

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs February 6, 2018

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. TEDDIE ELIJAH FASON

**Appeal from the Circuit Court for Henderson County
No. 13-131-2 Donald H. Allen, Judge**

No. W2017-01349-CCA-R3-CD

The Defendant, Teddie Elijah Fason, entered guilty pleas to burglary, theft of property valued at more than \$1,000, vandalism, and evading arrest, and he was sentenced to serve four years on probation. The Defendant appeals the trial court's revocation of his probation and its judgment ordering him to serve his sentences in confinement. After a thorough review of the record, we discern no abuse of discretion, and we affirm the trial court's judgment.

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

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and J. ROSS DYER, JJ., joined.

George Morton Googe, District Public Defender, and Gregory D. Gookin (on appeal) and John Hamilton (at hearing), Assistant District Public Defenders, for the appellant, Teddie Elijah Fason.

Herbert H. Slatery III, Attorney General and Reporter; Robert W. Wilson, Assistant Attorney General; Jody Pickens, District Attorney General; and Brian Gilliam, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL AND PROCEDURAL HISTORY

The Defendant committed the offenses at issue on April 6, 2013. On April 22, 2014, he entered guilty pleas and was granted judicial diversion requiring the service of

four years on probation. As part of the Defendant's probation, he was ordered to pay one hundred dollars per month toward court costs, fines, and restitution.

On August 11, 2014, the Defendant's case officer signed an affidavit stating that the Defendant violated the terms of his probation by committing traffic offenses consisting of driving on a suspended license, driving without insurance, and driving sixty-seven miles per hour in a thirty-mile-per-hour speed zone. The affidavit further alleged that the Defendant did not report his new offenses, that the Defendant was not residing at the primary location he had listed on his paperwork, and that he had not been at home during curfew on two occasions in July 2014.

On August 19, 2014, the trial court revoked the Defendant's probation and ordered him to serve his sentence in the Tennessee Department of Correction, with a referral to the "boot camp program." On December 11, 2014, the trial court held a hearing on a "Motion for Reduction of Sentence," and it granted the motion, ordering the Defendant to return to probation. The trial court specifically ordered the Defendant to be released to his mother's custody, to follow all the rules and regulations of his probation agreement, and to abide by his 6:00 p.m. to 6:00 a.m. curfew, which would be subject to random checks.

On January 27, 2015, the Defendant's supervising officer issued an affidavit that the Defendant had again violated the terms of his probation by driving on a suspended license. The affidavit also stated that the Defendant failed to reside at his approved address and was absent from his mother's home during curfew on January 13, 2015, despite numerous warnings that he needed to abide by his curfew. Finally, the affidavit alleged that the Defendant was arrested on January 26, 2015, for failure to appear.

On March 17, 2015, the trial court again revoked the Defendant's probation, ordering him to serve sixty days in prison before his probation would be reinstated. The order again noted particularly that the Defendant must reside with his mother and abide by the rules of his probation.

On May 9, 2016, the Defendant's case officer again signed an affidavit charging him with violating the terms of his probation. The affidavit stated that the Defendant had been instructed on April 25th and again on May 6th that he needed to reside at his approved address but that he was not present on May 7th and that a resident of the home stated that the Defendant did not live there. The affidavit further alleged that the Defendant violated his curfew when he was absent during the curfew check on May 7th. The affidavit also stated that the Defendant had not made any payments on his court costs, fines, and restitution since June 30, 2014. In an amended warrant issued on June 16, 2016, a second affidavit repeated these allegations and further stated that the

Defendant was arrested and charged with theft of property valued under \$500 on June 14, 2016, and that this arrest occurred after his curfew. On July 19, 2016, a second amended warrant listed as additional violations that the Defendant was arrested for seven counts each of aggravated burglary, theft, criminal trespass, and vandalism. It also alleged that the Defendant failed to report his current address and that a firearm was recovered from his residence.

The trial court held a hearing on June 9, 2017, at which Mr. Howard Henley, the Defendant's probation supervisor, testified that the Defendant had twice been found to be in violation of his probation and that one of those violations was for not living at his approved address. The court informed the Defendant that he must reside with his mother when it reinstated his probation on that occasion. Mr. Henley stated that the first violation had occurred under another probation officer and that he was not certain of the basis of the violation.

Mr. Henley confirmed that he signed the 2016 affidavits alleging that the Defendant violated his probation in numerous ways, including not abiding by his curfew, not living at his approved address, and for nonpayment of fines. Mr. Henley recalled that the Defendant had been instructed by the court to live with his mother at a particular address but that the Defendant's parents separated and the Defendant's father was the one who stayed at the approved address. Mr. Henley testified that at the Defendant's request, the court had given the Defendant permission to remain at the approved address with his father. Mr. Henley ordered the Defendant to move back to his approved address on April 25, 2016. On May 6, 2016, during an office visit, the Defendant told Mr. Henley that he was living with his girlfriend and gave Mr. Henley the girlfriend's address. Mr. Henley reminded the Defendant that he was not permitted to live with his girlfriend but only at his approved address, and he instructed the Defendant to move back home immediately. The next night,¹ Mr. Henley checked both the Defendant's approved address and his girlfriend's address when conducting the curfew check, but the Defendant was not at either location. At the Defendant's approved address, a woman who identified herself as the Defendant's grandmother stated that the Defendant was not living there and that she did not know where he was living. Mr. Henley was informed by the police that the Defendant was actually living at a third address when he was arrested in June 2016.

Mr. Henley testified that, according to the clerk's office, the Defendant had made no payments toward his court fees between the time Mr. Henley took over the Defendant's supervision and the time the 2016 warrants were written. The last payment was made on June 30, 2014. The Defendant told Mr. Henley that he was employed full-

¹ Mr. Henley testified that this curfew check was on May 6, 2016, but he also described it as "the next night." The affidavit states that the curfew check occurred on May 7, 2016.

time but was not able to make any payments. Mr. Henley acknowledged that the Defendant was attempting to have his suspended license reinstated during this time and was making payments toward that goal. The Defendant was also a student at a community college.

The Defendant was arrested on June 14, 2016, and charged with theft of property, and Mr. Henley testified that the Defendant did not report the new arrest to him. The Defendant's arrest occurred after his curfew and away from his home. The Defendant was subsequently arrested on June 29, 2016, for numerous burglary related charges, and he did not inform Mr. Henley of the new arrests. Mr. Henley testified that all new charges against the Defendant had been dropped. He agreed that the only remaining allegations were that the Defendant violated his curfew, was not living at his approved home, and failed to pay his fines.

Mr. Zachary Cummings, the Defendant's current probation supervisor, testified that he took over Mr. Henley's cases when Mr. Henley departed the office in December 2016. However, Mr. Cummings had never met with the Defendant, who was imprisoned during the entire period of Mr. Cummings's supervision. He affirmed that all of the Defendant's new charges had been dismissed by the State.

The Defendant testified that he had not been able to make payments toward his court costs because he was attempting to reinstate his suspended license and was making payments toward that diligently. He also lost financial aid for his schooling and had additional costs for his college tuition. He testified that he had successfully completed his degree at Jackson State Community College. The Defendant likewise had costs associated with child support. He had been in jail since June 14, 2016, and accordingly had no income. He testified that he did not have the means to pay the fines but that he had made some prior payments of twenty-five to fifty dollars. He acknowledged that he did not see his probation officer after May 6, 2016, and he also acknowledged not informing his probation officer of his new offenses, explaining that he failed to report or report the new arrests because he was in jail and could not call the officer collect.

The Defendant testified that, during an office visit, his probation officer had called the trial judge and that the judge and probation officer both agreed that the Defendant could move in with his girlfriend. He testified that he stayed at his approved address until he received permission to move in with his girlfriend. He testified that he wanted to live with his girlfriend to help raise his son. He denied telling Mr. Henley his new address, and he asserted that he did not start to live there until May 15th or 16th. He affirmed that his grandmother lived at his approved address and that she would have said that he was not living there because he was living with his girlfriend with the court's approval. The Defendant explained his absence during the curfew check by stating that

he was working the night shift. He averred that Mr. Henley knew that he worked the night shift and went to school during the day. He denied ever having lived at the third address which appeared in police reports following his arrest. All of his new charges had been dismissed.

The trial court revoked the Defendant's probation and ordered him to serve the original sentence in confinement. The court found that the Defendant had violated his curfew. The trial court credited Mr. Henley's testimony that the Defendant was required to live at his approved address, that he was not at home during his curfew hours on May 7th, and that his arrest occurred out of his home and after his curfew. The trial court, crediting Mr. Henley's testimony that the Defendant did not have permission to live with his girlfriend, also found that the Defendant violated his probation by moving away from his approved address. The court found that the Defendant had also violated the terms and conditions of his probation by failing to pay his fines, costs, and restitution and that the Defendant "certainly had the ability to pay that." The court further found that the Defendant violated his probation when he did not report to his probation officer after the May 6th office visit and when he did not report his new arrests. The trial court noted that the Defendant had violated his probation multiple times in the past, and it ordered him to serve his sentences in confinement. The Defendant appeals.

ANALYSIS

The Defendant on appeal alleges error in the revocation of his probation and in the imposition of sentences to be served in confinement. The State responds that the trial court did not abuse its discretion.

A trial court may revoke a sentence of probation if it determines by a preponderance of the evidence that the conditions of probation have been violated. T.C.A. §§ 40-35-310(a), -311(e). An appellate court will not overturn the trial court's decision regarding revocation absent an abuse of discretion. *State v. Shaffer*, 45 S.W.3d 553, 554 (Tenn. 2001); *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). Generally, a trial court abuses its discretion when it "applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party." *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010). The reviewing court should not overturn a trial court's decision regarding revocation unless it concludes "that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred." *Harkins*, 811 S.W.2d at 82. Proof of the violation is adequate when it provides the basis for a "conscientious and intelligent" judgment. *Id.* On review, the trial judge's factual findings in a probation revocation proceeding carry the weight of a jury verdict. *State v. Beard*, 189 S.W.3d 730, 735 (Tenn. Crim. App. 2005).

Furthermore, “the credibility of the witnesses is for the determination of the trial judge, who is in the best position to observe witness demeanor.” *Id.* Accordingly, the trial court’s findings are binding on the appellate court unless the evidence preponderates otherwise. *State v. Lewis*, 917 S.W.2d 251, 257 (Tenn. Crim. App. 1995).

Here, the trial court found that the Defendant violated his probation by failing to observe his court-imposed curfew, by failing to reside at his approved address, and by failing to pay court fees despite an ability to pay. The trial court credited Mr. Henley’s statement that he visited both the Defendant’s approved address and the address where he believed the Defendant was residing and that the Defendant was not at either home after curfew. The trial court also credited Mr. Henley’s testimony that he had told the Defendant on at least two occasions immediately prior to May 7, 2016, that the Defendant needed to move back into his approved address but that the Defendant was not living there on May 7, 2016. The Defendant testified that he was living at his approved address until May 15th, that he had permission to move out of the approved address, and that the only place he went after curfew was to his job. However, credibility determinations are the province of the trial court, and the record does not preponderate against the court’s finding that the Defendant violated the terms of his probation by leaving his home after curfew and by residing at a residence other than his approved address. The record contains evidence that the Defendant was employed and made payments toward other court costs, toward his child support, toward attorney fees, and toward his education, and the trial court found that the Defendant had the ability to make payments toward his court fines, costs, and restitution but did not do so. *See State v. Reginald Perry Davis Lashley*, No. M2014-00733-CCA-R3-CD, 2015 WL 866956, at *5-6 (Tenn. Crim. App. Feb. 27, 2015) (noting that a trial court must make a finding that failure to pay was willful but concluding that when other factors uphold the revocation, the failure to make the finding need not result in reversal). The record again does not preponderate against the trial court’s finding that the Defendant had the ability to pay but chose not to do so.

We note that the trial court found two violations of which the Defendant was not put on notice by the affidavits: the failure to report to his probation officer after May 6, 2016, and the failure to inform his probation officer of his new arrests. Generally, “[t]he revocation of 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); *see State v. Wade*, 863 S.W.2d 406, 408 (Tenn. 1993). However, the trial court here found three other violations of which the Defendant had adequate notice, and the record supports the trial court’s finding that the Defendant committed these violations. *State v. Ricky Davis*, No. 03C01-9706-CC-00215, 1998 WL 205925, at *2 (Tenn. Crim. App. Apr. 29, 1998) (concluding that although the trial court erred in relying on grounds not listed in the warrant, other

evidence, including the concession that the defendant violated the terms of his probation, supported the revocation). Accordingly, we conclude that the trial court did not abuse its discretion in revoking the Defendant's probation.

The Defendant next contends that the trial court erred in imposing a sentence to be served in confinement. When a trial court finds by a preponderance of the evidence that the defendant has violated the conditions of probation, the trial court may revoke the probation and order the defendant to serve the judgment as originally entered. T.C.A. § 40-35-311(e)(1)(A). "The determination of the proper consequence of the probation violation embodies a separate exercise of discretion." *State v. Patsy Lynn McCoy*, No. M2011-00006-CCA-R3-CD, 2011 WL 6916227, at *3 (Tenn. Crim. App. Dec. 28, 2011) (citing *State v. Hunter*, 1 S.W.3d 643, 647 (Tenn. 1999); *State v. Reams*, 265 S.W.3d 423, 430 (Tenn. Crim. App. 2007)). "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. Juan Manuel Coronado, II*, No. E2010-01058-CCA-R3-CD, 2011 WL 704543, at *3 (Tenn. Crim. App. Mar. 1, 2011) (quoting *State v. Jeffrey A. Warfield*, No. 01C01-9711-CCA-00504, 1999 WL 61065, at *2 (Tenn. Crim. App. Feb. 10, 1999)). There is no requirement that the trial court consider other sentencing options when revoking a defendant's probation. *State v. George Vincent Ware*, No. E2010-00141-CCA-R3-CD, 2010 WL 3448057, at *3 (Tenn. Crim. App. Sept. 1, 2010).

Here, the trial court had twice before found the Defendant in violation of the terms of his probation and had twice reinstated the probation. Both of these violations included a violation of the requirement that the Defendant remain at home after curfew and continue to reside at his approved address. The trial court, in reinstating the probation the second time, specifically noted that the Defendant must reside at the approved address. The trial court again found the Defendant in violation of the same terms of his probation, and it chose to revoke the probation and order the Defendant to serve his sentences in confinement. *See* T.C.A. § 40-35-311(e)(1)(A). We conclude that the Defendant has not shown that the trial court abused its discretion in ordering confinement.

CONCLUSION

Based on the foregoing, the judgment of the trial court is affirmed.

JOHN EVERETT WILLIAMS, JUDGE