

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs April 12, 2016

STATE OF TENNESSEE v. DANIEL McCAIG

Appeal from the Circuit Court for Dyer County
No. 14-CR-241 R. Lee Moore, Jr., Judge

No. W2015-01842-CCA-R3-CD - Filed December 19, 2016

Following a jury trial in the Dyer County Circuit Court, Defendant, Daniel McCaig, was found guilty of misdemeanor theft. Defendant appeals this conviction. The theft charge was in Circuit Court by virtue of Defendant's appeal from a conviction for the offense following a bench trial in the Dyersburg Municipal Court. The Dyersburg Municipal Court also partially revoked Defendant's probation in an unrelated offense. Defendant appealed both judgments to the Circuit Court for *de novo* review. Defendant was sentenced by the Circuit Court to serve 11 months and 29 days in the Dyer County Jail for the theft conviction. The Circuit Court judge (hereinafter "trial judge") also revoked his probation on the other case and ordered him to serve that sentence concurrently with the sentence for theft. Defendant has also appealed to this court the revocation of probation. In this appeal, Defendant raises the following issues for our review: 1) the evidence was insufficient to support his theft conviction; and 2) his due process rights were violated by the State's failure to provide written notice of the allegation against him which was the basis for the trial court's revocation of probation. Having reviewed the record and the briefs of the parties, we conclude that the evidence was sufficient to support Defendant's conviction for theft. We also conclude that the written notice to Defendant of his probation violation did not include the theft charge, and therefore, that ground cannot be a basis to revoke probation. Furthermore, the trial court failed to base its decision on a *de novo* review. Therefore, we affirm Defendant's theft conviction and reverse the trial court's revocation of Defendant's probation, and dismiss the probation violation warrant.

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

THOMAS T. WOODALL, P.J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT H. MONTGOMERY, JR., JJ., joined.

James E. Lanier, District Public Defender; Martin E. Dunn, Assistant Public Defender, and Sean P. Day, Assistant Public Defender (on appeal); and Martin Dunn, Dyersburg, Tennessee (at trial), for the appellant, Daniel Leon McCaig.

Herbert H. Slatery III, Attorney General and Reporter; Brent C. Cherry, Senior Counsel; C. Phillip Bivens, District Attorney General; and Charles Dyer, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts – Theft Offense

Amber Brimm, a loss prevention employee of Walmart in Dyersburg, testified that she was working on March 19, 2014. She knew Defendant prior to that date. She saw Defendant walk past her, and he was holding two packages of Ear Pro earplugs. She testified that Defendant “had them like tucked under, like trying to hide them.” Ms. Brimm watched Defendant walk to the drink aisle, select a drink, and then walk to another aisle, where he “squatted down to the floor, stretched out his left leg and put [the ear plugs] in his pocket.” Defendant then proceeded to use the self-checkout to purchase a four-pack of Monster drinks. Ms. Brimm watched as Defendant checked out, and Defendant did not scan the earplugs.

Ms. Brimm approached Defendant in the store vestibule, which she testified was past the “last point of sale.” Defendant went back inside the store with Ms. Brimm. Ms. Brimm was walking through the store with Defendant headed to the store offices, and Defendant “started hollering about how we can’t hold him against his will, can’t do this to him.” Defendant took the earplugs out of his pocket, threw them onto a store display, and ran out of the store. Ms. Brimm testified that the value of the ear plugs was \$34.96.

A store surveillance video was played for the jury. Ms. Brimm identified Defendant in the video recording, which showed Defendant in the sporting goods section of the store where the ear plugs were sold and in the drink aisle. She identified Defendant “carrying the Monster [drink] and the ear buds. They’re in his left hand.”

Defendant testified that he went to Walmart on March 19, 2014, to buy drinks for work. Defendant worked at Dyersburg Pallet, building pallets. Defendant testified that he “was a little early for work,” so he walked around the store. Defendant was looking for safety glasses, but the store did not have what he was looking for. Defendant then picked out drinks and paid for them at the self-checkout. On cross-examination, Defendant testified that he saw the earplugs in the sporting goods section, but he did not take them off the rack. He testified,

Q. You say you didn't take anything off the rack?

A. No, sir.

Q. You also saw the video when you went over to the drink aisle over there and you squatted down on the ground, isn't that right, sir?

A. Yeah, to get my drinks.

Q. But then while you're down there you're looking around from left to right and up and down the aisle. Isn't that true?

A. Well, I'm paranoid at some point, yes.

Q. Oh, you're paranoid?

A. And that's just because, yes, sir, I did prison time. I mean, as far as a lot of matter, you know, it's –

Defendant testified that he was “paranoid schizophrenic.”

Brittany Cole testified that she was Defendant's girlfriend. She testified that Defendant routinely went to Walmart to buy drinks for work. She testified that on the date of the incident, she sat in the car and waited for Defendant while he went inside Walmart. Defendant came out of the store carrying a four-pack of Monster drinks, and they “proceeded with [their] day.” She testified that Defendant “was acting normal . . . like he does every day.”

After the jury returned a guilty verdict for theft of property under \$500, the trial court set a date for sentencing and for a hearing on Defendant's probation violation warrant:

THE COURT: I'm gonna set a sentencing hearing and also a hearing on the – Now, the Court will consider the proof today as far as the probation violation is concerned but I have no idea what the probation was. I want to hear from the probation officer. I'm gonna set a sentencing hearing for this which we'll also deal with the probation violation. As I looked at the record it was an appeal of the probation violation.

[Defense counsel]: Yes, Your Honor. And I've spoken with [Defendant] and he is not really contesting that he violated his probation. It's more about the sentencing, so –

Facts – Probation Violation

Defendant was originally placed on probation in Dyersburg Municipal Court following convictions for driving on a revoked license and for violation of community supervision as a registered sex offender. There is no transcript in the appellate record of the hearing in Dyersburg Municipal Court which led to that court's revocation of probation. The probation violation warrant from the Dyersburg Municipal Court was issued on October 13, 2013, and alleged only two factual grounds for revocation of probation: (1) Failure to pay fines and costs and (2) Failure to keep appointments with the probation officer.

No proof of facts in support of the probation violation warrant was presented during the Dyer County Circuit Court hearing.

Court's Dispositions of Cases in Dyersburg Municipal Court and in Dyer County Circuit Court

The Dyersburg Municipal Court found Defendant guilty of theft at a bench trial on September 23, 2014. The municipal court sentenced Defendant to 11 months and 29 days, suspended after incarceration for 15 days. On the same day, the municipal court found that Defendant had violated probation, and ordered Defendant to serve 50 days of incarceration, consecutively to the sentence for the theft conviction, and ordered that the probation be extended.

Following the jury verdict of guilty of theft in the Dyer County Circuit Court, the trial judge sentenced Defendant to incarceration for 11 months and 29 days, and after finding that Defendant had also violated his probation, revoked the probation and ordered service by incarceration for 11 months and 29 days, concurrently with the sentence for the theft conviction.

Sentencing hearing

At the sentencing hearing, the trial court began the hearing with the following:

Let me stop you for just a second. This is Case No. 14-CR-241, State versus Daniel McCaig. Mr. McCaig was found guilty of theft under \$500 in Dyersburg City Court. He appealed to this court. We had

a jury trial on July 31. He was convicted of theft under \$500. Sentencing was scheduled for today.

There was also an issue of a possible probation violation which the Court would determine from the proof that was put on at the trial. Now, I left him on bond, pending the sentencing hearing.

The trial court then noted Defendant's prior convictions. Defendant testified about his criminal history and prior violations of probation and community corrections. Defendant testified that he was currently employed at Dyersburg Pallet and that he was "trying to do the best [he could] at moving forward in [his] life" and that he had been paying his probation fees as ordered. Defendant also worked construction jobs on the side. Defendant asked the trial court not to impose the maximum sentence of 11 months and 29 days and explained that he was currently being supervised on probation in other cases. Defendant testified that he furthered his education while incarcerated. He testified that he had been diagnosed with paranoid schizophrenia and was taking medication for anxiety and depression. Defendant testified that he lived with his fiancée. Defendant asked the court for leniency. He testified, "just please just have some kind of leniency toward me trying my best and working the best way I can on satisfying the courts."

As noted above, the Municipal Court's probation violation warrant alleged the following grounds for revocation of probation: (1) Defendant failed to pay court costs and fines, and (2) Defendant failed to keep appointments with his probation officer.

The trial court purported to set the *de novo* hearing on the probation violation at the same hearing as the sentencing for the theft conviction. The probation officer did not testify; in fact, no proof regarding the allegations in the probation violation warrant was presented.

While announcing the sentence for the theft conviction, the trial court included its brief ruling on the probation violation warrant:

With those things in mind, [Defendant], the Court doesn't see any basis for suspending your sentence. You are sentenced [for the theft conviction] to 11 months and 29 days in the Dyer County Jail. Your probation in the other case is revoked. Those sentences will be served concurrently.

Subsequently, the following exchange occurred between Defendant's counsel and the trial court:

[Defense counsel]: Your Honor, I think the question I have – I thought we were just going over the sentencing, and I did have a couple of things. I thought he was going to have [the probation officer] testify on the [violation of probation] and I had a couple of things I wanted to cover on the [violation of probation].

THE COURT: The Court decides whether or not he violated his probation on the theft charge. The Court heard proof during the trial on the theft charge. That is a basis for violating his probation. His probation was violated.

Analysis

Sufficiency of the evidence

Defendant challenges the sufficiency of the evidence to support his conviction for theft of property valued at \$500 or less. He simply asserts that Ms. Brimm’s testimony “was untruthful.”

We review Defendant’s challenge to the sufficiency of the evidence under the well-settled standard of review of whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011).

When examining the sufficiency of the evidence, this court should neither reweigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id.* Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Significantly, this court must afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

“A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner’s effective consent.” T.C.A. § 39-14-103. Theft of property valued at \$500 or less is a Class A misdemeanor. T.C.A. § 39-14-105(1).

Viewed in the light most favorable to the State, the evidence showed that Defendant took two pairs of earplugs from the sporting goods section at Walmart and walked past the shoe department where Ms. Brimm saw him acting suspiciously and carrying the earplugs as if he was trying to conceal them. Ms. Brimm followed Defendant to the drink aisle, where Defendant put the earplugs in his pocket. Ms. Brimm watched as Defendant paid for drinks and did not pay for ear plugs. She followed him out of the store and asked him to walk with her to the store office. On their way to the office, Defendant stopped and threw the earplugs on a display counter and ran out of the store. The evidence was sufficient to support Defendant's conviction. Defendant is not entitled to relief on this issue.

Revocation of probation

Defendant contends that he was denied due process because the State failed to provide written notice of the allegation upon which the trial court relied in revoking his probation. The State responds that the record indicates that Defendant was well aware of the State's intention to seek revocation of his probation based on the theft charge against him. We conclude that Defendant is entitled to relief on this issue.

First, under the circumstances of this case, where the Circuit Court had jurisdiction in the probation violation matter solely because of an appeal from the Dyersburg Municipal Court, the trial judge was strictly limited to the alleged probation violation grounds which were alleged in the Dyersburg Municipal Court. There is nothing in the appellate record to indicate that the probation violation warrant was ever amended in the Dyersburg Municipal Court. Therefore, Defendant's theft offense at Walmart, for which he was convicted, could not be a basis for the trial judge to revoke probation.

An appeal to Circuit Court from a Municipal Court that has state criminal court jurisdiction goes to Circuit Court for a *de novo* hearing. *State v. Cunningham*, 972 S.W. 2d 16, 18 (Tenn. Crim. App. 1998). "A *de novo* hearing encompasses more than just the presentation of proof. The court must try the matter *and render judgment* as if no judgment had previously been rendered." *Id.* In a *de novo* appeal, the matter must be tried in Circuit Court "as if no other hearing had occurred." *Id.* Thus, if the Municipal Court finds sufficient evidence to sustain one alleged factual ground for violation of probation, but concludes other alleged factual grounds were not proven, the Circuit Court can still hear proof as to the alleged factual grounds found not sustainable by the lower court. However, *de novo* appeal also limits the Circuit Court's consideration of grounds for probation violation to the grounds in the petition filed in the lower court. A defendant in such case is not on probation in Circuit Court. He or she has only appealed the lower court's ruling on the precise alleged factual grounds set forth in the violation warrant

which originated in the lower court. A Circuit Court cannot retain jurisdiction over a defendant's probation from a lower court after the Circuit Court has ruled in the *de novo* appeal. The Circuit Court must remand the case to the lower court for enforcement of the Circuit Court's ruling as an appellate court. *State v. Jeremy Ray Hines*, No. E2007-00963-CCA-R3-CD, 2008 WL 1700221, at *3 (Tenn. Crim. App. April 11, 2008), citing *State v. Dorothea Annette Jones*, No. E2006-CCA-R3-CD, 2007 WL 4460142, at *2 (Tenn. Crim. App. Dec. 20, 2007). This supports the conclusion that the Circuit Court cannot amend the lower court's probation violation warrant upon a *de novo* appeal.

Second, the trial court in Defendant's case failed to have a *de novo* hearing as is mandated. "It is therefore, incumbent upon the Circuit Court hearing a probation revocation appeal to make an independent judgment following the presentation of proof. This would include a consideration of the various sentencing options if there is a finding that the defendant violated the terms and conditions of probation." *Cunningham*, 972 S.W. 2d at 18.

At the hearing in the trial court, the State failed to present any evidence that Defendant had violated his probation imposed by the Dyersburg Municipal Court. Defendant did not personally plead guilty to any probation violation in the trial court. The State had its opportunity to present competent, relevant proof of the grounds alleged in the probation violation warrant, but failed to do so. The trial court revoked probation without a *de novo* hearing, and on a single ground that was not properly before the trial court for consideration. The judgment finding Defendant in violation of his probation is reversed, and the probation violation warrant is dismissed.

CONCLUSION

The conviction and sentence for theft is affirmed. The judgment revoking probation is reversed, and the probation violation petition from the Dyersburg Municipal Court is dismissed with prejudice.

THOMAS T. WOODALL, PRESIDING JUDGE