

FILED

Nov. 21, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER SESSION, 1995

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| STATE OF TENNESSEE, |) | C.C.A. NO. 01C01-9502-CC-00049 |
| |) | |
| Appellee, |) | |
| |) | |
| VS. |) | CHEATHAM COUNTY |
| |) | |
| JERRY REECE, |) | HON. ROBERT E. BURCH |
| |) | JUDGE |
| |) | |
| Appellant. |) | (Probation Revocation) |

**ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE
CIRCUIT COURT OF CHEATHAM COUNTY**

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant appeals as of right from the judgment of the trial court which found him to be in violation of the terms of his probation. He argues that the trial court abused its discretion. We affirm the judgment of the trial court.

On August 21, 1991, the Defendant was found guilty, on pleas of nolo contendere, of one count of attempt to commit aggravated sexual battery and one count of attempted rape. For these crimes he was sentenced as a Range I standard offender to two consecutive terms of four years in the Department of Correction. One sentence was suspended upon service of six months in jail and the other sentence was suspended in its entirety. The balance of his sentences were to be served on supervised probation. On February 10, 1992, the Defendant was convicted, on his plea of guilty, of one count of Class E felony theft. For this crime, he was sentenced to three years on probation, concurrent with his prior sentences.

On December 9, 1993, a probation violation warrant was issued which alleged that the Defendant had violated the terms of his probation. The warrant was issued because the Defendant was charged with two new counts of sexual battery, and thus had violated his probation by failing to obey the law.

At the hearing on the probation violation warrant, the Defendant's probation officer testified that the only reason he issued the warrant was that the Defendant had been arrested and charged with the two new crimes. He had complied with all other terms of probation. The victim of one of the alleged sexual battery charges testified at the probation revocation hearing. The record reflects that the other alleged victim was out of state at the time.

The victim who testified was ten years old. The record reflects that the Defendant was about fifty-four years old. The Defendant and the victim were neighbors. The witness said that on the day the incident occurred, the Defendant came into her house when only she and her step-sister were present. He came in to get some water which was not unusual because the Defendant's water line was often broken. He got his water and left, but came back a short time later to use the phone. He told the girls that somebody had tried to shoot him, and he wanted to use the phone. They noticed that the Defendant had one long fingernail, and the other ones were short. The witness said she asked him if the one fingernail was long so he could pick his nose and he said, "no, it's so I can pick my girls." She testified that the Defendant then "went over and stuck his tongue out at Jessica in the middle of her legs."

The witness described how the Defendant then tried to pull her step-sister's shirt down and he said, "I see your oranges or oreos or something." The witness said the Defendant was talking about her step-sister's breasts. The witness said she tried to hold her step-sister's shirt up and pushed the Defendant back but she couldn't. She described how the Defendant put his hand on her step-sister's leg about halfway between her hip and her knees.

Also, during the time that the Defendant was there, the witness said that she had asked her step-sister for part of the blanket because she was cold and did not have on any pants. After she got under the blanket, the Defendant "yanked it off and we tried to hold it down but we couldn't. He got it and said you have pants on and then he slapped me in my face." She said the Defendant had pulled her tee shirt up and looked under it, but did not touch her in any way. She further testified that both she and her step-sister were afraid. The witness said that the entire incident lasted only a few minutes. The State rested its case, and the Defendant put on no proof.

The trial court concluded that the testimony did not support a finding that the Defendant committed sexual battery. The court found that the proof established that the Defendant attempted to commit aggravated sexual battery but that the victims were able to resist his efforts. The court found the Defendant's actions to be in violation of the terms of his probation and revoked his suspended sentence. The Defendant argues that the trial judge abused his discretion in finding a violation of the terms of his probation.

"In determining whether to revoke probation, the trial judge need not find a violation of the terms of the probation has occurred beyond a reasonable doubt. The evidence need only show the trial judge has exercised conscientious judgment in making the decision rather than acting arbitrarily." Stamps v. State, 614 S.W.2d 71, 73 (Tenn. Crim. App. 1980), perm. to appeal denied, id. (Tenn. 1981). "In reviewing the findings of the trial judge, the judgment of the trial court is given the weight of a jury verdict." Id.

Both the granting and revocation of a suspended sentence rest in the sound discretion of the trial judge. State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). The trial judge has a duty at probation revocation hearings to adduce sufficient evidence to allow him to make an intelligent decision. Id. The fact that the Defendant was not convicted of any of the offenses with which he was charged does not mandate dismissal of the probation violation warrant. State v. Delp, 614 S.W.2d 395, 396-97 (Tenn. Crim. App. 1980).

The judgment of the trial court will not be disturbed on appeal unless it appears that there has been an abuse of discretion. For an appellate court to be warranted in finding an abuse of discretion in a probation revocation case, it must be established 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. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991).

If the Defendant had been convicted of attempted aggravated sexual battery based on the testimony presented at the revocation hearing, we would likely conclude that the evidence was not sufficient to support a finding of guilt beyond a reasonable doubt. However, we cannot say 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.

When a trial judge grants a suspended sentence, that judge demonstrates a certain amount of confidence that the Defendant will lead a lawful life. When the Defendant's subsequent actions violate that confidence, certainly the trial judge again exercises discretion in whether or not the suspended sentence should be revoked. Davenport v. State, 214 Tenn. 468, 474, 381 S.W.2d 276, 279 (1964); Thompson v. State, 198 Tenn. 267, 269, 279 S.W.2d 261, 262 (1955). The Defendant's subsequent actions may indicate that the initial decision to suspend the sentence was a mistake. All probationers are deemed to be on notice that they are not to engage in unlawful activity or otherwise conduct themselves inconsistently with good citizenship if they are granted probation instead of incarceration. Roberts v. State, 546 S.W.2d 264, 265 (Tenn. Crim. App. 1976).

While the evidence contained in this record presents a close call, we are unable to conclude that there has been an abuse of discretion. The judge's findings carry the weight of a jury verdict. The record reflects that the trial judge exercised conscientious judgment in making his decision.

The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

HEWITT P. TOMLIN, JR., SENIOR JUDGE