IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1997 SESSION

FILED

May 1, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	*	C.C.A. No. 01C01-9609-CC-00411
Appellee,	*	GILES COUNTY
VS.	*	Hon. William B. Cain, Judge
MICHAEL HARLAN BYRD,	*	(Revocation of Community Corrections)
Appellant.	*	

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OPINION FILED:__________________

REVERSED AND REMANDED

GARY R. WADE, JUDGE

OPINION

The defendant, Michael Harlan Byrd, entered a best interest plea of no contest to one count of attempted aggravated child abuse, a Class C felony. The trial court imposed a Range I, six-year sentence to be served on Community Corrections. On May 28, 1996, the trial court revoked the community corrections sentence and ordered the defendant to jail for failing to maintain employment and for failing to report to his community corrections officer; however, threats made by the defendant against an assistant district attorney were cited as the basis for the revocation.

In this appeal of right, the defendant claims that the trial court abused its discretion by revoking the placement into the community corrections program. He also challenges the admission into evidence of the tape-recorded conversation with another inmate in which the threatening statements were made against the assistant district attorney on three grounds:

(1) whether the defendant's speech is protected by the First Amendment of the United States Constitution;

(2) whether the defendant's speech was obtained in violation of his Sixth Amendment right to counsel; and

(3) whether the state laid a proper foundation for admission of the audio tape recording where no witness identified the defendant's voice as the speaker.

We reverse the judgment of the trial court, reinstate the defendant on the community corrections program, and remand the cause for continuing supervision under the prescribed terms.

On March 25, 1996, Glenn Smith, a community corrections officer, filed a revocation warrant alleging that the defendant had violated certain of the

program's conditions: (1) failure to report, (2) failure to do community service work, and (3) failure to maintain employment. The state later submitted as an additional ground to revoke that the defendant had made threats against the assistant district attorney and his family. At the revocation hearing, the state maintained that a psychological evaluation of the defendant also qualified as a basis for revocation.

At the revocation hearing, Cathy Hays, the manager of the community corrections program who performed the incoming interview with the defendant, testified that she informed the defendant of the requirements of the program. Afterward, the defendant signed a behavioral contract which was not made a part of this record. Ms. Hays recalled arranging a psychological evaluation of the defendant pursuant to an order entered by the trial court.

Smith, the defendant's community corrections officer, testified that the defendant was required to report twice a week for the first ninety days of the program. He recalled that the defendant failed to report on March 19th and 21st. Smith claimed that the defendant had not performed community service as required and had failed to maintain employment. He acknowledged, however, that on the day of his arrest, the defendant presented Smith with a report showing he had performed seventeen hours of community service at a municipal recreation department. Smith explained to the trial court that the recreation department had not been pre-approved as an appropriate community service organization.

The defendant was incarcerated until the revocation hearing. Robert Cardin, a jail inmate who had previously been convicted of two armed robberies and various drug-related offenses, claimed at the hearing that the defendant, while in jail awaiting hearing, described high-powered rifles and "what he would like to have

done to Mr. Dunavant." Cardin had told a cousin of the conversation who later informed authorities. Cardin was then asked by law enforcement officials to secretly tape record any similar remarks made by the defendant.

Mike Chapman, Chief Investigator for the Giles County Sheriff's Department, arranged for Cardin to make the recording. The tape, which was played at the revocation hearing, included the following exchanges:

> Defendant: [My father] flat out told Eddie [Bass, the sheriff] ... where you live I know and I can knock your f------ head off from a long ways off. That is what he told him. Because he says, where you live at and them hills the way they are, a man with a good rifle would give you a hard time. That is what he said to Eddie. And Eddie just up and let him sign the property bond.
> Cardin: Because your daddy threatened him?
> Defendant: And Eddie knows my daddy would do it.
> Cardin: What, to kill him?
> Defendant: Hell, yeah.
> Cardin: [W]ell, how do you know?
> Defendant: And that is why Eddie let him sign the property bond.
> Cardin: This is what I want to ask you: Do you know where Mr. Dunavant lives at?
> Defendant: I know where he lives at.
> Cardin: You haven't been on his property?
> Defendant: I know right where he lives at. I ain't been on his property, but I know right where he lives.
> Cardin: You glided across his property. They won't issue you no bond.
> Defendant: There ain't no reason why they shouldn't ....
> Cardin: Well, why won't he give you one?
> Defendant: Because he don't like me. Because the man is afraid of me.
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> ***
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> Cardin: Why would he be scared of you?
> Defendant: Because he knows what I am capable of doing and he is scared that I might do something....
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> ***
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> Defendant: A man can always obtain a rifle but the thing of it is, if the man holding the rifle is good enough to do the job.
> Cardin: Could you do the job?
> Defendant: I am capable of it. I can sit on the hill. But it is all a combination of skill.
>
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> Defendant: Not very many men could make a shot through the back door.

Cardin: Who do you think could make that shot like that?
Defendant: Not many men around here.
Cardin: You?
Defendant: But, again, I ain't in the position to do it.
Cardin: But if you got out there ... but you couldn't get out to do nothing. I would have to have some help, man.

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Cardin: But you said the other day ... you knowed all about Mr. Dunavant's property. You know how to get over his land. You see him when he leaves, when he comes home, and all of this. ...
Defendant: It is not hard for a person to find out things. Just in the course of driving by, a man sees a lot if he pays attention.
Cardin: Well, you could see why he wouldn't want you to get out on bond....
Defendant: Who said I will do something? I have no interest in doing anything to him. If I wanted to do something to him, I could have done it a long time ago. I ain't interested in messing with nobody. God is going to have his way with everybody....

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Defendant: I don't like Mr. Dunavant because when my ex-wife's father come and hit me in the head with a (inaudible), he like to have kill me.
Cardin: That is why you want to kill him?
Defendant: And I (inaudible) him. And I tried to defend myself to keep from getting hurt. They tried to send me to prison.

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Cardin: But still, Mike, that ain't no reason for you to want to kill him.
Defendant: I don't want to kill him. God will ---
Cardin: God ain't got nothing to be do with this, though?
Defendant: God will have his way with all. I just want to go away where he don't know where, ... a long, long ways.

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Cardin: But you know something, there is no way that I actually think that a man could get rid of Mr. Dunavant without gettin caught unless you dropped some explosives from a hang glider?
Defendant: I wouldn't.
Cardin: What?
Defendant: There is always a way. You know, where there is a will there is a way. Nothing is impossible.
Cardin: It would be impossible to kill a [g]od damn D.A.
Defendant: Think about it.
Cardin: Think about what?
Defendant: How many people around here has he f------ over.
Cardin: Well, maybe he have.
Defendant: Now just what are they going to do, arrest half of the [g]od damn city.

Cardin: If you killed him, shit, they would arrest every son of a bitch until they find .... Tell me what you are going to do?
Defendant: You just -- you can't arrest a man and charge him with something unless you have got concrete evidence.
Cardin: Do you think they would have --
Defendant: He has got a lot of enemies out there.
Cardin: Maybe he have.
Defendant: So who know who may have done it....
Cardin: They would point their finger at you because you are the onlyest one who has been across his property. ... So why do you think they wouldn't come after you....
Defendant: Because I ain't going to be there and because I will have witnesses that know where I am at.

(Emphasis added).

Pat Wiser, program coordinator for the City of Pulaski Parks and Recreation Department, testified that the defendant had performed seventeen hours of community service through her department, during which he had photographed a garden show, performed an errand, and completed a photographic layout. Ms. Wiser acknowledged, however, that she did not verify in advance that the tasks assigned to the defendant would qualify as community service with the community corrections program.

Scott Riley, a general foreman with Asplundh Tree Expert Company, testified that the defendant worked for the company on February 13, 1996, under another foreman. He recalled that the defendant had been transferred from Pulaski to Lewisburg temporarily to fill in for an injured worker. When the worker returned, the defendant was offered a position in Franklin County, two counties away, as a trimmer making less money. The defendant was laid off February 23, 1996. Jim McCaslin, an investigator with the public defender's office, testified that after the layoff, the defendant posted flyers offering roadside assistance at a rest stop and

submitted a resume and application with Ganton Technology and Oakwood Homes in late March of 1996.

Louise Elliot, a friend to the defendant's grandmother, worked in the building in which the community corrections program was located. She recalled that the defendant spoke with her when he reported and that Smith was not there on several of his visits. She specifically remembered a day when the defendant arrived before Smith and left rather than wait because of a job interview. She recalled that when the defendant returned later in the day, Smith had already closed the office.

Gregory Gilbert testified that on both March 19 and 21, 1996, he was with the defendant when he reported to his corrections officer at the community corrections building. He recalled that Smith was not there at 9:00 A.M. on the 19th so the defendant drove to a job interview. Upon their return to the community corrections office later that day, the defendant learned that Smith had already left. Gilbert, as co-director of the recreation department, confirmed that the defendant had performed seventeen hours of community service.

Eddie Bass, Sheriff of Giles County, testified that he was unaware of any threats being made toward him by the defendant's father. While acknowledging that the defendant made bail, the sheriff denied that it was due to the threats made by anyone.

In revoking placement to the program, the trial court ruled as follows:

> I think, in this type of proceeding, we are not dealing with a beyond a reasonable doubt [standard]. We are dealing with a preponderance of the evidence standard. I'm going to allow the ... psychological report[] into evidence at this time. <u>Though it, standing by itself, is not the main problem in this case.</u>

> The three items first presented by the Community Corrections officer in the warrant were failure to report ... to some degree, that is sustained by the evidence, but not sufficiently to cause this court to revoke his Community Corrections.
>
> Failure to do community service work ... I don't think that is sustained by the proof.
>
> Failure to maintain employment ... is something that is marginal.
>
> In each of these, [the defendant] has some degree of problem. But those, standing alone, do not form a basis to revoke Community Corrections. The problem from the start, has been item four ... the tape recording of the conversation between [the defendant] and ... Card[i]n.
>
> And ... the credibility of Mr. Card[i]n, with the Court, is nil. But it isn't the credibility of Mr. Card[i]n that is the problem. It's what is on the tape.
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> There is simply no explanation that is feasible for his conversation in which the potential threat to Mr. Dunavant is involved.
>
> We can say that Mr. Card[i]n, who is not dumb, instigated the conversation for the very purpose of drawing out [the defendant], and he succeeded in doing it. [The defendant's] remarks can be interpreted as being threats to the life of Richard Dunavant. They can be interpreted almost on the other hand as though he knew he were being tape recorded. Read it again and again and again, and you can't help but come to that same conclusion.
>
> But the preponderance of the evidence establishes grounds number four as a result of the tape recording with Mr. Card[i]n. Community Corrections is therefore revoked.

(Emphasis added).

Trial courts have authority to revoke a community corrections sentence upon a finding that the defendant has violated the conditions of the sentence. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991); Tenn. Code Ann. § 40-35-311.

Revocation may also be occur "at any time due to the conduct of the defendant." Tenn. Code Ann. § 40-36-106(e)(4) (emphasis added). Due process requires advance written notice to the defendant of the grounds upon which revocation is based. Gagnon v. Scarpelli, 411 U.S. 778, 786, 93 S. Ct. 1756, 1761 (1973). The burden then falls on the state to prove a violation by a preponderance of the evidence. Tenn. Code Ann. § 40-35-311(d); Harkins, 811 S.W.2d at 82. On appeal, a decision to revoke the defendant's release on community corrections should not be disturbed unless there was an abuse of discretion. Id. To find an abuse of discretion, it must appear that the record contains "no substantial evidence to support the conclusion of the trial judge that a violation of the conditions ... occurred." Id.

Here, the state provided no advance notice to the defendant that it intended to use the psychological report as a ground for revocation. Thus, the report should not have been admitted or even considered by the trial court. The report, which concluded that the defendant would not benefit from alternative sentencing and would have difficulty conforming to the requirements of release to the community, was clearly prejudicial. Yet, while the report was admitted into evidence and may have played a role in the revocation decision, it was described by the trial court as "not the main problem." Any reliance on the report, absent notice to the defendant that the report was a basis for revocation, would have violated due process principles. Because, however, that ground was not a basis for revocation, the error was clearly harmless.

Secondly, the trial court found that the defendant had performed community service. Thus, this ground was clearly rejected as a basis for revocation. In our view, the record supports the trial court's determination that the defendant

had, in fact, met the obligations of his conditional sentence by performing some seventeen hours of service for the recreation department.

The trial court also found that the evidence did not warrant revocation based upon the failure to report. The state's proof consisted of Smith's testimony that the defendant failed to report on two occasions. The defendant submitted the testimony of two witnesses who established the program officer was absent on those occasions. The trial judge indicated that he would not revoke on the failure to report where there was evidence the defendant was making an effort to comply. In our view, the evidence does not preponderate against the ruling that this ground for revocation, standing alone, did not warrant revocation.

The trial court characterized the evidence suggesting that the defendant had failed to maintain gainful employment as "marginal." While there was some evidence to the contrary, the trial judge properly ruled, in our view, that this ground, by itself, was an insufficient basis to revoke. Certainly, there was evidence in the record to support that conclusion.

The fourth ground alleged as a basis for the revocation was the taped conversation relative to Assistant District Attorney Richard Dunavant. The record indicates that the content of the tape was the basis for revocation. The defendant complains that his remarks are protected by the First Amendment; that the taped conversation was obtained in violation of his Sixth Amendment right to counsel; and that the defendant's voice was not properly authenticated prior to admission into evidence of the taped conversation.

Initially, constitutional questions should be addressed only when absolutely necessary. State ex rel. West v. Kivett, 308 S.W.2d 833, 835 (Tenn. 1957). While the defendant has raised a First Amendment challenge, it is our view that the questions presented can be more appropriately resolved under the pertinent statutes and the decisions of our state courts.

In this instance, the defendant's remarks do not constitute a violation of the terms of the program or otherwise qualify as "conduct" which would require termination of his conditional release. See Tenn. Code Ann. § 40-36-106(e)(4). Community corrections revocation, like probation revocation, is commonly predicated upon a showing of a violation of the conditions of the program. See, e.g., State v. James Dante, C.C.A. No. 02C01-9705-CC-00184 (Tenn. Crim. App., at Jackson, Dec. 15, 1997); see also Tenn. Code Ann. § 40-35-311(a). In this case, none of the specific conditions of the community corrections placement prohibited the defendant from expressing his views on the assistant district attorney. While the behavioral contract was not included in the record, we are able to glean from our review the specific terms of the community corrections sentence. The defendant was restricted by an evening curfew, required to report twice weekly, maintain employment, and perform 100 hours of community service. The judgment form restricted the defendant from contact with the child's mother.

The trial court also imposed additional conditions:

> [H]e will be committed, under 40-36-106(c), to Community Corrections under the strongest possible psychological treatment conditions available. He will have no alternative but to do exactly as he is instructed; to take whatever prescriptive medication psychological treatment may require in order to face his problems, to do whatever his counselors instruct him, to stay away from the child, and work with the counselor in an effort to rehabilitate.

The specific remarks made by the defendant in reference to the assistant district attorney are cause for serious concern because they reflect a lack of remorse for his crimes and raise doubts as to whether the defendant possesses rehabilitative qualities. It is our view, however, that his statements do not constitute a breach of specific conditions of the community corrections program.

Next, we must determine whether the defendant's remarks qualify as "conduct" within the meaning of the statute that would justify revocation of his placement in the program. The statute does not define the term. See Tenn. Code Ann. § 40-36-106(e)(4). In the context of parole and probation, a "breach of the laws" is the kind of conduct that may be a ground for revocation. Tenn. Code Ann. § 40-35-311(a); see Tenn. Code Ann. § 39-11-102(a) (for conduct to constitute an unlawful act, it must be "defined as an offense by statute ...."). "Conduct inconsistent with good citizenship" may also be a basis for revocation. Finley v. State, 378 S.W.2d 169 (Tenn. 1964). Yet, "inconsistent with good citizenship" has been traditionally defined as criminal conduct which does not necessarily result in a conviction. Galyon v. State, 226 S.W.2d 270 (Tenn. 1949); see also Ray v. State, 576 S.W.2d 598 (Tenn. Crim. App. 1978) (consorting with gamblers and bribing a police officer is conduct inconsistent with good citizenship). In summary, our research suggests that, in order to prevail in a revocation proceeding on an allegation of misconduct, the state must show by a preponderance of the evidence that the defendant has violated the laws of this state; it is irrelevant whether the defendant is prosecuted or convicted. See Harkins, 811 S.W.2d at 82.

No section of the criminal code prohibited the remarks made by the defendant about the assistant district attorney. In our judgment, the conversation with jail inmate Cardin does not rise to the level of "conduct" and, in consequence,

cannot form the basis of a revocation of the defendant's community corrections sentence. Because the statements by the defendant were not proscribed, the trial court had no basis to revoke the community corrections sentence.

Having so held, we will nonetheless address the defendant's remaining claims. He argues that the act of recording his statements inside the prison was a violation of his Sixth Amendment right to counsel. See Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964). The state responds that the defendant failed to satisfy the three part test set forth under Massiah: (1) that adversary proceedings had commenced; (2) that the informant was a government agent; and (3) that the agent interrogated the defendant as described in Massiah. State v. Bush, 942 S.W.2d 489, 513 (Tenn. 1996).

The Sixth Amendment right to counsel attaches to all critical stages of a prosecution. Hartman v. State, 896 S.W.2d 94, 99 (Tenn. 1995); Brewer v. Williams, 430 U.S. 387, 401, 97 S. Ct. 1232, 1240 (1977). As a general rule, principles applied to revocation of parole or probation may also be applied to other modes of alternative sentencing such as community corrections. See Harkins, 811 S.W.2d at 83; Gagnon v. Scarpelli, 411 U.S. at 782, 93 S. Ct. 1759. The U.S. Supreme Court has held that parole revocation is not a component of a criminal prosecution:

> Parole arises after the end of the criminal prosecution, including imposition of a sentence. . . . Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.

Morrissey v. Brewer, 408 U.S. 471, 480, 92 S. Ct. 2593, 2600 (1972). Probation revocation, where no resentencing occurs, is generally not considered to be a stage of a criminal prosecution where the right to counsel attaches:

> We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis .... Although ... counsel will probably be ... constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness --the touchstone of due process-- will require [appointed counsel].

Gagnon v. Scarpelli, 411 U.S. at 790, 93 S. Ct. at 1763. In Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254 (1967), the Supreme Court held, where sentencing had not yet occurred, a probationer was entitled to be represented by counsel at a revocation hearing because sentencing is a critical stage of a criminal proceeding.[1]

In Tennessee, the Community Corrections Act provides for resentencing and enhanced sentencing after revocation:

> [T]he court may resentence the defendant to any appropriate sentencing alternative, including incarceration, for any period of time up to the maximum sentence provided for the offense committed, less any time actually served in any community-based alternative to incarceration.

Tenn. Code Ann. § 40-36-106(e)(4). A defendant sentenced to community corrections "has no legitimate expectation of finality in the severity of the sentence, but is placed on notice ... that upon revocation of the sentence due to the conduct of the defendant, a greater sentence may be imposed." State v. Griffith, 787 S.W.2d 340, 342 (Tenn. 1990). If the court decides to resentence the defendant to a longer term of incarceration after revocation of community corrections, a sentencing hearing is required. State v. Ervin, 939 S.W.2d 581, 583 (Tenn. Crim. App. 1996).

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[1]States adopting this rule include: Alabama, Arizona, California, Colorado, Florida, Louisiana, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington, West Virginia, and Wisconsin.

A statutory right to counsel is afforded to persons faced with either probation or community corrections revocation. See Tenn. Code Ann. § 40-35-311(b); Sup. Ct. R. 13, §1(d)(4). Had the trial court ordered a sentencing hearing following community corrections revocation in order to render a harsher sentence than that originally imposed, the Sixth Amendment right to counsel would be implicated because a sentencing hearing is a critical stage of a criminal proceeding. See Mempa, 389 U.S. at 134, 88 S. Ct. at 254 (citing Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252 (1948)). That is not, however, the case here. Community corrections status was simply revoked and the defendant incarcerated for the original term less credit for time served on the program. Although we do not dispute that the defendant enjoyed a statutory right to be represented by counsel during the actual hearing, we do not believe that the Sixth Amendment right to counsel was implicated.

The state contends that this ground for revocation stands regardless of admission of the taped conversation in evidence because Cardin testified to admissions made by the defendant prior to the taped conversation, such as "[O]nce he was on Mr. Dunavant's property. ... And he also said something about Mr. Dunavant's wife was there in the window and the onliest reason he didn't shoot, because it was not Mr. Dunavant." The trial judge, however, found the credibility of Cardin as a witness to be "nil." Certainly, the trial court was in a better position, having seen and heard this witness, to accept or reject the truthfulness of the testimony. We yield to the trial court's assessment of the unrecorded observations of this witness.

Finally, the defendant contends that Rule 901, Tenn. R. Evid., requires authentication of the voice on the tape as that of the defendant prior to admission in

evidence. The state argues that the defendant has waived this argument for failure to object at the revocation hearing.

In general, before this kind of evidence is admissible it must be properly authenticated or identified. Tenn. R. Evid. 901. This condition precedent to admissibility is satisfied when the trier of fact has sufficient proof to determine that the evidence is what its proponent claims. Id. In the case of tape recordings, Rule 901 provides that the speaker's voice may be identified "by opinion based upon hearing the voice at any time and connecting it with the alleged speaker." Id. Yet strict rules of evidence do not apply at community corrections or probation revocation hearings. See Barker v. State, 483 S.W.2d 586 (Tenn. Crim. App. 1972); State v. Allen, 752 S.W.2d 515 (Tenn. Crim. App. 1988). Furthermore, no objection was made by the defendant at the revocation hearing. As a result, the issue has been waived by the defendant in this case. Tenn. R. Evid. 103(1); see State v. Walker, 910 S.W.2d 381, 399 (Tenn. 1995) (Anderson, J., concurring)(lack of objection to admission of tape recording precludes review on appeal unless plain error rule applies).

In summary, the trial court should not have considered the psychological report. The tape recorded conversation did not constitute a violation of a condition of the program or conduct that could support a revocation. The trial court determined that failure to maintain employment and the failure to report were insufficient grounds to revoke. In view of all this, the judgment revoking community corrections must be reversed. This cause is remanded to the trial court for placement in the program under such additional terms and conditions as the trial court may require. See Tenn. Code Ann. § 40-36-106(e)(2).

Gary R. Wade, Judge

CONCUR:

Thomas T. Woodall, Judge

Curwood Witt, Judge