IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs September 4, 2019

STATE OF TENNESSEE v. BRIAN MARQUINCE LONG

Appeal from the Circuit Court for Henry County
Nos. 15477, 15508, 15747 Donald E. Parish, Judge

No. W2018-01558-CCA-R3-CD[1]

In this consolidated appeal, Defendant, Brian Marquince Long, challenges the trial court's revocation of Community Corrections in three separate cases. After a review, we conclude that the trial court did not abuse its discretion in revoking Defendant's Community Corrections sentence and ordering him to serve his effective seventeen-year sentence in incarceration.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT L. HOLLOWAY, JR., JJ., joined.

Hansel J. McCadams, Paris, Tennessee, for the appellant, Brian Marquince Long.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Matthew F. Stowe, District Attorney General; and Paul Hessing and Jerald M. Campbell, Jr., Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

This appeal concerns the revocation of Community Corrections in three separate cases originating in Henry County Circuit Court: case number 15477 (the "possession

[1] The State filed a motion to consolidate three separate appeals in docket numbers W2018-01558-CCA-R3-CD, W2018-01562-CCA-R3-CD, and W2018-01563-CCA-R3-CD because they involved common questions of law and/or common facts. This Court granted the motion pursuant to Tennessee Rule of Appellate Procedure 16, consolidating all three cases under docket number W2018-01558-CCA-R3-CD.

case"); case number 15508 (the "drug dealing case"); and case number 15747 (the "contraband case").

In the possession case, Defendant was arrested in April of 2014, after a traffic stop during which police found marijuana on Defendant's person and cocaine in the crease of a five dollar bill located in the vehicle. In July of 2015, Defendant was indicted for two counts of possession of a controlled substance with two prior convictions from Henry County in 2002 and 2011.

The drug dealing case occurred in September of 2015, while the possession case was still pending. Defendant was arrested after a traffic stop during which police discovered crack cocaine and marijuana packaged for resale. According to the affidavit accompanying the arrest warrant, Defendant admitted that he shoved several baggies of drugs down a friend's pants immediately prior to the traffic stop. Defendant was indicted by the Henry County Grand Jury in November of 2015 for one count of possession of .5 grams or more of cocaine with intent to deliver.

In December of 2015, Defendant entered a best interest plea in the drug dealing case, pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to one count of possession of .5 grams or more of cocaine with the intent to deliver.[2] Defendant received a sentence of eight years on Community Corrections after the service of 67 days in incarceration. The judgment form specified that Defendant was "to go to long-term rehabilitation while on [C]ommunity [C]orrections." As part of the guilty plea, Defendant signed a "Behavioral Agreement" listing the conditions of his sentence and an agreement to pay court costs and fines. The possession case was still pending at this time.

On February 1, 2016, a violation report was filed in the drug dealing case, claiming that Defendant violated the terms of Community Corrections when he was arrested in January of 2016 and received new charges for driving on a suspended license, simple possession/casual exchange, and criminal trespass.[3] In addition, the violation report claimed that Defendant failed to report the new charges to his case officer. The technical record contains an "offender termination" form indicating that Defendant was "partially revoked on 5-11-16" in the drug dealing case and ordered to serve 90 days in confinement. The partial revocation order states that Defendant "admitted that he had violated the terms and condition of his supervision" by incurring new charges and failing to report those charges to his case officer. The partial revocation order was not filed until June 27, 2016, but there is a notation entering the order nunc pro tunc May 11, 2016.

[2] Prior to the plea, Defendant mailed a letter to the trial court claiming that he was entering the plea under pressure and that he had filed complaints in federal court against certain officials.

[3] The disposition of these charges is not apparent from the technical record.

On May 11, the same day he was partially violated on the drug dealing case, the possession case was finally resolved: Defendant pled guilty to one count of possession of cocaine in exchange for a two-year sentence as a Range I, standard offender, to be served concurrently to the sentence in the drug dealing case. The judgment form for the possession case was not filed until July 11, 2016, but indicated that the sentence was imposed the same day the trial court partially revoked the Community Corrections sentence in the drug dealing case, May 11. In exchange for the guilty plea in the possession case, Defendant received 110 days of pretrial jail credit and was ordered to serve an additional 90 days in incarceration, which were run concurrently with the 90-day incarceration period from the partial revocation in the drug dealing case, prior to returning to Community Corrections. Again, as part of the guilty plea, Defendant signed a "Behavioral Agreement" that explained the conditions of his Community Corrections sentence. Defendant also signed an agreement to pay court costs. The charge for possession of marijuana was nolle prossed.

On March 2, 2017, violation reports were filed in both the possession case and the drug dealing case alleging that Defendant violated the "Behavioral Agreement" by failing to have "face to face contact with the Community Corrections Officer" since February 1, 2017, and by failing to make payments to the trial court. Amended violation reports were filed in both the possession case and the drug dealing case in May of 2017. The amended reports alleged Defendant had also acquired new charges for aggravated assault with a pistol,[4] possession of a controlled substance, and possession of contraband in a penal institution.

From what we can gather, the charges listed in the amended violation reports form the basis of the contraband case. In the contraband case, Defendant was charged by the Henry County Grand Jury in July of 2017 with one count of tampering with evidence and one count of possession of marijuana in a penal institution. According to arrest warrants, Defendant shoved drugs up his anus during booking.[5] Defendant was brought to medical and advised that he flushed the drugs down the toilet. Officers later found drugs in Defendant's cell and bunk.[6]

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[4] The final disposition of this charge is not apparent from the record.

[5] The arrest warrant does not specify the charge for which Defendant was being booked.

[6] Defendant filed a federal lawsuit related to the jail contraband case in which he alleged, inter alia, that the officers' attempts to retrieve the drugs inserted in his rectum violated his federal constitutional rights under 42 United States Code section 1983. *See Brian Marquis Long v. Henry Co. Jail*, No. 1:17-cv-01141-JDB-cgc, 2018 WL 4839088, at *1-2 (W.D. Tenn. Oct. 4, 2018). Defendant filed another federal lawsuit pursuant to section 1983 against Henry County based on jail conditions and his treatment by jail personnel. The court dismissed the lawsuit for failure to state a claim. *See Brian*

Defendant pled guilty on July 2, 2018, and received a three-year sentence for tampering with evidence and a six-year sentence for possession of marijuana. The tampering with evidence sentence was ordered to be served entirely on Community Corrections while the possession of marijuana sentence was ordered to be served one-year in incarceration followed by five years on Community Corrections. The sentences were ordered to run consecutively to each other and consecutively to the sentences in both the possession case and the drug dealing case.[7] As part of the guilty plea in the contraband case, the trial court permitted Defendant to participate in a long-term rehabilitation program of at least 180 days. According to the technical record, it appears Defendant had secured a bed at "Safe Harbor." The trial court determined that Defendant would receive 180 days of jail credit upon completion of the rehabilitation program. The trial court informed Defendant if he attempted to leave the program he would be charged with escape.

On November 22, 2017, the trial court entered an order granting Defendant 31 days of jail credit on the contraband case.

Defendant next filed a series of pro se motions in both the possession case and the drug dealing case. The first, entitled a "motion to vacate, set aside, or correct sentence" was filed on November 29, 2017.[8] In the motion, Defendant complained about various components of his sentences in both the possession case and the drug dealing case. That same day, Defendant filed a "motion for post-conviction and or amendment of sentencing" in both cases. In this motion, Defendant made various complaints about the calculation of his sentence and alleged prosecutorial misconduct and ineffective assistance of counsel. On December 8, 2017, the trial court entered an order summarily denying Defendant's "motion" for post-conviction relief with regard to Defendant's probation violation in the possession case and the drug dealing case, finding the "disposition of these two violation of probation cases is not subject to attack pursuant to the Post Conviction Act."

That same day, the trial court entered an order setting a hearing on Defendant's motion to vacate, set aside, or correct sentence in the possession case and the drug dealing case. In the order, the trial court took judicial notice that Defendant entered a guilty plea in the contraband case on July 10, 2017. The trial court appointed counsel for the hearing.

Marquis Long v. Steve Page, No. 18-1121-JDT-cgc, 2018 WL 4169146, at *1-2 (W.D. Tenn. Aug. 30, 2018).

[7] At this point, from our calculation, Defendant's total effective sentence was seventeen years.

[8] Defendant also filed this motion in the contraband case, but not until December of 2017.

Before the scheduled hearing, the trial court entered an order on the contraband case on March 15, 2018. In the order, the trial court noted that the parties "reached an agreement" wherein:

> Defendant shall continue to have an effective nine (9) year sentence in this cause, split to serve 1 year in the Henry County Jail. This sentence shall run consecutively to Case Number 15508 [the drug dealing case] and 15477 [the possession case] and the one (1) year partial revocation he is currently serving on those matters. However, Defendant can be released to treatment in this cause after service of 120 days of this sentence in the Henry County Jail. (Defendant is aware that this equates to 90 days if he receives good behavior credits from the Henry County Sheriff's Department.) Service of this 120 day sentence shall commence as of March 26, 2018, allowing for Defendant to be released to treatment on or about June 25, 2018.

On April 23, 2018, a Community Corrections violation report was filed alleging that Defendant violated his "Behavioral Agreement" by acquiring new charges on April 18, 2018. The new charges were described in the violation report as introduction of a weapon into a penal institution. The arrest warrant issued on April 30 alleged that Defendant was "in possession of a wooden shank" in his pants when he was searched and that the remainder of the shank material was found in his cell.

Defendant filed a pro se "motion to vacate, set aside, or correct sentence" in the contraband case on July 18, 2018, again complaining about his sentence and alleging prosecutorial misconduct and ineffective assistance of counsel. On July 30, 2018, Defendant filed a motion for "habeas corpus, violation of rights, unlawful imprisonment, [and] malice punishment" in the possession case, the drug dealing case, and case number 15944.[9] In the motion, Defendant claimed that he was denied counsel, that he received "malice punishment," and that his constitutional rights were violated. Defendant filed a separate, yet substantially similar, motion in the contraband case. The trial court summarily denied all of these motions.

The Hearing

The trial court held a hearing on the violation of Community Corrections at issue herein on August 1, 2018. At the hearing, Judy Wallace testified that she was responsible for supervising Defendant on Community Corrections starting on May 11, 2016, on the possession case; from November 9, 2015, on the drug dealing case; and from July 10,

[9] Case number 15944 is not one of the cases consolidated on appeal. We cannot ascertain the charges and or disposition from this case from the record on appeal.

2017, on the contraband case. Defendant's effective sentence was seventeen years. Ms. Wallace explained that she filed violation reports in all three cases while Defendant "was serving a partial [revocation] for [sentences in the possession case and the drug dealing case], [and] he got in trouble in jail[,] and he made a weapon." Prior to the current violation and Defendant's most recent incarceration, Ms. Wallace described Defendant's supervision as sporadic. Ms. Wallace explained that Defendant was supposed to report to her "[o]nce a week," but he "would come two (2) or three (3) times, and then he would miss a couple of weeks[.]" However, Ms. Wallace agreed that Defendant never went thirty days without reporting. Ms. Wallace explained that she often had difficulty performing home visits. These were supposed to take place "once a month"; however, she explained Defendant was home "[m]aybe once every other month or something like that." Ms. Wallace also testified that Defendant "didn't make very many court payments at all."

After Defendant was placed in jail on the partial revocation, Ms. Wallace "was doing jail checks to make sure that he was still there" and that he "went to rehab." Ms. Wallace did not recall any discussions with Defendant about jail credit.

Lieutenant Steven Page, the Assistant Jail Administrator, testified that his duties included "[m]ainly security." He received a report on April 18 about pod 128 that led him to "do a search of that pod" by pulling "all of the men out" and "strip search[ing] them." During the search, a part of a hairbrush was taken out of Defendant's cell. It appeared to be the type and style of brush that was sold in the jail commissary. The handle portion of the brush had been "broken off and then sharpened" into what Lieutenant Page described as a shank. "The sharp piece came from [Defendant] when Officer Wilburn was searching him" and contained what looked like ink markings on it. The actual pieces of the shank were not admitted into evidence because, according to counsel for the State, they were "evidence in the case that's now pending." However, the trial court reviewed the evidence and described the portion found on Defendant's person on the record as follows: "a sharp, what appears to be a piece of wood that, maybe, has some brush fiber on it, that's maybe two (2") inches, two and a half (2 ½") inches in length." The trial court described the portion of the shank found in Defendant's cell as "what appears to be a section of hair brush . . . broken, in part, and it appears to be made of brush like material, and wood."

As a result of the discovery of the shank, Defendant was charged with possession of contraband in a penal facility. Based on his experience, Lieutenant Page described the shank as a "weapon," and he was not of the opinion that the item could be used to clean out from underneath one's fingernails or as a door stopper. Lieutenant Page testified that inmates "usually use their shoes" as a door stopper. Likewise, Lieutenant Page did not believe that the item could be used as a tattoo pen. However, Lieutenant Page agreed that the item could have been used to stop a cell door from closing and that he did not have

any evidence that the item was actually being used by Defendant as a weapon other than his "experience that people sharpen wood to stab other people."

Defendant testified that he had been in jail since May 13, 2017. Defendant denied seeing Ms. Wallace while he was incarcerated until his "request" one month prior to the hearing to calculate his sentences "to make sure [his] time was right." Defendant admitted that he possessed the shank that was confiscated by jail authorities. Defendant bought the brush at "[t]he commissary." Defendant denied using it to make threats or harm other inmates, instead claiming he made the shank "[t]o tattoo ink." Defendant explained that he burned the bristles and used the ashes to make tattoo ink. Defendant explained that he used the sharpened end to shave the area he was going to tattoo and that he used a "piece of paperclip" as a tattoo needle. Defendant claimed that he performed tattoo work on himself and other inmates. Defendant claimed that he used the non-sharpened end of the brush to "jam" his cell door so that it appeared locked. Defendant claimed that "once [he] got done with the soot, [the sharpened end of the brush], it cleaned my fingernails" and got rid of the soot stain from burning the bristles. Defendant admitted that he did not have all of his tattoo tools on him at the time of the search.

At the conclusion of the hearing, the trial court noted Defendant's "spotted history" of reporting and partial probation violations. The trial court determined that Defendant was "under supervision at the time he was in the jail" because of Ms. Wallace's testimony that she "had continued to . . . go see [Defendant] while he was in jail, and regularly check with the jail to check on his status while he was serving a period of partial revocation." The trial court determined that because Defendant was still considered on supervision at the time he was serving the sentence related to a partial revocation, Defendant was still under the "restrictions" associated with Community Corrections. The trial court accredited Lieutenant Page's testimony that Defendant was in possession of an object "fashioned in such a way as it could be used as a deadly weapon." The trial court determined Defendant's testimony was "less credible" than the testimony of Lieutenant Page and Ms. Wallace. In conclusion, the trial court determined that Defendant violated his Community Corrections sentence and determined that resentencing was unnecessary because the "sentences that were imposed here are more than adequate."

After the hearing, the trial court entered an order on August 3, 2018, in which the trial court determined that Defendant was "in violation of the terms of his Community Corrections supervision agreement by possessing a weapon in the county jail." As a result, the trial court revoked Defendant's "release to Community Supervision" and ordered Defendant to serve the remainder of his seventeen-year sentence in the Tennessee Department of Correction. The trial court noted that the partial revocation being served by Defendant would be "merge[d] into the sentence reflected in this Order, thereby nullifying this Court's prior Order of a partial revocation."

Defendant filed a timely notice of appeal.

Analysis

On appeal, Defendant argues that the trial court erred in finding that Defendant violated his Community Corrections sentence because "there was no credible substantive proof that the brush [Defendant] possessed was a weapon as contemplated by [Tennessee Code Annotated section] 39-16-201." The State disagrees, pointing out that Defendant admitted that he possessed the broken hairbrush and that the trial court accredited the testimony of the officer who confiscated the broken hairbrush and described it as a shank. As a result, the State insists that the trial court properly revoked Defendant's Community Corrections sentence.

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). Given the similar nature of a sentence of community corrections and a sentence of probation, the same principles are applicable in deciding whether the revocation of a community corrections sentence is proper. *State v. Harkins*, 811 S.W.2d 79, 83 (Tenn. 1991). When a defendant's community corrections sentence is revoked, the court "may resentence the defendant to any appropriate sentencing alternative, including incarceration, for any period of time up to the maximum sentence provided for the offense committed." T.C.A. § 40-36-106(e)(4). The revocation of probation rests in the sound discretion of the trial court and will not be overturned by this Court absent an abuse of that discretion. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991); *State v. Leach*, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995); *see also State v. Pollard*, 432 S.W.3d 851, 864 (Tenn. 2013) (holding that an abuse of discretion standard with a presumption of reasonableness applies to all sentencing decisions). An abuse of discretion occurs 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 also State v. Shaffer*, 45 S.W.3d 553, 554 (Tenn. 2001).

In this case, there is substantial evidence in the record to support the trial court's finding that Defendant violated the terms of his Community Corrections sentences. Tennessee Code Annotated section 39-16-201(b)(1)(A) prohibits a person from "knowingly and with unlawful intent" possessing a "weapon" while "present in any penal institution where prisoners are quartered or under custodial supervision without the express written consent of the chief administrator of the institution." Because Tennessee Code Annotated section 39-16-201 does not define weapon, Defendant urges this Court to utilize the definition of "deadly weapon" found in Tennessee Code Annotated section 39-11-106(a)(5). We decline to do so. While the term "weapon" is not defined

specifically in the code, this Court has pointed to the "commonly accepted definition" of weapon appearing in Black's Law Dictionary as "[a]n instrument of offensive or defensive combat" and explained that the term "'weapon' is not a technical term which requires legal research to determine its meaning; in this context, its meaning can be ascertained by [a] person of common intelligence." *State v. Joseph John Henry Morrell*, No. E1999-00924-CCA-R3-CD, 2000 WL 218188, at *2 (Tenn. Crim. App. Feb. 25, 2000), *perm. app. denied* (Tenn. Dec. 11, 2000); *see also State v. James Anthony Hill*, No. M2003-00516-CCA-R3-CD, 2004 WL 431481 (Tenn. Crim. App. Mar. 9, 2004) (holding that evidence was sufficient to support possession of a weapon in a penal institution despite defendant's argument that sharpened piece of metal confiscated from him was not designed or adapted for the purpose of inflicting bodily injury, but rather as a tool for removing toilet paper from his air conditioning vent), *perm. app. denied* (Tenn. Sept. 7, 2004).

Moreover, the trial court was charged with assessing the credibility of the witnesses, and "the trial judge's findings in a probation revocation proceeding carr[ies] the weight of a jury verdict." *State v. Beard*, 190 S.W.3d 730, 735 (Tenn. Crim. App. 2005). Here, Defendant admitted that he possessed the broken hairbrush and admitted that one end of the brush had been sharpened. Defendant claimed that the brush was not a weapon because he was using the brush to draw tattoos, and that the sharpened end was used to shave the area where the tattoo would be drawn and to clean "soot" out from under his nails. Lieutenant Page, on the other hand, testified that in his experience, the hairbrush was fashioned into a weapon and could not be used for the purpose claimed by Defendant. In our view, the trial court did not abuse its discretion in revoking Defendant's Community Corrections sentence and ordering that he serve his sentence in confinement. This Court has "repeatedly cautioned that 'an accused, already on probation, is not entitled to a second grant of probation or another form of alternative sentencing.'" *State v. Casey Dupra Drennon*, No. M2014-02366-CCA-R3-CD, 2015 WL 6437212, at *2 (Tenn. Crim. App. Oct. 23, 2015) (quoting *State v. Jeffrey A. Warfield*, No. 01C01-9711-CC-00504, 1999 WL 61065, at *2 (Tenn. Crim. App. Feb. 10, 1999), *perm. app. denied* (Tenn. Jun. 28, 1999)), *no perm. app. filed*; *see also State v. Timothy A. Johnson*, No. M2001-01362-CCA-R3-CD, 2002 WL 242351, at *2 (Tenn. Crim. App. Feb. 11, 2002), *no perm. app. filed*. Defendant is not entitled to relief.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

TIMOTHY L. EASTER, JUDGE