

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 5, 2005

STATE OF TENNESSEE v. KASHE M. HARRIS

**Appeal from the Criminal Court for Davidson County
No. 2003-A-683 J. Randall Wyatt, Judge**

No. M2004-01789-CCA-R3-CD - Filed August 10, 2005

The defendant, Kashe M. Harris, pleaded guilty to one count of fraudulent receipt of food assistance (food stamp fraud), Tenn. Code Ann. § 71-5-314 (Supp. 2003), and one count of fraud in obtaining aid for dependent children (AFDC fraud), *id.* § 71-3-120. The defendant received judicial diversion and was placed on unsupervised probation for concurrent terms of two years for each count and ordered to make restitution. After serving a portion of her two-year probationary period and completing restitution, she moved the court to terminate her probation and expunge her record. The trial court granted the defendant's motion, and the state now brings the instant appeal. Because we find that the trial court had jurisdiction to grant the defendant's motion, we affirm the judgment of the lower court.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and J.C. MCLIN, JJ., joined.

Ross E. Alderman, District Public Defender, Nashville, Tennessee; Jeffrey A. DeVasher, Assistant Public Defender, Nashville, Tennessee (on appeal); and Diane McNamara, Assistant Public Defender, Nashville, Tennessee (at hearing), for the Appellee, Kashe M. Harris.

Paul G. Summers, Attorney General & Reporter; Richard H. Dunavant, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and James Sledge, Assistant District Attorney General, for the Appellant, State of Tennessee.

OPINION

On May 29, 2003, the defendant entered into a plea agreement with the state in which she was placed on judicial diversion pursuant to Tennessee Code Annotated section 40-35-313 for two years. During this time, the defendant was placed on unsupervised probation and required to pay restitution to the state in the amount of \$3,320.

On March 29, 2004, the defendant filed a motion requesting that the court terminate her probation and expunge her record. The petitioner had maintained employment, completed restitution, obtained a college degree, and complied with the terms of her probation since the commencement of her probation. However, the defendant complained that she was having difficulty finding employment due to her “pending” felony conviction and, therefore, had concerns about her ability as a single parent to support her six-year-old daughter.

The state objected to the motion on the basis that the trial court did not have the legal authority to grant the motion, but after conducting a hearing,¹ the trial court issued an order concluding that it did have jurisdiction to amend the defendant’s probationary period in the requested manner. The court concluded that it had jurisdictional authority pursuant to Tennessee Code Annotated section 40-35-212(c) (2003) and *State v. John Travis Collins*, No. E2001-01301-CCA-R3-CD, slip op. at 2 (Tenn. Crim. App., Knoxville, Aug. 27, 2002). Section 40-35-212(c) states that a trial court retains jurisdiction “over the manner of the defendant’s sentence service” provided that the defendant is not sentenced to serve a term of imprisonment with the Tennessee Department of Correction (TDOC). Tenn. Code Ann. § 40-35-212(c) (2002). Furthermore, in *John Travis Collins*, this court applied § 40-35-212(c) to affirm that a trial court acted within its jurisdiction when modifying a probationary sentence. *John Travis Collins*, slip op. at 2. Applying this law to the instant case, the trial court held that it maintained jurisdiction to amend a defendant’s sentence if that defendant is not in the custody of the TDOC. Therefore, because the defendant in the instant case was not in the custody of TDOC, the trial court concluded that it had jurisdiction to grant the defendant’s motion. Accordingly, the trial court held a hearing to determine if the defendant’s motion was meritorious.

Approximately 13 months after the date of commencement of probation on judicial diversion, the court issued an order granting the defendant’s motion in which the court noted that the parties had stipulated to the following facts: (1) The defendant was not in the custody of the TDOC; (2) the defendant had complied fully with the terms of her probation; (3) the defendant was a single mother of one young child; (4) the defendant had paid her restitution of \$3,320 to the state in full; (5) the defendant had maintained part-time employment while attending college; (6) the defendant recently had obtained her undergraduate degree from Tennessee State University; and (7) the defendant had found it extremely difficult to procure employment while this case “remain[ed] open.” The court further found that the defendant had pleaded guilty to two Class E felonies, food stamp fraud and AFDC fraud, which have minimum one-year sentences, and that the defendant had been on probation for her sentences for greater than one year as of the date of the court’s order.² Accordingly, the court held that the defendant had been on probation for a sufficient period to satisfy the statutory requirement that defendants receiving judicial diversion serve a probationary term that is at least as long as the length of the defendant’s minimum conviction sentence. *See* Tenn. Code Ann. § 40-35-313(a)(1)(A) (2003); *see also State v. Porter*, 885 S.W.2d 93, 95 (Tenn. Crim. App. 1994).

¹ The state did not include a transcript of this hearing as part of the appellate record.

² The defendant entered her guilty pleas on May 29, 2003, and the court issued its order granting the defendant’s motion for termination of probation and expungement of record on June 25, 2004.

The court concluded that the facts of the defendant's case supported termination of her probation and expungement of her convictions. Specifically, the court found that the defendant had shown amenability to correction, was in good mental health, had no prior history of drug abuse, had a positive attitude as evidenced by her prompt payment of restitution and compliance with the requirements of probation, had procured a college degree and maintained employment while doing so, and was a single mother wishing to "better her position in life for the benefit of her child by obtaining employment consistent with her college degree." Accordingly, the court concluded that the ends of justice would be served by granting the defendant's motion because terminating her probation and expunging her record would benefit both the general public and the defendant.

The state appeals the trial court's ruling on the basis that the trial court lacked jurisdiction to grant the defendant's motion. The state argues that the trial court's jurisdiction extended only to modifying the defendant's manner of service and not to terminating her sentence. The state asserts that Tennessee Code Annotated section 40-35-308(a) is a related statute specifically addressing probation and is instructive on this issue. *See* Tenn. Code Ann. § 40-35-308(a) (2003). That statute provides that a sentencing court may release a defendant serving a probationary sentence "from further supervision[] provided, that release from supervision shall not discharge the defendant from the remainder of the sentence; the defendant shall remain within the jurisdiction and authority of the sentencing court until the sentence fully expires. During such period, the defendant's probation is subject to revocation." *Id.*

The defendant counters that the trial court had authority to modify the period of the defendant's probationary period from two years to approximately 13 months. The defendant argues that because she was placed on judicial diversion, there was never an adjudication of guilt; therefore, *she was not serving a sentence* within the meaning of Code section 40-35-308(a). Moreover, the defendant asserts that the trial court merely amended the length of her probation from the originally imposed two-year period to 13 months by releasing her from probation as of the effective date of the court's order. Furthermore, the court's action was permissible because the defendant's effective 13-month probationary sentence exceeded the one-year minimum sentence for her offenses, thereby satisfying the requirement that the probationary period for those placed on judicial diversion meet or exceed "the minimum sentence for the felony involved." *Porter*, 885 S.W.2d at 95.

The Sentencing Reform Act of 1989 allows a sentencing court to "defer further proceedings and place the person on probation upon such reasonable conditions as it may require without entering a judgment of guilty and with the consent of such person," provided that the candidate has not, *inter alia*, previously pleaded guilty to or been convicted of a felony or Class A misdemeanor. Tenn. Code Ann. § 40-35-313(a) (2003). This procedure, commonly known as judicial diversion, is similar to pretrial diversion; however, judicial diversion follows a determination of guilt, and the decision to grant diversion rests with the trial court, not the prosecutor. *See State v. Anderson*, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992).

Section 40-35-313(a)(1)(A) further provides, in relevant part, that "[s]uch deferral shall be for a period of time not less than the period of the maximum sentence for the misdemeanor with which the person is charged, or not more than the period of the maximum sentence of the felony with which the person is charged." Tenn. Code Ann. § 40-35-

313(a)(1)(A) (2003). In addition, section 40-35-314(c) addresses the jurisdiction of the sentencing court for those defendants who have been sentenced to a local jail or workhouse: “The court shall retain full jurisdiction over the defendant during the term of such sentence and may reduce or modify the sentence or may place the defendant on probation supervision where otherwise eligible.” *Id.* § 40-35-314(c).

As the defendant correctly notes, she was placed on judicial diversion, and, therefore, pursuant to section 40-35-313(a)(1)(A), the trial court entered no guilty judgment, and the defendant was required to serve a probationary term at least as long as the minimum sentence for her conviction offenses. *See id.* § 40-35-313(a)(1)(A); *Porter*, 885 S.W.2d at 95. Accordingly, the defendant was required to serve a probationary sentence of at least one year. Therefore, the 13-month probationary term served by the defendant satisfies the minimum time requirement for those receiving judicial diversion.

Moreover, this court has previously held that a trial court has jurisdiction to modify or reduce a probationary term if the defendant had not been placed in the physical custody of the TDOC. *See John Travis Collins*, slip op. at 2. As her judgment form reflects, the defendant in the instant case was never placed in the custody of the TDOC before being placed on judicial diversion.

Accordingly, we hold that the trial court was acting within its jurisdictional authority when it modified the defendant’s two-year probationary term to a 13-month term.

JAMES CURWOOD WITT, JR., JUDGE