

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1994 SESSION

FILED

September 18, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE, * C.C.A. # 03C01-9409-CR-00333
APPELLEE, * HAMILTON COUNTY
VS. * Hon. Douglas A. Meyer, Judge
CHARLES EMBRY, * (Revocation of Probation)
APPELLANT. *

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OPINION FILED: _____

AFFIRMED

Gary R. Wade, Judge

OPINION

The defendant, Charles Embry, appeals the trial court's revocation of probation. The single issue presented for review is whether the trial court abused its discretion in revoking the probation.

We affirm the judgment of the trial court.

On May 5, 1993, the defendant entered a nolo contendere plea to a charge of attempted aggravated sexual battery. The trial court found the defendant guilty and, pursuant to a plea agreement, approved the suspension of a Range I, six-year sentence. Two months later, the state filed notice of its intention to seek revocation of the probationary grant based upon a new charge of simple rape.

Apparently, the defendant was tried on the second rape charge before a jury on March 30, 1994. The trial judge who had approved of the earlier plea agreement presided. Sometime before the jury returned the verdict on the newer charge, the trial court considered the evidence heard and made the following observation:

Based on the testimony I've heard in court today, I find that the defendant violated good behavior so that [the prior] sentence [of six years] is ordered into execution.

Trial counsel for the defense objected to proceeding on the matter of revocation in the prior case based upon the argument that it would "be premature to act" prior to the

return of the jury verdict. In response, the trial judge pointed out that "the degree of proof necessary ... to revoke is not the same. There [was] no question in [his] mind that [the defendant was] guilty of raping [the second victim] ... and such an action would be a violation of his good behavior and would call for the revocation of that six-year sentence...."¹

In this appeal, the defendant does not complain about the procedure used in the trial court, only that the trial court made its findings prior to the jury determination. The defendant relies upon the proposition of law that an accusation of criminal misconduct, standing alone, will not justify a revocation of probation. See State v. Gerald Bates, No. 01C01-9101-CR-00006 (Tenn. Crim. App., at Nashville, June 29, 1991). In Bates, the state filed a petition to revoke probation:

It was stipulated that the appellant had been rearrested. A reading of [the] record indicates that the appellant's probation was revoked because of an accusation standing alone. This is not sufficient to justify a revocation, and the state is require[d] to establish at least some facts that would permit the trial court to make a conscientious and intelligent judgment as to whether the conduct of the appellant violates the conditions of his original sentence.

Slip op. at 2.

A defendant who is granted probation has a liberty

¹Although not a part of the record, the defendant conceded in his brief that the jury returned a verdict of guilt on the second charge.

interest and is entitled to due process before any revocation. Practy v. State, 525 S.W.2d 677, 682 (Tenn. Crim. App. 1974). Certain procedural requirements must be met. See Gagnon v. Scarpelli, 411 U.S. 778 (1973); State v. Wade, 863 S.W.2d 406, 408 (Tenn. 1993). These include: (1) written notice of the claimed violation of probation; (2) disclosure to the probationer of the evidence against him; (3) opportunity to be heard in person, to present witnesses, and to introduce documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a "neutral and detached" tribunal; and (6) a written statement by the finder of fact as to the evidence relied on and the reasons for revocation. Strict rules of evidence do not apply; reliable hearsay may be permitted. Practy, 525 S.W.2d at 680.

The trial court maintains continuing jurisdiction over any felony offender granted probation. The statutes governing revocation procedures provide, in pertinent part, as follows:

40-35-310. **Revocation of Suspension of Sentence.**--The trial judge shall possess the power, at anytime within the maximum time which was directed and ordered by the court for such suspension, after proceeding as provided in § 40-35-311, to revoke and annul such suspension....

40-35-311. **Procedure to Revoke Suspension of Sentence or Probation.**--(a) Whenever it shall come to the attention of the trial judge that any defendant who has been released upon suspension of sentence has been guilty of any breach of the laws of this state or who has violated the conditions of his probation, the trial judge shall have the power to cause to be issued under his hand a warrant for the arrest of such defendant as in any other

criminal case....

Proof of probation violation does not have to be established beyond a reasonable doubt, but only by a preponderance of the evidence. Tenn. Code Ann. § 40-35-311(d). A judgment of revocation cannot be disturbed unless the trial court abuses its discretionary authority. State v. Williamson, 619 S.W.2d 145, 147 (Tenn. Crim. App. 1981).

As indicated, the defendant does not claim any violation of his right to due process; instead, he simply asserts that the state made an accusation of further criminal misconduct and nothing more. It appears that there was much more than that; however, the record is simply inadequate to fully review the claims of the defendant. The trial on the second charge, which apparently served as a substitute for the probation revocation hearing on the first offense, has not been included in the record. The evidence contained therein was obviously the basis of the revocation.

It is the duty of the appellant to file an adequate record of the proceedings in order to convey a fair, accurate and complete account of what transpired with respect to the issue presented on appeal. State v. Hooper, 695 S.W.2d 530, 537 (Tenn. Crim. App. 1985); State v. Jones, 623 S.W.2d 129, 131 (Tenn. Crim. App. 1981). The failure to do so is fatal to the defendant's claim. Absent a transcript of the proceeding, this court must presume that the judgment of the trial court is supported by the evidence. State v. Baron, 659 S.W.2d 811,

815 (Tenn. Crim. App. 1983); State v. Taylor, 669 S.W.2d 694, 699 (Tenn. Crim. App. 1983). This court is, therefore, bound by the conclusive presumption that the trial court ruled correctly. Clark v. State, 214 Tenn. 555, 557, 381 S.W.2d 898, 899 (1964).

Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

Joseph M. Tipton, Judge

Robert E. Burch, Special Judge