IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 26, 2013

STATE OF TENNESSEE v. STEVEN TODD ANDES

Direct Appeal from the Criminal Court for Carter County
Nos. S15421B, S15457, S15458B, S15846, S18067, S18200, S18204, S20215, & S20445
Robert E. Cupp, Judge

No. E2012-01676-CCA-R3-CD - Filed June 14, 2013

The Criminal Court for Carter County sentenced the Defendant, Steven Todd Andes, to community corrections sentences after his convictions in 2002, 2007, and 2010. In January 2012, the Defendant's probation officer filed an affidavit alleging the Defendant had violated his probation. The trial court issued a warrant, and, after a hearing, at which the Defendant's probation officer did not testify, the trial court revoked the Defendant's community corrections sentences in all of his cases. On appeal, the Defendant contends the trial court erred when it revoked his probation because the trial court: (1) denied his due process rights by failing to allow him to confront and cross-examine adverse witnesses; and (2) failed to provide a written statement regarding the evidence and reasons upon which it relied when revoking his probation. After a thorough review of the record and applicable authorities, we conclude that the trial court did not err when it revoked the Defendant's probation. The trial court's judgment is, therefore, affirmed.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which THOMAS T. WOODALL and NORMA MCGEE OGLE, JJ., joined.

David H. Crichton, Johnson City, Tennessee, for the appellant, Steven Todd Andes.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Tony Clark, District Attorney General; and Melanie Sellers, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

A. Background

This case arises out of multiple guilty pleas entered by the Defendant beginning in 2002. On January 4, 2002, the Defendant pled guilty to five different drug related offenses, for which he received a twelve-year effective sentence. The trial court ordered that the sentence be served on community corrections.

On May 17, 2007, the Defendant pled guilty to three drug related offenses, for which he received a fifteen-year effective sentence. The trial court again ordered the Defendant to serve his sentence on community corrections.

On September 13, 2010, the Defendant pled guilty to two drug related offenses, for which he received a ten-year effective sentence.

On January 10, 2012, the trial court issued a violation of probation warrant against the Defendant, and, shortly thereafter, the Defendant's community corrections officer issued a violation report. The following evidence was presented at a hearing to determine whether the Defendant had violated his community corrections sentence:

The Defendant's community corrections officer, Ashton Belcher, did not testify at the hearing, but she had filed a violation report. In that report, which was never introduced into evidence, she stated that the Defendant had not provided verification that he had paid any of the $36,882 that he owed in court costs. The report indicated that Belcher conducted a "curfew check" at the Defendant's home and that he was not present at the home after his curfew. The report further indicated that the Defendant had tested positive for Oxycodone and Suboxone. The Defendant denied the use of intoxicants, but laboratory analysis confirmed that those substances were present in his blood. Finally, the report indicated that the Defendant had failed to report for one of his treatment classes without receiving prior approval.

At the hearing, the Defendant, who was never sworn, stated that Belcher placed him on "house arrest," telling him that she was going to sent him to a "six month program" if he "mess[ed] up." The Defendant said he then failed a drug test and received a thirty day incarceration order. Before he went to jail on that order, he missed the curfew check by "five minutes." He explained that he was supposed to be home at 7:00 p.m. but was a few minutes late. The Defendant stated that Belcher told him that "she was going to give [him] sixty days in jail for that, plus the six month program." The Defendant said he went to see Belcher before he was arrested and was informed that his probation had been violated because he "was late for class." He explained that, if one was more than fifteen minutes late to class, they were not allowed to enter. They were, however, sometimes allowed to make up the

class. He said he called and left a message to see if he could make up the class. Belcher, however, filed the violation. The Defendant said he had been incarcerated since being arrested for violating his probation sentence.

The Defendant agreed that he had been on probation many times and that his probation had been revoked and reinstated on multiple occasions. He explained that he had a drug problem. The Defendant said he was accepted into a rehabilitation program but that the judge put him on house arrest rather than send him to rehabilitation.

The trial court, while examining the violation report, stated the following:

> The defendant, Steven Todd Andes, pled guilty in Criminal Court, Carter County, on January 29, 2002; June 4, 2002; May 17th, of '07; September 30th, of 2010, respectively. The offenses are Sale of Schedule II, 5 counts of that; Sale of Schedule VI, 3 counts of that; Possession with the Intent to Sell Schedule II; Possession with the Intent to Sell . . . Schedule IV; Possession of Schedule VI; Sale of Schedule III x 3; Possession of Schedule III; Possession of Schedule IV, II Resale. He was sentenced to Department of Corrections. The court suspended that sentence and placed you on Alternative Community Corrections for a period of forty-five years from June the 1st, 2011 to June 1, of 2056. On 10/12/11 Mr. Andes reported at his initial intake. All the rules were read to you and it was signed. Community service was ordered to complete 240 hours of community service within 2 years; 120 hours within 1 year at a minium of 10 hours per month. On 11/5/11 the offender signed up for community service but failed to report. He received 8 additional hours added to his community service balance as a direct consequence. He completed a total of 109 hours of community service, that's since 2002. You . . . owe court costs in the amount of $36,882.00. You've paid absolute nothing on that. Curfew check on 12/29/11 at . . . 7:05 offender was not at his residence. The offender . . . did not attempt to contact, or gain prior approval before leaving his residence. However, the offender did leave a message after the case officer had left the residence to inform the case officer of his whereabouts. The offender tested positive for Oxycontin and Suboxone on 12/6/11, and denied use of intoxicants. However, laboratory analysis confirmed the offender was positive for Oxycontin and Suboxone. The . . . offender failed to gain full-time employment, however, he claimed he was doing various odd jobs. The offender reported as instructed for his . . . office visits. He failed to report for treatment classes on 1/4/12 without receiving prior approval. History of supervision: Placed on Alternative Community Corrections for twenty years; transferred from Alternative Community

Corrections to Board of Probation and Parole; committed the offense of DUI, Possession of Schedule VI, and Child Endangerment. Committed the offense of Possession of Marijuana. Committed the offense of Possession of Schedule II, Resale, and Possession of Drug Paraphernalia. Committed the offense of Sale of Controlled Substance, Possession of Schedule II for Resale. Revoked with Board of Probation and Parole, reinstated with Alternative Community Corrections on all new cases for 45 years. Thirty day incarceration order, I'm not giving the dates, I'm just giving the orders of what's coming down, for testing positive, 30 day incarceration order for testing positive. Committed the new offense of Sale of Schedule III. Forty-eight hours incarceration order for failing to report for community service and adhering 24 hour curfew. Absconded from alternative community Corrections, committed the new offense of Failure to Appear. Warrant signed for Failure to Appear/Report; committed new offenses; tested positive for intoxicants and absconded. The first amended warrant was signed for failure to report; second amended warrant signed for failure to report to take full and truthful report and obey special court orders. Committed the offense of Driving on Suspended License, Disorderly Conduct; revoked and reinstated to Alternative Community Corrections for 45 years. Seven day incarceration order for testing positive for Suboxone THC. Thirty-four day incarceration order for failing to report for office visit; tested positive for Suboxone; failure to give a full and truthful report. Committed the new offense of Possession of Schedule III Drugs, Driving on Suspended License, and Reckless Driving. The warrant was signed for failure to complete community service, make payments toward court costs, attend treatment sessions and report for office visits, obey the law, and adhere 24 arrest rule. Re-invoked, reinstated to Alternative Community Corrections for 45 years. Committed the new offense of Falsification of Drug Screen, tested positive for Benzos and confessed using Suboxone, THC. Offender was arrested for violation of probation, revoked, reinstated to Alternative Community Corrections for 45 years. A warrant was signed for failure to pay court costs, gain employment, obtain permission from the court to take . . . Suboxone and obey 24 hours house arrest, tested positive for Oxycontin and Suboxone. Comments: The offender is extremely defiant and seems to lack the motivation to successfully complete, succeed after Alternative community Corrections – under Alternative Community Corrections' supervision. The case officer and offender had an agreement upon first office visit after being revoked and reinstated on 10/11/11 that he would agree to attend and complete in-patient treatment if he tested positive on a drug screen. He tested positive for . . . Oxycontin and Suboxone on 12/6/11 without a valid prescription. The case officer informed him he would receive an incarceration order as directed,

> the consequences would be placed on a waiting list for in-patient treatment. Although, he agreed to attend treatment his attitude toward treatment was poor. Heretofore, he did not think it was fair he would have to serve the incarceration order and attend treatment. While the incarceration order was being prepared the offender was waiting for a bed to become available for treatment he committed another violation on 12/29/11. The case officer conducted a curfew check and the offender was not at his residence. The violation of probation warrant was signed by Honorable Lynn Brown on January 4th, 2012. He was arrested and held without bond . . . in the county jail, and that's the history of it. The court finds you've violated the terms of your probation. You'll serve . . . your sentences. Good luck to you, sir.

The Defendant's attorney asked the trial court if it would consider revoking part of his sentence. The trial court stated, "No. He's had chance after chance and . . . he's the only person I've ever seen that got on probation, catch another offense, just put right back out." It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends that the trial court erred when it revoked his probation because the trial court: (1) denied his due process rights by failing to allow him to confront and cross-examine adverse witnesses; and (2) failed to provide a written statement regarding the evidence and reasons upon which it relied when revoking his probation.

A trial court may revoke probation upon its finding by a preponderance of the evidence that a violation of the conditions of probation has occurred. T.C.A. § 40-35-311(e) (2010). "In probation revocation hearings, the credibility of witnesses is to be determined by the trial judge." *State v. Mitchell*, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). If a trial court revokes a defendant's probation, its options include ordering confinement, ordering the sentence into execution as originally entered, returning the defendant to probation on modified conditions as appropriate, or extending the defendant's period of probation by up to two years. T.C.A. § § 40-35-308(a), ©), -310 (2010); *see State v. Hunter*, 1 S.W.3d 643, 648 (Tenn. 1999). The judgment of the trial court in a revocation proceeding will not be disturbed on appeal unless there has been an abuse of discretion. *See State v. Smith*, 909 S.W.2d 471, 473 (Tenn. Crim. App. 1995). In order for this court to find 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). After finding a violation, the trial court is vested with the statutory authority to "revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered . . . ." T.C.A. §

40-35-311(e)(1) (2010); *accord Hunter*, 1 S.W.3d at 646 (holding that the trial court retains the discretionary authority to order the defendant to serve his or her original sentence in confinement). Furthermore, when probation is revoked, the trial court may order "the original judgment so rendered to be in full force and effect from the date of the revocation of the suspension . . . ." T.C.A. § 40-35-310(a) (2010).

A defendant at a probation revocation proceeding is not entitled to the full array of procedural protections associated with a criminal trial. *See Black v. Romano*, 471 U.S. 606, 613 (1985); *Gagnon v. Scarpelli*, 411 U.S. 778, 786-790 (1973). In *Practy v. State*, however, this Court enunciated the constitutionally-mandated procedural due process standards applicable to a probation revocation proceeding. 525 S.W.2d 677, 679-80 (Tenn. Crim. App. 1974) (citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and *Morrissey v. Brewer*, 408 U.S. 471 (1972)). The *Practy* Court enumerated the "'minimum requirements of due process'" as first set forth by the United States Supreme Court in *Morrissey*:

> "(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; ©) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied upon and reasons for revoking [probation or] parole."

Id. at 680 (quoting *Morrissey*, 408 U.S. at 489); *see also State v. Leiderman*, 86 S.W.3d 584, 590 (Tenn. Crim. App. 2002).

A. Right to Confront Witnesses

The Defendant contends he was denied his due process rights by failing to allow him to confront and cross-examine adverse witnesses. The Defendant does not specifically state to which witness he is referring, but we note that the Defendant's probation officer did not testify at the hearing. The Tennessee Constitution, Article I, Section 9, and the United States Constitution, Sixth Amendment, prohibit proof of an essential element of a crime in a criminal prosecution by the admission of evidence that violates the right to confront and cross-examine adverse witnesses. *State v. Wade*, 863 S.W.2d 406, 407 (Tenn. 1993) (citing *State v. Henderson*, 554 S.W.2d 117, 122 (Tenn. 1977); *Pointer v. Texas*, 380 U.S. 400, 403 (1965). Since the issue in a probation revocation proceeding is not the guilt or innocence of the defendant, the right to confront and cross-examine adverse witnesses is not absolute and

may be relaxed under certain circumstances. *Id.* Both the Tennessee Supreme Court and the United States Supreme Court have recognized that "the full panoply of rights due a defendant" in criminal prosecutions do not apply to parole revocations. *Id.* at 407-08. However, since a probationer's conditional freedom from incarceration is at risk, he must be afforded due process in the revocation proceeding. The United States Supreme Court set forth the minimum requirements of due process in probation proceedings in *Gagnon v. Scarpelli*, 411 U.S. at 778, which, as stated above, include a conditional right to confront and cross-examine adverse witnesses. The language reads, "(d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)".

Our Supreme Court has quoted the following approvingly:

> The fourth guarantee clearly establishes that some right to confrontation exists, but the qualifying "good cause" language reflects the flexibility that marks these proceedings and suggests that the confrontation requirement will be relaxed in certain circumstances.

Wade, 863 S.W.2d at 408 (citing *Downie v. Klincar*, 759 F. Supp. 425 (N.D. Ill.1991)). And, even where there is a showing of good cause, due process requires proof that the report is reliable. *Id.* (citing Annotation, Admissibility of Hearsay Evidence in Probation Revocation Hearings, 11 A.L.R.4th 999 (1982)).

In the case under submission, it is unclear whether the probation officer was present at the hearing. The Defendant's attorney conceded at the outset of the hearing that the Defendant "agrees for the most part with" the "affidavit [swearing that the Defendant had violated his probation] that is signed by Jim Lengel on January the 4th, of 2012 . . . ." The Defendant then informed the trial court, "So, I failed a drug test before Christmas and that was a thirty days of incarceration order. Before I come to jail on that thirty days I missed a home visit at 7 o'clock." He further admitted that he was "late for [a court ordered] class," which also constituted a violation of his probation. The State then did not call to testify the probation officer, who may or may not have been present. The Defendant made no objection about the probation's officer's lack of presence, if he was not in fact present, and also made no objection about the probation officer's failure to testify. We conclude that the Defendant's right to confront his probation officer was not violated. He admitted his probation violations, and he agreed with the probation officer's affidavit swearing that he had violated his probation in several instances. The Defendant is not entitled to relief on this issue.

B. Written Statement

The Defendant next contends that the trial court erred when it failed to provide a written statement regarding the evidence and reasons upon which it relied when revoking his probation. He asserts that the trial court gave only a "very brief statement in open court" and then ordered the Defendant to serve his sentence. The State counters that the trial court read from the "History of Supervision" section of the probation violation report to support that the Defendant had been given numerous chances to succeed at the community corrections program, all to no avail. This, the State asserts, is sufficient findings by the court to support the Defendant's probation revocation. We agree with the State.

As summarized above, the trial court announced in the record the Defendant's lengthy history of supervision. The court recited the numerous times the Defendant has violated his probation and been returned to probations. The court also found that the Defendant had violated the terms of his probation by failing a drug test and also by not being home in time to meet his curfew. Pursuant to *State v. Liederman*, 86 S.W.3d 584, 589 (Tenn. Crim. App. 2002), where the transcript indicates that the trial court made oral findings at the conclusion of the probation revocation hearing regarding both the grounds for revocation and the reasons for the court's finding, the requirement of a "written statement" is satisfied. The Defendant is not entitled to relief on this issue.

III. Conclusion

Based upon the foregoing authorities and reasoning, we affirm the judgment of the trial court.

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ROBERT W. WEDEMEYER, JUDGE