IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 17, 2016

# STATE OF TENNESSEE v. MITCHELL LEE DAVIS

**Appeal from the Circuit Court for Sevier County**
**Nos. 14957 & 17201-III Rex Henry Ogle, Judge**

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**No. E2015-01220-CCA-R3-CD – Filed March 31, 2016**

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The Defendant, Mitchell Lee Davis, pleaded guilty to burglary, misdemeanor theft, and sale of a Schedule II controlled substance, and the trial court entered the agreed sentence of five years, 180 days of which were to be served in confinement and the remainder to be served on probation. The Defendant's probation officer subsequently filed an affidavit alleging a probation violation. The trial court issued a warrant, and the parties agreed that the Defendant should serve 120 more days followed by reinstatement to probation. The trial court rejected the agreement, revoked the Defendant's probation, and ordered him to confinement. The Defendant did not appeal but then filed a motion to reduce his sentence pursuant to Tennessee Rule of Criminal Procedure 35, contending that the trial court improperly considered his lengthy criminal history when it revoked his probation. The trial court denied the Defendant's motion. On appeal, the Defendant contends that, after the trial court rejected the parties' agreement for the probation violation, the trial court violated his due process rights by not holding a hearing to determine whether there was sufficient evidence to support the probation violation. He further contends that the trial court abused its discretion when it revoked his probation because it based its decision on the Defendant's previous criminal history. After review, we affirm the trial court's judgment.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the Court, in which THOMAS T. WOODALL, P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

William L. Wheatley, Sevierville, Tennessee, for the appellant, Mitchell Lee Davis.

Herbert H. Slatery III, Attorney General and Reporter; David H. Findley, Senior Counsel; James Dunn, District Attorney General; and R. Patrick Harrell, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION
## I. Facts

This case arises from the Defendant's allegedly violating his probation. On May 28, 2014, the Defendant pleaded guilty to burglary, misdemeanor theft, and sale of a Schedule II drug. The trial court entered an agreed sentence of five years, with 180 days to be served in confinement followed by probation.

On December 17, 2014, the Defendant's probation officer filed a probation violation report alleging that the Defendant had a number of violations, including new arrests, failing to report the new arrests, failing to report a change of address, failing to report to his probation officer, and failing a drug screen. Before a hearing on the probation violation, the Defendant and the State agreed to a sentence of 120 days of confinement and the Defendant would then be reinstated to probation.

During the hearing, held on January 27, 2015, the Defendant's attorney announced the agreement to the trial court. The trial court asked about the basis of the violations, and the Defendant's probation officer informed the trial court that, on two separate occasions, the Defendant moved without notifying him. He said the Defendant had a positive drug screen after which he stopped reporting. The trial court noted that the paperwork submitted to him indicated that the Defendant had been arrested for possession of drug paraphernalia, simple possession, and public intoxication in Jefferson County. The State said that it was unaware of those charges, and the Defendant informed the trial court that he had not been arrested in Jefferson County since he had begun probation.

The trial court then stated:

> Well, I'm not going to approve this. He's got such a – I mean, let me just say, sir – let's just start back in '86. You've got . . . sixty-eight convictions. Plus, not to be outdone, you were able to get your probation violated at least . . . eight times. Do you admit what [the probation officer] said about the facts?

The Defendant's attorney then asked whether the trial court meant about the facts supporting the probation violation, and the trial court said yes. The Defendant then admitted that the facts as stated by his probation officer were accurate. The trial court then ordered the Defendant to serve the remainder of his sentence in confinement. The court entered this order on February 9, 2015. The Defendant did not appeal this order.

On April 16, 2016, the Defendant filed a pro se motion to reduce his sentence

pursuant to Tennessee Rule of Criminal Procedure 35. In it he contended that his attorney had failed to properly perfect his appeal of the trial court's order sentencing him to confinement. The trial court appointed the Defendant counsel, who filed an amended motion for reduction of sentence. The Defendant's motion stated that the trial court had abused its discretion when it revoked the Defendant's probation because the probation revocation was based, in part, upon criminal acts that were known to the trial court at the time it imposed the suspended sentence.

The trial court held a hearing on the motion. During the hearing, the Defendant's attorney informed the trial court that he thought that the trial court improperly based the revocation upon the Defendant's prior criminal history. The trial court then pointed out to the attorney that the Defendant had a new violation, and the Defendant's attorney acknowledged this fact. The Defendant's attorney posited that the trial court still gave the Defendant's prior criminal history undue weight.

The trial court stated:

> Well, . . . and you're absolutely right about that. Don't dispute that at all. But . . . this Court has the right, in setting a sentence, to look at their prior record. That's what we're required to do.
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> And then when they come in on a probation violation, we have to look at their success and failure, and the basis of the probation violation. And one of the things that you base . . . a decision on [is] their ability to succeed on probation or otherwise is their prior record; has other things besides incarceration been considered by the Court; . . . and have they failed to succeed. And so that's what I did with him.
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> . . . .
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> I mean, it's just like I put this lady here on . . . probation even though she was a Range 2 offender. And if . . . she goes out and violates the law, and then I look and she's got all these probation violations, I think I've given her the benefit of the doubt to start with.
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> . . . .
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> And . . . if they keep violating, then I think their past failures, the totality of the circumstances should be considered by the Court.

The Defendant's attorney expressed understanding of the trial court's position, but

he reminded the trial court that the Defendant violated his probation by driving on a revoked license and by failing a marijuana screen months before the violation was issued, which he asserted were "minor" violations.

The trial court disagreed that the violations were "minor," and it denied the Defendant's motion for a reduced sentence. It is from this judgment that the Defendant now appeals.

## II. Analysis

On appeal, the Defendant contends that the trial court erred when it ordered him to serve the balance of his sentence in confinement because he only admitted his violations in exchange for the proffered plea agreement. He posits that, when the trial court rejected the plea agreement, it violated his due process rights by not conducting an "inquiry into the charges and determine whether or not a violation ha[d] occurred." T.C.A. § 40-35-311(b) (2014). The Defendant notes that neither he nor his probation officer was sworn before making their statements to the court. The Defendant finally contends that the trial court erred when it revoked his probation based primarily on his prior criminal history, which was known to the trial court at the time the Defendant entered his original guilty plea. The State counters that the Defendant has waived any due process argument because he failed to raise it in his motion for a reduced sentence and instead only argued that the trial court improperly based his revocation decision on the Defendant's prior criminal history. The State further contends that the trial court did not abuse its discretion when it considered the Defendant's prior criminal history in determining that the Defendant should serve the remainder of his sentence in confinement.

All of the issues regarding revocation of the Defendant's probation are waived. The Defendant allowed the order filed February 9, 2015, to become final when he failed to file a notice of appeal. Therefore, we will only address the merits of his challenge to the trial court's denial of the Defendant's motion to reduce the originally agreed-upon sentence of five years. Rule 35(a), Tennessee Rules of Criminal Procedure, provides that a trial court "may reduce a sentence upon motion filed within 120 days after the date the sentence is imposed or probation is revoked." The Advisory Commission Comments to Rule 35 explain that "[t]he intent of this rule is to allow modification only in circumstances where an alteration of the sentence may be proper in the interests of justice." Moreover, the trial court may deny the motion without a hearing. Tenn. R. Crim. P. 35(c). Our standard of review when considering a trial court's denial of a Rule 35 motion is whether the trial court abused its discretion. *State v. Irick*, 861 S.W.2d 375, 376 (Tenn. Crim. App. 1993). A trial court abuses its discretion when it has "applied an incorrect legal standard, or has reached a decision which is illogical or unreasonable and causes an injustice to the party complaining." *Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006).

We conclude that the trial court did not abuse its discretion when it denied the Defendant's Rule 35 motion. The record reflects that while the Defendant was on probation, he was arrested, tested positive for drugs, and failed to report the arrest to his probation officer. The Defendant conceded to the probation violation at the revocation hearing. After finding that the Defendant violated his probation, the trial court had the authority to revoke his probation and to order him to serve his sentence. *See* T.C.A. §§ 40-35-311(e)(1), 40-35-308(a), (c), 40-35-310. There is nothing in the record to show that the interests of justice require a reduced sentence. The Defendant is not entitled to relief on this issue.

## III. Conclusion

In accordance with the foregoing reasoning and authorities, we affirm the trial court's judgment.

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ROBERT W. WEDEMEYER, JUDGE