

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1996 SESSION

FILED
April 16, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee)
)
 V.)
)
 BILLY CARTER,)
)
 Appellant)

NO. 03C01-9506-CR-00159
SULLIVAN COUNTY
HON. FRANK L. SLAUGHTER
JUDGE
(PROBATION REVOCATION)

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OPINION FILED: _____

JUDGMENT VACATED; REMANDED

William M. Barker, Judge

OPINION

The appellant, Billy Carter, appeals from the judgment of the Sullivan County Criminal Court revoking his probation. He argues that he was denied due process of law, that the trial court erred in allowing the testimony of a social worker, that the evidence was insufficient to revoke his probation, and that he was denied the effective assistance of counsel.

After reviewing the record on appeal, we conclude that the appellant was denied his right to due process of law, and accordingly, the judgment of the trial court is vacated and this cause is remanded for further proceedings.

On September 12, 1993, the appellant pled guilty in the Sullivan County Criminal Court to burglary and was sentenced to five (5) years in the Tennessee Department of Correction. After completing the Alternative Incarceration Unit Program (boot camp), the appellant was placed on probation pursuant to Tennessee Code Annotated section 40-20-206. Thereafter, on December 2, 1994, the appellant's probation officer, Elmer Sams, appeared before the Criminal Court of Sullivan County and made a sworn affidavit that the appellant had violated his probation order. Specifically, the affidavit alleged that the appellant had been arrested for burglary and theft in an amount over \$11,500 and burglary and theft in an amount over \$600. Based upon the affidavit of the probation officer, the trial court issued a warrant on December 2, 1994, for the arrest of the appellant. The return on the warrant, dated January 18, 1995, indicates that the appellant was not served and contains the notation, "Wife advises he is in the Blount County jail." The return on the probation violation warrant was made by Norman Wilson.

Although there is no indication in the record that the appellant was ever served with the warrant, the trial court on February 2, 1995, appointed counsel to represent the appellant.

Thereafter, on February 10, 1995, the appellant appeared in court with his appointed counsel and a hearing was conducted to determine whether the appellant

had violated condition (2) of his probation, which was the appellant's promise to "obey the laws of the United States, or any state in which I may be as well as any municipal ordinances."

The State presented two witnesses, Elizabeth Hill McKinney and Jimmy B. Phillips. The appellant presented no proof.

Ms. McKinney, a social worker for the Salvation Army in Johnson City, testified that the appellant had admitted his guilt to her in connection with the burglary and theft of the residence of Jimmy Phillips. Mr. Phillips testified that on or about September 14, 1994, his home had been burglarized and that approximately thirty-five to forty pistols, a knife collection, and \$3,500 in cash had been stolen. Mr. Phillips testified that the appellant rented an apartment from him and also had worked some for Phillips.

After hearing the testimony of two witnesses for the State, the trial court revoked the appellant's probation and directed that he be incarcerated for the remainder of his five-year sentence.

It is well settled that in the context of a probation revocation, due process requires (1) written notice of the claimed probation violation; (2) disclosure of the evidence against the defendant; (3) the opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses unless good cause for not allowing confrontation is found; (5) a neutral and detached hearing body; and (6) a written statement by the fact finder as to the evidence relied upon and the reasons for revoking probation. Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973); See also Pracy v. State, 525 S.W.2d 677, 680, 682 (Tenn. Crim. App. 1974). After a review of the record on appeal, we conclude that the trial court denied the appellant two of the aforementioned minimum requirements of due process of law in revoking his probation.

As stated above, before a defendant's probation may be revoked, he is entitled to have written notice of the claimed probation violation. The record in this case does not affirmatively show that the appellant was given such written notice. Although the trial court issued a warrant on December 2, 1994, charging the defendant with probation violation for being arrested for burglary and theft, the record fails to reflect that the appellant was served with the warrant providing him with written notice. Additionally, Gagnon requires that the fact finder make a written statement as to the evidence relied on and the reasons for revoking probation. In this case the only written statement entered by the trial court is a fill-in-the-blank form order which contains the bare conclusion that the appellant has violated the terms and conditions of his probation. Although the trial court acknowledged at the beginning of the hearing that a mere arrest would not be grounds for revocation of probation in this case, the reason given in the revocation order was that the appellant was "arrested and charged with burglary and theft over \$600, burglary and theft over \$11,500." Not only did the trial court in this case fail to set forth in writing the evidence relied upon and the reasons for the probation revocation, the conclusion contained in the trial court's order revoking probation could not serve as a valid basis for the revocation. Being arrested and charged with a crime is not a violation of a condition of the appellant's probation. The failure to obey the law is, however. Although the testimony of Elizabeth Hill McKinney that the appellant admitted his guilt for the burglary of the Phillips residence could justify a finding that the appellant had violated the terms and conditions of his probation, the trial court made no such finding.

In State v. Delp, 614 S.W.2d 395 (Tenn. Crim. App. 1980), our Court held that where a trial court substantially complies with the sixth requirement of Gagnon, the requirements of due process have been met. In Delp, the Court found substantial compliance with this requirement where the trial court failed to enter a written order stating the evidence relied upon for revoking probation but instead "made detailed

findings orally from the bench at the conclusion of the hearing.” Id. At 397. The Court found that because the oral findings summarized and “clearly set forth the reasons for the revocation of probation . . . ,” the probationer’s due process rights had not been violated. Unfortunately, not only did the trial court in this case fail to set forth in writing the evidence relied upon and reasons for the probation revocation, it failed to make any oral findings which would justify the revocation.

We also note that at least at one point during the revocation hearing, the trial judge made the comment that there could perhaps be a finding that the appellant’s probation could be revoked if it appeared that he had failed to report his arrest to the probation officer. Not only was there no evidence tending to establish the appellant’s failure to report his arrest, the trial court’s warrant and the affidavit in support of the warrant did not allege that the appellant had violated the conditions of his probation by failing to report his arrest. Obviously, due process considerations would not allow a probation revocation to be based upon a probation violation not charged in writing. See Gagnon.

The appellant next contends that the trial court erred when it allowed Elizabeth McKinney, a social worker for the Salvation Army in Johnson City, to testify that the appellant told her that he was guilty of the charges stemming from the burglary of the Phillips residence. The appellant insists that Rule 501 of the Tennessee Rules of Evidence provides that his communication with Ms. McKinney was privileged subject only to a waiver by him. We disagree.

Rule 501 provides that “[e]xcept as otherwise provided by constitution, statute, common law, or by these or other rules promulgated by the Tennessee Supreme Court, no person has a privilege to: (1) [r]efuse to be a witness; (2) [r]efuse to disclose any matter; (3) [r]efuse to produce any object or writing; or (4) [p]revent another from being a witness or disclosing any matter or producing any object or writing.” Tennessee Code Annotated section 63-23-107 provides a privilege for the

confidential relations and communications between a client and a certified master social worker or an independent practitioner of social work holding a valid certificate of registration. Elizabeth McKinney holds only a bachelor of science degree in social work. She therefore is not qualified to be, nor is she, a certified master social worker or an independent practitioner of social work pursuant to Tennessee Code Annotated sections 63-23-101 and 103. Therefore, we agree with the trial court that there was no privilege which prevented her from testifying regarding the appellant's statements to her concerning the burglary of the residence of Mr. Phillips.

Obviously, we cannot review the sufficiency of the evidence in support of the revocation in the absence of factual findings by the trial court. Additionally, we are likewise unable to address the appellant's claim of ineffective assistance of counsel in the absence of factual findings in support of the revocation.

Although we conclude that there was sufficient evidence from which the trial court *might* have found that the appellant violated the conditions of his probation, the trial court's failure to make findings of fact in accordance with the principles of due process announced in Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Practy v. State, 525 S.W.2d 677 (Tenn. Crim. App. 1974), coupled with the records' failure to reflect that the appellant was given written notice of the claimed probation violation, requires us to remand this case to the trial court for further proceedings which shall be conducted in accordance with the due process requirements in Gagnon.

Accordingly, the order of probation revocation entered by the trial court in this case is vacated, and the case is remanded to the trial court for further proceedings consistent with this opinion.

WILLIAM M. BARKER, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

DAVID G. HAYES, JUDGE