

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

Assigned on Briefs December 3, 2019

FILED

03/12/2020

Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. TOSCAR SMITH**

**Appeal from the Criminal Court for Shelby County  
No. 15-02728 Lee V. Coffee, Judge**

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**No. W2019-00713-CCA-R3-CD**

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The Defendant, Toscar Smith, appeals from the Shelby County Criminal Court's revocation of his nine-year probationary sentence for his conviction for aggravated assault. The Defendant contends that the trial court erred in ordering his sentence into execution. 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 CAMILLE R. MCMULLEN and J. ROSS DYER, JJ., joined.

Phyllis Aluko, District Public Defender; Barry W. Kuhn (on appeal) and Mary Kathryn Kent (at hearing), Assistant District Public Defenders, for the Appellant, Toscar Smith.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Amy P. Weirich, District Attorney General; Justin Walling, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The Defendant was charged with attempted second degree murder related to a violent attack he perpetrated upon his mother's boyfriend, whom the Defendant believed had sexually assaulted the Defendant's niece. The Defendant pleaded guilty, pursuant to a plea agreement, on October 6, 2015. A probation revocation petition was filed on October 16, 2019, which alleged that the Defendant had failed to verify employment, had failed to report, had cost arrearages, had failed to pay restitution, had failed to report for drug screens, had failed to report for anger management classes, had failed to report for alcohol assessment, and had failed to report to receive his community service assignment. The revocation issue was settled by agreement on April 25, 2017, whereby the Defendant was returned to probation with placement in the Jericho Project. The agreement specified

that the Defendant was to pay restitution for the victim's medical bills, submit to drug screens, attend anger management classes, avoid contact with the victim, and perform 400 hours of community service.

A second petition for probation revocation was filed one month later, on May 25, 2017. The petition alleged that the Defendant had not been in contact with "recovery support," had tested positive for cocaine in a drug screen, and had missed several sessions of an unspecified nature.

At the revocation hearing, Tennessee Department of Correction Probation Officer Dawn Sadler testified that the Defendant had been placed on probation through her agency. She said that the conditions of probation were reviewed with the Defendant when he was returned to probation after the first violation. She agreed that the Defendant was to be placed in the Jericho Project as a result of the agreement to resolve the first violation. She said Jericho Project personnel reviewed with the Petitioner the expectations of the program.

Officer Sadler testified that she received a notification from the Jericho Project that the Defendant had not contacted recovery support, had tested positive for cocaine, and had missed several scheduled sessions. A Jericho Project treatment status notification and summary document was received as an exhibit. She agreed that the Defendant was supposed to attend "IOP classes with Alliance Health Care" as part of the Jericho Project program and that he only attended three sessions. She said she received information that the Defendant missed several sessions with recovery support outreach. She agreed that the Defendant had stated to Jericho Project personnel that he had not used drugs or alcohol since 2016 and said that the positive cocaine result was obtained from a urinalysis conducted by Jericho Project personnel on May 8, 2017. She said the probation office had not performed a drug screen on the Defendant because he had not reported to the probation office since orientation on May 4, 2017. She said that if the Defendant had "kept going with his program," he would have reported to the probation office. She agreed that he had been provided with her contact information.

The Defendant testified that he had been reporting to Jericho Project until he had a car accident in June or July 2016, which prevented him from continuing the program. He said that he reported the accident to Jericho Project personnel and that he was told they would try to let him make up the days he missed. He said that he was placed on bedrest for six to eight weeks and that he talked to Jericho Project personnel after he was no longer on bedrest. When asked if he talked to anyone at the probation office, he said he thought he did not have to do anything with them because they had told him to report to Jericho Project. He said he went to classes when he could and disagreed that he stopped attending. When asked about a statement that he had a medical issue in early May 2017

in the Jericho Project document that was previously received as an exhibit, he said “that might be” the car accident.

When asked about the positive drug screen, the Defendant stated, “I don’t know anything about that.” He said he had been told that the screen was positive and that it could have been from prescription medication. He said he had been taking Lortab for pain from bruised ribs and a bruised leg. He said he had also been taking Lexapro and Vistaril at the time.

The Defendant testified that his last contact with anyone with Jericho Project had been in May 2016. He said he and his family had been trying without success to contact the program since then. He said his sister called after he was arrested and was told the person who “was over” Jericho Project was no longer in charge of the program. He said he met with his Jericho Project counselor, who told him about the drug test result and the missed classes. The Defendant said his counselor stated that the counselor was going to talk to a judge to see if the Defendant could take make-up classes. He thought he had attended three or four weeks of classes and did not know how many he was supposed to attend. He thought he attended one class after he recovered from the car wreck and acknowledged he was supposed to attend more. He said he had not attended more because he lost contact with Jericho Project personnel.

The Defendant testified that the trial court should return him to probation because he did not “really just violate” and had tried to “correct the wrong” once he had violated the terms of probation. He said that when he could not remedy the situation, he lived his life, worked, and took care of his family until his arrest. He said he had not been “out there getting in any trouble.” He said he would like to complete the Jericho Project program.

The Defendant acknowledged that he had been in court when the agreement for Jericho Project had been introduced. He acknowledged that he signed the agreement, which outlined his responsibilities. He said that he attended seven or eight IOP classes and that the document stating he attended three classes was incorrect. He agreed he had not attended a court review with the judge on April 26 of an unspecified year. He said he did not know he had a pending violation at that time.

The Defendant acknowledged that he had been arrested on June 28, 2018, for possession of cocaine. He agreed the case was still pending. He agreed he had only been arrested for the probation violation warrant because of the June 28 drug possession arrest. He said, though, that he had been trying to contact someone “to see what I had to do” relative to the probation violation.

The trial court observed that the Defendant's plea agreement involving probation had been remarkable, given the Defendant's "horrendous" criminal history. The court stated the Defendant "had no business ever being placed on probation" and noted the Defendant was a Range II offender. The court noted that the Defendant had served prison sentences for three prior aggravated assault convictions, the same offense as the present case, and three aggravated robbery convictions. The court observed that the Defendant had a record of juvenile adjudications going back to age fourteen.

The trial court found that the Defendant never reported to the probation office after he was returned to probation in April 2017 and that the Defendant was only apprehended for the subsequent violation because he was arrested in June 2018 for the cocaine charge. The court found that the Defendant lied under oath about not getting into trouble and had violated every condition of which the court had advised him. The court said that, in hindsight, it should have sentenced the Defendant to prison, rather than probation, at the time the Defendant entered his guilty plea. The court noted that the Defendant had already received one reprieve after the first violation and stated, "There are no other chances." The court found that the Defendant would not follow the court's orders if the court granted the Defendant an additional reprieve. The court revoked the Defendant's probation and ordered him to serve his sentence.

On appeal, the Defendant contends that the trial court erred in revoking his probation and ordering him to serve his sentence. The State counters that the court did not abuse its discretion. We agree with the State.

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." *Id.* at 82 (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). A finding of abuse of discretion "reflects that the trial court's logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved in a particular case." *Shaffer*, 45 S.W.3d at 555 (quoting *State v. Moore*, 6 S.W.3d 235, 242 (Tenn. 1999)).

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) (2019). 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. *Id.* §§ 40-35-

308(a), (c) (2019), -310 (2019). “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*, 215 Tenn. 553, 387 S.W.2d 811, 814 (Tenn. 1965)).

The record reflects that the Defendant violated the terms of his probation by testing positive for cocaine, failing to report to his probation officer, and failing to communicate with and participate in the Jericho Project program. The trial court concluded that the Defendant’s actions constituted violations of his terms of probation. The court noted that the Defendant had an abysmal criminal history and had been given a previous reprieve following a probation violation in the present case. The court had no confidence that the Defendant would comply with the terms of probation if given a further reprieve for this violation. We conclude that the court did not abuse its discretion in revoking the Defendant’s probation and in ordering him to serve his sentence.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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ROBERT H. MONTGOMERY, JR., JUDGE