

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1997 SESSION

<p><b>FILED</b></p> <p>October 16, 1997</p> <p>Cecil W. Crowson Appellate Court Clerk</p>
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STATE OF TENNESSEE, )  
 )  
 Appellee, )  
 )  
 VS. )  
 )  
 TONEY MOORE, )  
 )  
 Appellant. )

C.C.A. No. 01C01-9609-CC-00403

WILLIAMSON COUNTY

HON. DONALD P. HARRIS,  
JUDGE

(Probation Revocation)

FOR THE APPELLANT:

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OPINION FILED: \_\_\_\_\_

AFFIRMED

**JOE G. RILEY,**  
JUDGE

## **OPINION**

The appellant, Toney Moore, appeals the Williamson County Criminal Court's order revoking his probation and requiring the sentence to be served consecutively to a new conviction. He presents two issues for our review: (1) whether the trial court abused its discretion in failing to reinstate his probation; and (2) whether the trial court erred in requiring the original sentence to be served consecutively to the conviction triggering the probation violation. The judgment of the trial court is AFFIRMED.

## **PROCEDURAL HISTORY**

The appellant pled guilty in August 1994 to two (2) unrelated and separate indictments charging various offenses. He was ultimately placed on supervised probation. Appellant's original probation violation warrant issued on March 4, 1996, did not include the second case in which the appellant received probation; however, it was referred to at the hearing. After the hearing revoking appellant's probation, the original warrant was amended to include the second case. All parties agreed that the evidence from the probation violation hearing based on the original warrant would apply to the second case. The trial court issued an amended order, noted the stipulation, and revoked the appellant's probation in both cases. The appellant then filed a motion to consolidate the two cases which was granted by the trial court. This Court issued an order consolidating the cases pursuant to Tenn. R. App. P. 17; therefore, both cases are properly before this court for review.

#### **A. Case No. I-494-113**

On August 8, 1994, the appellant pled guilty to criminal impersonation, driving on a revoked license (5th offense), and unauthorized possession of a vehicle. For criminal impersonation he received a suspended sentence of six (6) months and supervised probation. For driving on a revoked license he received six (6) months suspended with supervised probation for (11) months and twenty-nine (29) days. For unauthorized possession of a vehicle he received eleven (11) months and twenty-nine (29) days, all of which was suspended and supervised probation. The judgments indicate the sentences were to be served concurrently with each other and consecutively to the sentences imposed in Case No. I-494-114.

#### **B. Case No. I-494-114**

In the second case, the appellant pled guilty on the same date to assault, evading arrest, and escape. He received a suspended six (6) month sentence for evading arrest. For the assault he received a sentence of eleven (11) months and twenty-nine (29) days in confinement. The assault and evading arrest sentences were to be served consecutively to the two (2) year sentence imposed for escape and the sentences in Case No. I-494-113, but concurrently with each other. The appellant was released on supervised probation on January 27, 1995.

#### **C.**

In March 1996, a jury found the appellant guilty of driving while being declared an Habitual Motor Vehicle Offender (HMVO), a Class E felony. He was sentenced as a Range II, multiple offender, to four (4) years. A probation violation warrant was issued based on this offense. A hearing was held on the probation violation warrant in June

1996.

Even though he was convicted of the HMVO violation, the appellant testified and denied that he had done any driving. He explained that he arranged for a friend, Theresa Cotham, to drive him to Nashville that day. On the return trip home the two experienced a flat tire. He indicated that Cotham got a ride to get help and a jack to fix the tire, but that he stayed with the car. Shortly thereafter, a police officer approached him and asked if he was with the disabled car. After receiving an affirmative response, the officer assisted the appellant. The officer then asked for the appellant's driver's license which resulted in his arrest.

Theresa Cotham also testified at the hearing. She confirmed the appellant's testimony and stated that she drove him to Nashville and that at no time in her presence did the appellant operate any automobile.

Sheila Taylor, appellant's probation officer, also testified on his behalf. With the exception of constantly changing jobs and the HMVO conviction, she stated that appellant had complied with all other conditions of his probation.

Outside of the presentence report, the state did not offer any proof as it relied on the HMVO conviction.

### **ABUSE OF DISCRETION**

Appellant argues the trial court abused its discretion in failing to reinstate his probation. Specifically, he contends the trial court erred in relying on the Habitual Motor Vehicle Offender (HMVO) conviction since the state failed to introduce a certified copy of the judgment.

A trial court may revoke probation and order the imposition of the original sentence upon a finding by a preponderance of the evidence that the person has violated a condition of probation. Tenn. Code Ann. § 40-35-310, 311. The decision to revoke probation rests within the sound discretion of the trial court. State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). Probation revocations are subject to an

abuse of discretion, rather than a *de novo* standard of review. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). An abuse of discretion is shown if the record is devoid of substantial evidence to support the conclusion that a violation of probation has occurred. Id. The evidence at the revocation hearing need only show that the trial court exercised a conscientious and intelligent judgment in making its decision. State v. Leach, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995).

The evidence in this case fully supports the trial court's order of revocation. At the hearing, the HMVO conviction triggering the probation warrant was established without dispute. Preceding the hearing the trial judge asked defense counsel about the HMVO offense and counsel replied, "that was a trial we had in the Circuit Court in which the jury found [the defendant] guilty of the offense." Without objection from the defense, the district attorney submitted a certified copy of the trial court order indicating guilt and introduced the presentence report, evidencing the HMVO arrest and conviction. The appellant reviewed the presentence report on cross-examination and conceded to its content. Noting the HMVO conviction and the appellant's lengthy history of driving offenses, the trial judge revoked appellant's probation. The trial court properly relied upon the conviction as a basis for revocation.

### **CONSECUTIVE SENTENCING**

Appellant argues the trial court erred in requiring his original two (2) year sentence to be served consecutively to the four (4) year sentence imposed for the HMVO conviction.

Rule 32(c)(2) of Tennessee Rules of Criminal Procedure provides that a trial court may require a sentence to run consecutively to any prior sentence not fully served. Trial courts also have the express statutory authority to revoke a suspended sentence and order it to be served consecutively to a subsequent sentence. Tenn. Code Ann. § 40-35-310; see also Kenny DeWayne Covington v. State, C.C.A. No. 01C01-9401-CR-00010 (Tenn. Crim. App. filed October 6, 1994, at Nashville) *perm. to appeal denied*

(Tenn. 1995). This issue is without merit.

The judgment of the trial court is AFFIRMED.

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JOE G. RILEY, JUDGE

CONCUR:

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J. CURWOOD WITT, JUDGE

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JOE H. WALKER, III, SPECIAL JUDGE