

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 24, 2024

STATE OF TENNESSEE v. LONNIE K. CODY

**Appeal from the Criminal Court for Sullivan County
No. S70695 James F. Goodwin, Jr., Judge**

No. E2023-01535-CCA-R3-CD

Defendant, Lonnie K. Cody, appeals the trial court's order revoking his probationary sentence for aggravated burglary, vandalism of \$1,000 or less, and unauthorized use of a motor vehicle. Following our review of the entire record and the briefs of the parties, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JILL BARTEE AYERS, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

Jennifer L. Burch, Qualified Law Student, and Mitchell A. Raines, Assistant Public Defender – Appellate Division (on appeal), and Andrew Vodden, Assistant Public Defender (at revocation), for the appellant, Lonnie K. Cody.

Jonathan Skrmetti, Attorney General and Reporter; Johnny Cerisano, Assistant Attorney General; Barry P. Staubus, District Attorney General; and Mike Filetti, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

On February 6, 2019, Defendant was indicted for aggravated burglary, vandalism of \$1,000 or less, and unauthorized use of a motor vehicle. On October 16, 2019, Defendant pled guilty as charged in the indictment. As part of the plea agreement, Defendant was sentenced to six years, suspended to supervised probation, and he was ordered to perform community service work and pay \$200 in court fines. Defendant was also ordered to undergo an alcohol and drug assessment and to follow the recommended

FILED

10/10/2024

Clerk of the
Appellate Courts

treatment. Additionally, he was ordered not to use or possess alcohol or any “illegal/non-prescription drugs” and to submit to random drug screens.

According to the “History of Supervision” section of the probation violation report, Defendant reported as instructed for approximately fourteen months until his arrest for a domestic violence charge on December 29, 2020, which resulted in the issuance of his first probation violation warrant. On May 26, 2021, Defendant’s probation was revoked, and he was then reinstated. Defendant was subsequently charged with public intoxication, and the report reflects that on March 18, 2022, a social worker referred Defendant to the Day Reporting Center (“DRC”).¹ He reported to the DRC for intake on April 4, 2022. Defendant failed a drug screen for alcohol on May 9, 2022, and stopped reporting to the DRC the following day.

The record reflects that Defendant served an eleven-month, twenty-nine-day sentence, from June 23, 2022, until June 22, 2023, for a domestic assault conviction. The technical record also reflects that on October 3, 2022, the trial court again revoked Defendant’s probation and reinstated him after he had served one year in jail “due to absconding.” We note that during that time, Defendant was serving his sentence for domestic assault.

After his release from jail on June 26, 2023, from serving his domestic assault sentence, Defendant failed to report to the DRC for intake, and he failed to contact his probation officer. On July 19, 2023, Defendant was arrested in Sullivan County for public intoxication. On July 21, 2023, Defendant’s probation officer attempted a home visit to the address listed on the “CLEAR report.” After receiving no response at the home, the probation officer left a tag on the door directing Defendant to contact him. Defendant never contacted his probation officer. Thus, on July 31, 2023, Defendant’s probation officer submitted to the trial court a probation violation report and an affidavit for violation of probation. The affidavit alleged that Defendant failed to comply with the conditions of probation by being arrested for public intoxication, failing to report to the DRC or complete the program, missing a home visit, and failing to contact his probation officer, in violation of probationary rules one, five, six, and ten. The “absconder” box was checked on the probation violation report, and the “recommendation” section noted that Defendant had absconded while on probation. An arrest warrant was issued for Defendant that same day, and he was taken into custody on August 11, 2023.

At the probation revocation hearing, Defendant pled guilty to the “facts of the [p]robation [v]iolation” as set forth in the probation violation warrant. However, defense

¹ The record does not include a second probation violation warrant.

counsel argued that “under *State v. Munn*,² and because of the [v]iolation of [a]bsconding without specifically noted in here, we believe that this should be a technical violation of probation.” The State responded that absconding was “alluded to . . . pretty heavily,” and the trial court said: “I mean, I’m going to take it when it says the officer has not been contacted by the offender that he absconded.” The trial court overruled Defendant’s motion noting that Defendant could preserve the issue for appeal.

At the disposition hearing, Defendant agreed that this was his third³ probation violation and that his first one also involved a “DRC [v]iolation.” He admitted that he was an alcoholic and that he was drinking at the time that he failed to report to the DRC for intake. Defendant testified as to how alcoholism had impacted his life, that he began drinking at the age of fifteen, and that much of his criminal history was due to “drinking or something to that nature[.]” He said, “I can’t really think of a time that I haven’t broken the law and haven’t been under the influence.”

Defendant claimed that he was “unaware” he was to “report back” to the DRC following his release from jail for the domestic assault sentence. He said, “when I got out of jail I mean before I even made it home, I had a beer in my hand because I just kind of gave up[.]” Defendant claimed that he thought the trial court was not going to help him keep his job, and “so rather than wait and be patient,” he drank and “gave up rather than try to have faith in the [c]ourt to, you know, help me get help, plus be able to keep my job or what not, that weekend I started drinking.” Defendant also testified that he failed to report to the DRC because he had been drinking and missed his ride to the center from “Net Trans.”

Defendant asserted that he wanted to be sober and needed structure and accountability for a lengthy period, which the DRC did not provide. He said that if the court released him to probation, he had been accepted into the Buffalo Valley Treatment Program and that a space was available for him on October 18, 2023. He planned to reside in a sober living house after completing the program. On cross-examination, Defendant admitted that he had violated probation on other charges in the past. He also has several past failures to appear.

On redirect examination, Defendant made the following statement concerning whether he was aware that he was supposed to report to the DRC:

² *State v. Munn*, No. W2022-00675-CCA-R3-CD, 2023 WL 2607676, at *4 (Tenn. Crim. App. Mar. 23, 2023) (the trial court erred in revoking defendant’s probation when absconding was not alleged in the Petition for Revocation of Suspension of Sentence), *no perm. app. filed*.

³ During direct examination by defense counsel, Defendant agreed that this was his second probation violation. However, during cross-examination by the State, he agreed that this was his third probation violation. The History of Supervision section of the violation report also indicated that this was Defendant’s third violation.

I was aware after I had started drinking, I was like, there's no point in even going because I mean, I'm going to show up with alcohol on my breath you know, and all of that and then I was really disappointed like I said later on that day I got the call, that same day, I was supposed to have been there, I got the call that I had a date set here that next day for a Motions Hearing, and I was like well, I messed everything up[.]”

Upon conclusion of the proof, the trial court found that Defendant had violated his probation, acknowledging that Defendant had difficulty with alcoholism. The court noted that although Defendant recognized that he was an alcoholic, he needed to accept responsibility for his “drinking” and “actions.” The court found:

you never once during your whole testimony, said, I'm at a place where I need help, I need this recovery program so that I can get off of alcohol. You talked around it, you talked over it, you talked under it, but I don't think that you've figured out yet that “yes, I am an alcoholic and yes, there are certain steps that I'm going to have to take.”

The trial court further said: “I heard the testimony of someone who is having recovery thrust upon them, or who is expecting an outside force, a judge, a probation officer, a counselor at a recovery center, to feed recovery to them, and that's not the way it works.” The court noted that Defendant lacked the “willingness and understanding to be personally responsible for every second of every day[.]” The court ordered Defendant to serve the balance of his sentence in confinement and entered a formal revocation order confirming its judgment from which Defendant filed a timely appeal.

Analysis

Defendant asserts that the probation violation affidavit and warrant do not support a finding that he absconded, and therefore, the trial court erred in finding that he committed a non-technical violation of his probation. He asks this court to vacate the trial court's order and remand the case for new proceedings, or find, under a de novo review, that his violation was technical and reinstate him to supervised probation for the third time. The State argues that the trial court properly revoked Defendant's probation for absconding because he failed to report to the DRC for intake, failed to appear for a home visit, and failed to make contact with the DRC or his probation officer prior to his arrest. The State also argues that the trial court properly engaged in the requisite two-step analysis for probation revocation and imposition of consequences. We agree with the State.

A trial court's decision to revoke probation is reviewed for an abuse of discretion with a presumption of reasonableness “so long as the trial court places sufficient findings and the reasons for its decisions as to the revocation and the consequence on the record.”

State v. Dagnan, 641 S.W.3d 751, 759 (Tenn. 2022). Generally, discretion is abused when the trial court applies “incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party.” *Id.* at 758 (quoting *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010)).

A trial court must engage in a “two-step consideration” when determining whether to revoke a defendant’s probation. “The first [step] is to determine whether to revoke probation, and the second is to determine the appropriate consequence upon revocation.” *Id.* at 757. If a trial court finds by a preponderance of the evidence that a defendant violated his or her probation, then it is within the trial court’s discretionary authority to revoke probation under the first step. T.C.A. § 40-35-311(e)(1), (2); *Dagnan*, 641 S.W.3d at 757 n.4; *State v. Beard*, 189 S.W.3d 730, 734-35 (Tenn. Crim. App. 2005).

In determining the appropriate consequence under the second step, a trial court may consider the nature and seriousness of the violation, the number of prior revocations, the defendant’s criminal history, and amenability to continued probation. *Dagnan*, 641 S.W.3d at 759 n.5 (“consideration of past criminal history is only appropriate in the second part of the two-step analysis”). Factors relevant in demonstrating a defendant’s amenability to continued probation include a defendant’s acceptance of responsibility and expressions of genuine remorse, and the likelihood of complying with orders designed to further or accomplish a defendant’s rehabilitation. *State v. Owens*, No. E2021-00814-CCA-R3-CD, 2022 WL 2387763, at *5 (Tenn. Crim. App. July 1, 2022), *no perm. app. filed*. “The primary purpose of probation sentence, however, ‘is rehabilitation of the defendant,’ and the conditions of probation must be suited to this purpose.” *State v. Holmes*, No. M2020-01539-CCA-R3-CD, 2022 WL 2254422, at *16 (Tenn. Crim. App. June 23, 2022) (quoting *State v. Burdin*, 924 S.W.2d 82, 86 (Tenn. 1996)), *no perm. app. filed*.

“If the trial judge finds by a preponderance of the evidence that the defendant has violated the conditions of probation and suspension of sentence, then the court may revoke the defendant’s probation and suspension of sentence, in full or in part, pursuant to § 40-35-310.” T.C.A. § 40-35-311(d)(1). The probation statute provides for two categories of probation violations, technical and non-technical, with differing penalties for both. A non-technical violation allows the trial court to revoke probation and order a defendant to serve his or her sentence when the court finds “by a preponderance of the evidence, that the defendant has committed a new felony, new Class A misdemeanor, zero tolerance violation as defined by the department of correction community supervision sanction matrix, absconding, or contacting the defendant’s victim in violation of a condition of probation.” *Id.* § -311(e)(2). Technical violations include any “act that violates the terms or conditions of probation but does not constitute a new felony, new Class A misdemeanor, zero tolerance violation as defined by the department of correction community supervision

sanction matrix, absconding, or contacting the defendant's victim in violation of a condition of probation." *Id.* § -311(g).

[W]hen a defendant is on probation for a felony offense and commits a technical violation of probation, the trial court's authority to order an incarcerative sanction is restricted based on the number of previous "revocations." As such, a court may not order a felony probationer to serve the remainder of the sentence as the consequence of a technical violation until he or she is subject to a "fourth or subsequent revocation." Tenn. Code Ann. § 40-35-311(e)(1).

However, when any probationer commits a non-technical violation, a trial court's authority to impose a consequence for that violation is broad. Indeed, the trial court may fully revoke a suspended sentence for a non-technical violation, even if the probationer has not previously violated the terms and conditions of the suspended sentence. *See generally* Tenn. Code Ann. § 40-35-311(e)(2) (Supp. 2021).

State v. Rand, — S.W.3d. —, 2024 WL 2796980, at *3 (Tenn. Crim. App. May 31, 2024).

Although "[a]bsconding" is not defined in the Tennessee Criminal Sentencing Reform Act of 1989, *see* T.C.A. § 40-35-101 *et seq.*, this court has defined "abscond" as "[t]o go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed, in order to avoid their process. To hide, conceal, or absent oneself clandestinely, with the intent to avoid legal process." *Munn*, 2023 WL 2607676, at *4 (citation omitted).

As to the first step in *Dagnan*, Defendant does not contest the trial court's decision to revoke his probation. Rather, he argues that he did not receive adequate notice of the absconding allegation and that the trial court erred in finding that he absconded, a non-technical violation of his probation which subjected him to a "full revocation of his probation to serve in confinement." He asserts that he failed to report which is only a technical violation of his probation.

The record shows that Defendant stipulated to the facts set forth in the probation violation warrant, which included the probation violation report and accompanying affidavit. The trial court relied on those facts as the basis for Defendant's probation violation and for revoking his probation. The "absconder" box was checked on Defendant's probation violation report, and the report recommended that Defendant's sentence "be revoked to serve" which was "required due to the offender absconding from supervision which is zero-tolerance per [Tennessee Department of Correction] policy." Therefore, Defendant had sufficient notice of the absconding claim prior to the revocation hearing. *See State v. Yoc*, No. M2018-00585-CCA-R3-CD, 2020 WL 672293, at *5 (Tenn. Crim. App. Feb. 11, 2020) (stating that defendants are entitled to "minimum due process

rights” in a probation revocation proceeding which includes written or actual notice of the alleged probation violation); *State v. Butler*, No. W2023-00566-CCA-R3-CD, 2023 WL 8234319, at *7 (Tenn. Crim. App. Nov. 28, 2023) (“*Munn* stands for the proposition that . . . the State is required to formally allege in a violation report or warrant that a probationer has absconded before an evidentiary hearing is held in order to provide notice of the claim”), *no perm. app. filed*.

Furthermore, the record supports the trial court’s finding that Defendant absconded while on probation. Defendant acknowledged that he avoided reporting to the DRC for intake on June 26, 2023, because he was drinking. Thereafter, he never reported or contacted the DRC or his probation officer. He also was not present for a home visit on July 21, 2023, and a tag was left on Defendant’s door requesting that he contact his probation officer, which Defendant had not done at the time the arrest warrant was issued on August 11, 2023. Defendant did not dispute these allegations at the probation violation hearing; indeed, he testified that there was “no point” to show up at the DRC with alcohol on his breath and that he “just gave up” reporting after that. Defendant’s testimony proved that he attempted to hide, conceal, or absent himself clandestinely with the intent to avoid legal process. *Munn*, 2023 WL 2607676, at *4; *see State v. Taylor*, No. E2023-00791-CCA-R3-CD, 2024 WL 1526109, at *5 (Tenn. Crim. App. Apr. 9, 2024) (affirming the trial court’s finding that the defendant absconded after failing to report to probation or contact his probation officer), *no perm. app. filed*; *State v. Herrick*, No. E2023-00984-CCA-R3-CD, 2024 WL 2272795, at *4 (Tenn. Crim. App. May 20, 2024) (finding that the defendant who “never reported to the probation office or made any effort to contact his probation officer for three years after failing to be present for a home visit” absconded), *no perm. app. filed*.

As for the second step in *Dagnan*, the consequence for the probation violation, Defendant committed a non-technical violation; therefore, the trial court was statutorily authorized to order him to serve the remainder of his sentence in confinement. *See* T.C.A. § 40-35-311(e)(2). The court was concerned that Defendant needed to accept responsibility for his “drinking” and “actions.” The court found:

you never once during your whole testimony, said, I’m at a place where I need help, I need this recovery program so that I can get off of alcohol. You talked around it, you talked over it, you talked under it, but I don’t think that you’ve figured out yet that “yes, I am an alcoholic and yes, there are certain steps that I’m going to have to take.”

The trial court further said: “I heard the testimony of someone who is having recovery thrust upon them, or who is expecting an outside force, a judge, a probation officer, a counselor at a recovery center, to feed recovery to them, and that’s not the way it works.” The court also noted that Defendant lacked the “willingness and understanding to be personally responsible for every second of every day[.]” *See Taylor*, 2024 WL 1526109,

at *5. In addition to the trial court’s findings, we point out that this appears to be Defendant’s third probation violation. This court has repeatedly held that “[a]n accused, already on probation, is not entitled to a second grant of probation or another form of alternative sentencing.” *State v. Jones*, No. E2023-00155-CCA-R3-CD, 2023 WL 6389810, at *3 (Tenn. Crim. App. Sept. 29, 2023), *no perm. app. filed* (quoting *State v. Shelton*, No. E2022-00875-CCA-R3-CD, 2023 WL 2261081, at *3 (Tenn. Crim. App. Feb. 28, 2023), *perm. app. denied* (Tenn. June 29, 2023)); *State v. Warfield*, No. 01C01-9711-CC-00504, 1999 WL 61065, at *2 (Tenn. Crim. App. Feb. 10, 1999); *see State v. Brumfield*, No. M2015-01940-CCA-R3-CD, 2016 WL 4251178, at *3 (Tenn. Crim. App. Aug. 10, 2016).

Based on the record, we conclude that the trial court did not abuse its discretion in in revoking Defendant’s probation and ordering him to serve the balance of his sentence in confinement. He is not entitled to relief.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

JILL BARTEE AYERS, JUDGE