case numbers 20-01880 and C2003232.

had been referred to an "employment specialist." The Assistant PD then began to ask about Defendant's arrest for unlawful possession of a weapon but prefaced the question with a question to the court about whether the court would consider the testimony. Then the following exchange occurred:

> THE COURT: I don't know how much – how many times I have to say it. I'm not going to consider anything except the fact that he absconded.
>
> [Assistant PD]: Well, Judge, we –
>
> THE COURT: Okay, so if he hadn't absconded –
>
> [Assistant PD]: – have you already concluded that he absconded? Because I haven't even finished my cross.
>
> THE COURT: Please stop arguing with me. Please just talk about the absconsion. If you have proof that he didn't abscond let's hear it.
>
> [Assistant PD]: The burden is on the State, Judge.
>
> THE COURT: Yeah. And they've made their – they've proved their case. I'm just waiting for you to finish up this cross-examination.
>
> [Assistant PD]: So you've already made a decision?
>
> THE COURT: I mean, if you have proof that he didn't abscond, you're welcome to put it on. Right now, there's proof in the – in this record by a preponderance of the evidence that he has absconded. So you can go on and on about his arrests or other things.
>
> [Assistant PD]: I don't want to go on about his other arrests –
>
> THE COURT: Yeah. I don't know why you are.
>
> [Assistant PD]: – if you're not going to consider them. Because they're in the affidavit of complaint.
>
> THE COURT: You keep talking about it and I told you I wasn't going to consider it.
>
> [Assistant PD]: Yes.

THE COURT: So, please, ask a relevant question.

The Assistant PD asked about Defendant's failure to provide an updated address, and Ms. White acknowledged that Defendant had been living on "Loch Lomore" but that the Petition stated "Loch Lomond." She explained, "It runs into the same street though. Like, his front door faces Loch Lomond, but the house is on Loch Lomore, so, yeah." She agreed that she attempted home visits over one week in June 2021 and that Defendant had been reporting regularly prior to that. At one of the unsuccessful home visits, Defendant's mother answered the door and stated that he no longer lived there. On June 23, 2021, the probation officer "ran a CLEAR report" to find any new contact information for Defendant. Ms. White made a "few more" attempts to contact Defendant in July 2021 by sending him letters, but at that point, Ms. White was "over-supervising" Defendant.

Near the conclusion of Ms. White's testimony, the trial court asked the Assistant PD, "is there anymore new information you wish to glean from this witness (Ms.White)?" When the Assistant PD responded in the affirmative, the trial court responded:

> THE COURT: Because I think [Ms. White] needs to go back to work. We have a courtroom specialist who's supposed to be taking this, doing the testimony, but you've wasted this – you're supposed to be calling on people right now; right?
>
> [Ms. White]: I'm supposed to be doing home visits, right now.
>
> THE COURT: Right. Okay. So you're keeping her from her job. Do you have any more relevant questions?
>
> [Assistant PD]: I do, Judge.
>
> THE COURT: Pardon?
>
> [Assistant PD]: I do.
>
> THE COURT: Just say one of them, please.

The trial court then asked Ms. White "where was [Defendant] arrested?" Ms. White responded, "I'm not sure." The trial court then responded "Oh. It was Desoto County,

Mississippi."[3] The court then asked Ms. White if Defendant had her permission to go to Mississippi and she responded he did not. The Assistant PD then stated to Ms. White "you never had any reason to believe that [Defendant] left Shelby County; correct?" Ms. White responded, "correct." The trial court then offered, "and that's because he didn't tell you, did he," to which Ms. White responded, "right." The trial court then thanked the Assistant PD for "pointing that out."

Before inquiring whether Defendant chose to testify or present any evidence, the trial court found simply, "by a preponderance of the evidence he has violated probation." The court did not state the reasons for its finding or the basis on which it found that Defendant violated his probation.

Turning to the consequences of Defendant's violation, the trial court asked the Assistant PD, "do you wish to put on any proof that I should reprobate him or something to that effect?" After a recess, the Assistant PD stated that Defendant chose not to testify, and the trial court heard arguments of counsel. The State argued that the preponderance of the evidence showed that Defendant absconded from supervised probation. The Assistant PD argued that there were only "two possible bases for violation today. The failure to maintain lawful employment and the change of address." She argued that "more than a mere failure to report" was required to establish Defendant absconded and that it was not one of the grounds alleged in the Petition. The trial court found the "arrest ticket," which stated that Defendant was arrested in Desoto County, Mississippi was sufficient notice to Defendant of the alleged ground of absconding to satisfy due process.

The trial court found that Defendant "wasn't supposed to be in Mississippi and that's where he was." The court noted, "Incidentally, . . . you can't give proof of employment unless you are reporting. I can only surmise that he doesn't have proof of employment. And . . . that's a violation of probation." The court further found that there was no proof presented that Defendant "completed Rebuilding Mindsets," which was a condition of his probation. The court stated that "it would be an insult to the decent law-abiding citizens of Shelby County to reprobate [Defendant] for no reason at all." The court ordered Defendant to serve his original sentence in confinement. Defendant timely appealed.

Analysis

[3] Later during argument, while the Assistant PD was pointing out that Defendant had no notice that "anything had happened in Desoto County," the trial court stated the "arrest ticket which is in the Court's jacket said [Defendant] was arrested in Desoto County, Mississippi." The trial court then instructed the Assistant PD "so you should've been familiar with that. But it is in the record, and I'll take judicial notice that it's in the record."

Defendant asserts that the trial court abused its discretion when it relied on his absconding, which was not alleged in the Petition, as the basis for the revocation; that the State failed to establish that Defendant absconded; and that the trial court failed to properly place its findings on the record. The State responds that it gave proper notice of the grounds for revocation, that the proof established by a preponderance of the evidence that Defendant absconded, and that the trial court sufficiently stated its reasoning for the revocation and acted within its discretion.

In *State v. Dagnan*, an opinion filed a little over a month before the violation hearing in this matter, the Tennessee Supreme Court clarified that a probation revocation proceeding involves a two-step inquiry, both of which are distinct discretionary decisions that must be reviewed and addressed on appeal. 641 S.W.3d 751, 757-58 (Tenn. 2022). "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." T.C.A. § 40-35-311. Upon finding that a defendant violated the terms of his or her probation, a trial court "must determine (1) whether to revoke probation, and (2) the appropriate consequence to impose upon revocation." *Dagnan*, 641 S.W.3d at 753. Once the trial court decides to revoke a defendant's probation, it may (1) order confinement; (2) order the sentence into execution as initially entered; (3) return the defendant to probation on modified conditions as necessary; or (4) extend the probationary period by up to two years. *See State v. Hunter*, 1 S.W.3d 643, 646-47 (Tenn. 1999); T.C.A. §§ 40-35-308, -310, -311.

If the trial court "places sufficient findings and the reasons for its decisions as to the revocation and the consequence on the record," the standard of review on appeal is abuse of discretion with a presumption of reasonableness. *Dagnan*, 641 S.W.3d at 759. As it relates to factual findings, "'appellate courts cannot properly review a sentence if the trial court fails to articulate in the record its reasons for imposing the sentence.'" *Id*. at 758 (quoting *State v. Bise*, 380 S.W.3d 682, 705 n. 41 (Tenn. 2012)). "It is not necessary for the trial court's findings to be particularly lengthy or detailed but only sufficient for the appellate court to conduct a meaningful review of the revocation decision." *Id*. (citing *Bise*, 380 S.W.3d at 705-06). The appellate court may conduct a de novo review if a trial court fails to place sufficient reasoning for the probation revocation on the record and the record is sufficient for the court to do so. *Id*. at 759 (citing *State v. King*, 432 S.W.3d 316, 327-28 (Tenn. 2014)). To establish an abuse of discretion, "there must be no substantial evidence to support the conclusion of the trial court that a violation of the conditions of probation has occurred." *State v. Shaffer*, 45 S.W.3d 553, 554 (Tenn. 2001) (citing *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991)).

Here, the trial court did not make sufficient findings to support the revocation of Defendant's probation or its reasoning for imposing incarceration in accordance with *Dagnan*. We need not determine whether the record is sufficient to conduct a de novo review, however, because we conclude that due process requires reversal because the trial court relied on absconding as a ground to revoke his probation without Defendant's being noticed of that allegation in the probation violation warrant, and the error is not harmless.

Minimum due process requires that written notice of claimed violations of probation be disclosed to a probationer. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (citation omitted). Generally, revoking a defendant's probation "based on grounds not alleged and noticed to the defendant is a violation of due process." *State v. Chad Allen Conyers*, No. E2004-00360-CCA-R3-CD, 2005 WL 551940, at *4 (Tenn. Crim. App. Mar. 9, 2005), *no perm. app. filed*. However, the error produced by a trial court's partial reliance on a ground for revocation not noticed to the defendant is harmless "if the trial court also relied upon properly noticed grounds supported by the evidence." *State v. Christopher Roy McGill*, No. M2015-01929-CCA-R3-CD, 2016 WL 3947694, at *4 (Tenn. Crim. App. July 18, 2016) (citing *State v. David W. Sonnemaker*, No. E2003-01402-CCA-R3-CD, 2004 WL 483239, at *5 (Tenn. Crim. App. Mar. 12, 2004), *perm. app. denied* (Tenn. Oct. 11, 2004); *State v. Ricky Davis*, No. 03C01-9706-CC-00215, 1998 WL 205925, at *2 (Tenn. Crim. App. Apr. 29, 1998), *no perm. app. filed*), *no perm. app. filed*.

The State submits that the revocation warrant and petition for revocation fairly gave notice of the grounds for violation. The State argues that the allegations that Defendant failed to report and failed to provide a current and valid address served as the bases for the violation, which the court "collectively" labeled "absconding," and that the proof was sufficient to support the trial court's conclusion. We disagree.

This Court has previously recognized the definition of "abscond" as "[t]o go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed, in order to avoid their process. To hide, conceal, or absent oneself clandestinely, with the intent to avoid legal process." *State v. Timothy Wakefield*, No. W2003-00892-CCA-R3-CD, 2003 WL 22848965, at *1 (Tenn. Crim. App. Nov. 25, 2003) (quoting Black's Law Dictionary 8 (6th ed.1990)), *no perm. app. filed*. Furthermore, absconding is specifically excluded from technical violations, which include failure to report. T.C.A. § 40-35-311(g).

We conclude that the trial court erred by revoking Defendant's probation based on a ground not alleged in the petition. Furthermore, we cannot conclude that the error was harmless because the court did not rely on other grounds that were properly noticed. At the revocation hearing, the State objected to cross-examination on any subject other than absconding, and the trial court insisted that absconding was the *only* issue before the court.

The trial court severely limited the Assistant PD's cross-examination of the probation officer.

At the conclusion of the hearing, the court found "[i]ncidentally" that Defendant had not presented proof of employment, a ground alleged in the petition, and that he had not presented proof that he completed "Rebuilding Mindsets," a ground not alleged in the petition. Based upon the trial court's previous statements regarding the limiting nature of the proof to that of absconding, we are unable to reconcile this remark.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is reversed and this case is remanded for a new hearing.

_____

TIMOTHY L. EASTER, JUDGE