

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs July 25, 2017

FILED

08/08/2017

Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. GABRIEL BANDY**

**Appeal from the Criminal Court for McMinn County  
Nos. 10-CR-591, 11-CR-002 Andrew Mark Freiberg, Judge**

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**No. E2017-00284-CCA-R3-CD**

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The Defendant, Gabriel Bandy, pleaded guilty to violating his probation. The court revoked his probation, denied his request for community corrections, and ordered the remainder of his twelve-year sentence to be served in confinement. On appeal, the Defendant contends that the trial court abused its discretion by denying community corrections. 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 ALAN E. GLENN and J. ROSS DYER, JJ., joined.

C. Richard Hughes, Jr., District Public Defender, and Donald Leon Shahan, Jr., Assistant District Public Defender, for the appellant, Gabriel Bandy.

Herbert H. Slatery III, Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; Stephen D. Crump, District Attorney General; and Heather Higginbotham-Miller, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

On May 5, 2014, the Defendant pleaded guilty to two counts of promoting the manufacture of methamphetamine. The trial court sentenced him to twelve years' probation. On February 2, 2016, a violation of probation report was filed, stating that the Defendant had failed to report as instructed and that he had not paid his court costs. On May 2, 2016, an addendum to the report stated that the Defendant had been arrested for possession of drug paraphernalia, possession of methamphetamine, driving under the influence (DUI), driving on a revoked license, and reckless driving.

The Defendant pleaded guilty to the probation violation. He testified that he failed to report as directed and had been arrested and convicted of DUI and misdemeanor drug possession, but he denied intentionally not paying his court costs. He stated that his probation officer told him he did not have to make payments toward his remaining balance while he was receiving Social Security disability. The trial court found that the Defendant had violated his probation.

A July 26, 2016 Rhea County General Sessions Court order was received as an exhibit and reflected that the Defendant pleaded guilty to violating the financial responsibility law, DUI, and misdemeanor possession of methamphetamine.

The Defendant testified that he had been using illegal drugs, including marijuana and heroin, since age thirteen, that he had a substance abuse problem, and that he had lost “everything.” He stated that he had been incarcerated since he was age thirteen or fourteen due to his drug use, that he was “tired of being in prison,” and that he did not think being in prison was a solution to his drug problem. He said that he had five children and three grandchildren, that he had a home, and that he thought a “step down” program would be beneficial. He requested an eighteen-month or two-year program in order for him to learn how to care for himself and his family. He noted that he had been incarcerated for eight to eleven years at a time, that he was released “back on the street” and did not know what to do, and that if he were released again, “we’re gonna have the same problem then.” He asked the trial court for help.

When asked what circumstances had changed for the Defendant since the time of his prior convictions, he testified that he had obtained joint custody of his six-year-old daughter, that he saw her daily, that his son was in the Navy, and that his grandchildren lived in California. The Defendant said that it was difficult to adapt to life outside of prison, that he had previously “turned to drugs,” that he was getting older, that he contracted hepatitis C and broke his back, and that he wanted something better for himself. He stated that he wanted to “be able to give something to my kids and my grandkids[.]” He said that he had spent most of his life in prison and that “[t]here’s not help in there. It just makes you worse.”

On cross-examination, the Defendant testified that he had been on probation multiple times previously, that he underwent an alcohol and drug assessment, and that after the assessment, he continued using methamphetamine and returned to prison. He said that he was in the Tennessee Department of Correction between ages nineteen and thirty. He stated that the drug classes there were “a joke” and that most participants continued using drugs while in the program and failed drug tests. He noted that he had completed a drug treatment program and an anger management course, that he did what

he had to do to survive in prison, and that most drug programs could not come into a correctional facility.

The Defendant testified that he never asked his probation officer for help seeking drug treatment. He said that he “just recently got mixed in with the heroin scene,” that he used “a little bit” of methamphetamine, and that he had quit using methamphetamine previously because of his child. The Defendant stated that it was difficult to stop and ask for help. He said that going through withdrawal in jail was “a wake up” and that his drug use and the possibility of failing a drug screen were the reasons he stopped reporting to his probation officer. Upon examination by the trial court, the Defendant stated that he had been to prison twice.

The trial court found that the Defendant had been “brutally honest” and noted that it thought inmates in the county jail would benefit from talking to the Defendant about his life in prison. The court found that the Defendant “should justly . . . be declared TDOC” and that the Defendant had a “bad history of supervision,” although it also found that the Defendant did not have a history of violence. The court scheduled a hearing to determine the Defendant’s eligibility for community corrections but noted its reservations based upon the Defendant’s criminal history. The court found that the Defendant was no longer a candidate for probation and revoked his probation.

At a January 30, 2017 hearing, upon examination by the trial court, community corrections case officer Tabitha McDermott testified that another person in her office prepared a post-sentence report in connection with the Defendant’s case. She stated that the Defendant was arrested for aggravated robbery in Bradley County and that he was eventually indicted for misdemeanor theft. Defense counsel interjected that the case occurred in 1993 and that the Defendant eventually pleaded guilty to misdemeanor theft. Ms. McDermott stated that the Defendant was convicted of two counts of assault in 1994 and that he had been placed on community corrections. She said that the Defendant had previously violated his parole several times, that his community corrections and parole had been revoked, and that he had previously escaped from prison and had been returned. Ms. McDermott stated that the Defendant had received determinate release, that his probation was revoked, and that subsequent probation was also revoked.

On cross-examination, Ms. McDermott testified that she and “Mr. Connor” discussed Mr. Connor’s willingness to supervise the Defendant at a long-term inpatient rehabilitation program. Mr. Connor told Ms. McDermott that he had sent letters to “everyone” and a memorandum to the trial court. Ms. McDermott noted that her office would follow the court’s instructions.

Defense counsel argued that the Defendant had been honest with the trial court during the revocation hearing, that the court knew the Defendant's supervision history was "atrocious," and that the Defendant was asking the court to give him an opportunity to prove he could "make something of himself."

The post-sentence report was received as an exhibit and reflected that the Defendant was age forty-two and reported membership in the Aryan Nation. The Defendant reported drinking a "fifth" of alcohol daily between 1986 and 2009, using \$100 worth of methamphetamine daily beginning in 2003, using \$300 worth of "pills" daily in 1987, using \$100 worth of heroin daily beginning in 2016, and smoking two marijuana cigarettes daily beginning at age ten. The Defendant stated that as a result of his alcohol and drug use, he blacked out, had "fits of rage," hallucinated, and committed crimes. The report reflected that the Defendant was convicted of seventeen misdemeanors and three felonies between ages eighteen and twenty-one. The Defendant reported having completed a drug and alcohol treatment program in 1995, and he noted that he walked out of a drug treatment program in 2009 "because they wouldn't detox me." The Defendant reported having hepatitis C and a broken back.

The trial court stated it allowed the Defendant to apply to the community corrections program because the court was "struck" by the Defendant's testimony at the revocation hearing. The court noted that the State's exhibits at the initial hearing did not include all of the Defendant's criminal history, including supervision history, that was included in the post-sentence report. The court acknowledged that an inpatient rehabilitation program was willing to accept the Defendant. However, the court found that Tennessee Code Annotated section 40-35-310(b) prohibited a community corrections sentence when a violation of a suspended sentence involved the commission of a new offense. The court found that the Defendant's violation of probation involved new convictions for DUI and possession of methamphetamine. The court determined that it did not have the authority to place the Defendant on community corrections.

The trial court found that the Defendant's legal ineligibility notwithstanding, the Defendant's history of supervision was "worse than [the court] thought" and rebutted any presumed eligibility for community corrections. The court noted that the Defendant previously had been on probation, community corrections, and parole and had not been able to complete any of them. The court denied community corrections, and this appeal followed.

### **I. Denial of Community Corrections**

The Defendant contends that the trial court abused its discretion by denying his request to be placed on community corrections after revoking his probation. The State

responds that the record supports the court's decision denying community corrections because the Defendant violated the conditions of his probation by committing further crimes.

Our supreme court has concluded that a trial court's decision to revoke a defendant's probation "will not be disturbed on appeal unless . . . there has been an abuse of discretion." *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991) (citing *State v. Williamson*, 619 S.W.2d 145, 146 (Tenn. Crim. App. 1981)). 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). When a trial court finds by a preponderance of the evidence that a defendant has violated the conditions of probation, the court "shall have the right . . . to revoke the probation." T.C.A. § 40-35-311(e)(1) (2014). "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*, 378 S.W.2d 811, 814 (Tenn. 1965)). 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 two years, order a period of confinement, or order the defendant's sentence into execution as originally entered. T.C.A. §§ 40-35-308(a), (c), -310 (2014). In addition, the court may "resentence the defendant for the remainder of the unexpired term to any community-based alternative to incarceration authorized by chapter 36 of this title; provided, that the violation of the defendant's suspension of sentence is a technical one and does not involve the commission of a new offense." *Id.* § 40-35-310(b).

The record reflects that the May 2, 2016 addendum to the February 1, 2016 probation violation report was based upon the Defendant's April 14, 2016 DUI and possession of methamphetamine arrest. The Defendant testified that he was convicted of DUI and misdemeanor drug possession. The record supports the trial court's determination that as a result of the Defendant's new charges, the court was not authorized to place him on community corrections. See *id.* In addition, the record supports the court's finding that the Defendant was unsuitable for community corrections as a result of his prior supervision record. The Defendant had a lengthy criminal history beginning in 1993, and Ms. McDermott testified that the Defendant had "several" probation violations and that the Defendant's previous community corrections sentence, probation, and parole had been revoked.

The Defendant asserts that the trial court abused its discretion because it knew about the Defendant's poor supervision record and still held a hearing to determine his eligibility for community corrections. The court noted that it did not have access to the

Defendant's full criminal and supervision record during the sentencing hearing. After the court had access to the Defendant's full criminal and supervision record, it determined that the Defendant was neither eligible nor suitable for community corrections. After revoking the Defendant's probation, the court did not abuse its discretion by ordering the Defendant to serve his sentence in confinement, regardless of the fact that it chose to hold a hearing to determine the Defendant's eligibility for community corrections. *See id.* § 40-35-310. The Defendant is not entitled to relief on this basis.

In consideration of the foregoing and the record as a whole, we affirm the judgment of the trial court.

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ROBERT H. MONTGOMERY, JR., JUDGE