

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 21, 2005

STATE OF TENNESSEE v. JASON L. HOLLEY

**Direct Appeal from the Criminal Court for Davidson County
No. 99-D-2434 Seth Norman, Judge**

No. M2003-01429-CCA-R3-CD - Filed October 25, 2005

The defendant, Jason Holley, pled guilty to four separate charges of possession with intent to sell more than .5 grams of cocaine, a Class B felony. See Tenn. Code Ann. § 39-17-417 (2003). Pursuant to a plea agreement, the trial court imposed a Range I, twelve-year sentence for each conviction, to be served concurrently. The defendant was permitted by the Department of Correction to attend the boot camp program and, upon his successful completion of that program, was placed on probation and supervised by the Board of Probation and Parole. See Tenn. Code Ann. § 40-20-206 (2003). More than two years later, a violation warrant was issued and the trial court revoked his probation and ordered the original sentence into execution. One week after the revocation, the defendant filed a pro se notice of appeal. Three months later, the defendant entered into an agreement with the state whereby he agreed to plead guilty to the violation of his probation in exchange for the state's dismissal of other criminal charges. Two months later, the defendant filed a motion in the trial court seeking either a suspended sentence or admission into a drug court program. The trial court denied the motion and the defendant again appealed. This court consolidated the two appeals and the following issues are presented for our review: (1) whether the trial court erred by revoking probation and ordering service of the sentence, and (2) whether the trial court erred by denying the defendant's motion for a suspended sentence. The judgment of the trial court is affirmed.

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

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and J.C. MCLIN, JJ., joined.

Cynthia F. Burns, Nashville, Tennessee, for the appellant, Jason L. Holley.

Paul G. Summers, Attorney General & Reporter; Kathy D. Aslinger, Assistant Attorney General; and Dan Hamm, Tammy Meade, and Katrin Miller, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

On May 22, 2000, the defendant entered pleas of guilty to four charges of possession of more than .5 grams of cocaine with intent to resell. Pursuant to a plea agreement with the state, the trial court imposed concurrent sentences of twelve years for each of the offenses. While in the Department of Correction, the defendant was placed in a boot camp program and, upon successful completion of that program, was released onto intensive probation. See Tenn. Code Ann. § 40-20-206 ("[U]pon successful completion of a special alternative to incarceration program, an offender shall be released to the supervision of the division of community services for the department of correction under the terms and conditions imposed by the department for the balance of the original sentence imposed by the trial court. . . .").

On January 29, 2003, a probation violation warrant was filed, wherein it was alleged that the defendant had violated the terms of his release by failing to "obey the laws of the United States as well as any municipal ordinances." The warrant contained allegations that the defendant was arrested on the following charges: on May 5, 2002, for selling cocaine; on August 2, 2002, for assault, vandalism, and harassment; and on September 29, 2002, for driving on a suspended license.

At the probation violation hearing, John Ferrell, an officer of the Board of Probation and Parole, confirmed that the defendant had been charged with several counts of possession of a controlled substance with intent to sell and domestic violence assault. Ferrell testified that the defendant had failed to report the new arrests as required by the terms of his probation. He was unaware of a driving under the influence charge pending against the defendant. Ferrell confirmed that a capias had been issued when the defendant failed to appear for the initial setting of the revocation hearing. He also stated that the defendant had failed to report in person during the weeks prior to the revocation hearing.

During cross-examination, Ferrell conceded that the new charges against the defendant alleging the possession and/or sale of a controlled substance had been retired. He also acknowledged that the defendant had reported by telephone after the issuance of the capias. Ferrell agreed that the defendant had complied with all the other terms of his probation.

At the conclusion of the hearing, the trial court revoked the defendant's probation based upon his failure to appear at the initial setting of the revocation hearing:

This matter was set about two weeks ago. It was set on . . . May the 1st, for probation violation hearing, I told [the defendant's] lawyer that I was going to hear the matter. And [the defendant] and his lawyer both left and did not return. He is a forfeit in this Court. . . .

. . . .
That's exactly why I am putting his sentence into effect. He forfeited his bond in this court.

One week later, the defendant filed a pro se notice of appeal in this court and approximately three months later, the defendant, represented by counsel, appeared in the trial court and conceded that he had violated the terms of his probation. The assistant district attorney announced that it had agreed to dismiss other pending charges in exchange for the defendant's

concession. When informed by the court clerk that an appeal was pending on the probation revocation, the assistant district attorney stated as follows:

[W]hat we anticipate doing, and I think to make everything clear, that even though we have had a probation violation hearing, the probation violation had been sustained. I think on the record he was going to concede the violation and put the sentence into effect. So there was no issue on appeal.

When defense counsel expressed approval of the agreement, the trial court announced its approval.

Two months later, the defendant filed a motion in the trial court seeking suspension of the remainder of his sentence or admittance into a drug court program. At the hearing on the motion, the defendant testified that his understanding of the earlier agreement was that if he admitted the probation violation, he would be allowed to petition for suspension of the remainder of the sentence at a later date. He claimed that he needed to work to support his four children, his elderly mother, and his disabled brother. The defendant stated that he had completed a drug treatment program and a Bible certification program. He testified that he would be able to obtain employment if he were released. At the conclusion of the hearing, the trial court indicated that it did not have the authority to place the defendant on probation because he had received a twelve-year sentence. The trial court provided defense counsel the opportunity to provide legal authority to the contrary. When counsel was unable to do so, the trial court denied the motion. The defendant then filed a timely notice of appeal in this court. This court consolidated the two cases for purposes of appeal.

In this appeal, the defendant first asserts that the trial court erred by revoking his probation. He argues that he was not given notice of the ground upon which the revocation was based, namely that he had failed to appear at the initial setting of the probation violation hearing, as required by law. He also contends that the allegation contained in the probation violation warrant, that he had been arrested three times and charged with new offenses, was not sufficient to support revocation of his probation. The state contends that there were proper grounds for the revocation. In the alternative, the state submits that the defendant should be bound by his concession that he had violated the terms of his probation.

Our general law provides that a trial court may revoke a sentence of probation upon finding by a preponderance of the evidence that the defendant has violated the conditions of his release. Tenn. Code Ann. § 40-35-311(e) (2003); Stamps v. State, 614 S.W.2d 71, 73 (Tenn. Crim. App. 1980). On appeal, a revocation will be upheld absent an abuse of discretion. In order to establish that the trial court has abused its discretion, the defendant must show that there is no substantial evidence to support the determination that he violated his probation. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991) (citing State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978); State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980)). Relief can be granted only when "the trial court's logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved." State v. Shaffer, 45 S.W.3d 553, 555 (Tenn. 2001) (quoting State v. Moore, 6 S.W.3d 235, 242 (Tenn. 1999)).

The United States Supreme Court has observed that "probationers have an obvious interest in retaining their conditional liberty, and the [s]tate also has an interest in assuring that revocation proceedings are based on accurate findings of fact and, where appropriate, the informed exercise of discretion." Black v. Romano, 471 U.S. 606, 611 (1985). Our own supreme court has recognized that those on probation have a liberty interest which must be protected by minimum standards of due process of law. State v. Wade, 863 S.W.2d 406, 408 (Tenn. 1993). In Gagnon v. Scarpelli, the Supreme Court adopted several factors which the Court considered the "minimum requirements of due process" in a probation revocation proceeding:

"(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole."

411 U.S. 778, 786, (1973) (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972)). The failure to provide written notice of the allegations is a violation of due process. See Wade, 863 S.W.2d at 408. But see State v. Peck, 719 S.W.2d 553, 557 (Tenn. Crim. App. 1986) (finding that actual notice may suffice if there is a rehearing on the probation revocation). The use of alleged probation violations not contained in the probation violation warrant constitutes a due process violation. See State v. Roger McCormick, No. 01C01-9312-CR-00437, slip op. at 6 (Tenn. Crim. App., at Nashville, Oct. 13, 1994).

In this case, the probation violation warrant alleged only one ground, namely that the defendant had violated his probation by failing to obey all laws. As support for the violation, the warrant included allegations that he had been arrested three times while on probation. The warrant did not contain the underlying facts of the charged offenses. At the revocation hearing, the state did not put on any proof pertaining to the offenses. There was evidence that the defendant had failed to report the arrests, as required, but failure to report the arrests was not alleged in the violation warrant.

When the violation alleged is the commission of a new offense, the state must present sufficient facts at the revocation hearing to enable the trial court to "make a conscientious and intelligent judgment as to whether the conduct in question violated the law." Harkins, 811 S.W.2d at 83 n.3. While a pending charge may be a basis for the revocation of probation, "a trial court may not rely upon the mere fact of an arrest or an indictment to revoke a defendant's probation." State v. Clyde T. Smith, No. M2002-00553-CCA-R3-CD, slip op. at 2 (Tenn. Crim. App., at Nashville, Jan. 21, 2003). Because the state failed to establish any of the facts underlying the defendant's new arrests, a revocation on that basis would have been improper.

Furthermore, the record establishes that the pending charges were not the basis of the revocation. The trial court specifically stated that it was revoking the defendant's probation

because he failed to appear at the initial setting for the probation violation hearing. Because the defendant was not given notice that this might be the basis for the revocation of his probation, revocation on this basis abridged his right to due process. See Wade, 863 S.W.2d at 408; McCormick, slip op. at 6. Had that been the final action in the trial court, the defendant would be entitled to relief. The record, however, establishes that the defendant made an appearance in the trial court three months later, after the case had been remanded to the trial court by this court for appointment of counsel, and conceded that he had violated the terms of his probation in exchange for the state's dismissal of other pending charges. The transcript of that proceeding, which was made a part of the record on appeal by the defendant, establishes that the defendant admitted the probation violation "so there was no issue on appeal." Because the defendant acknowledged having violated the terms of his probation, he may not now complain that the trial court erred by revoking probation. The defendant is not entitled to relief on this issue.

As his second issue, the defendant complains that the trial court erred by denying his motion for a suspended sentence. He asserts that he is a favorable candidate for probation based upon his completion of a Bible program and a drug treatment program. He also contends that he should have been granted a suspended sentence in order to take care of his children and other family members. The state contends that the trial court did not err by denying the motion because it was not timely filed, see Tenn. R. Crim. P. 35(b), and because the defendant was statutorily ineligible for probation, see Tenn. Code Ann. § 40-35-303(a) (2003).

The defendant filed a motion seeking suspension of his sentence two months after he had acknowledged the probation violation and agreed to serve the twelve-year sentence with the Tennessee Department of Correction. He testified at the hearing that he had completed certain programs and that he would be able to obtain employment if the sentence were suspended. The trial court refused to grant the motion, noting that the twelve-year sentence rendered the defendant statutorily ineligible for probation.

Tennessee Code Annotated section 40-35-303 provides that "[a] defendant shall be eligible for probation under the provisions of this chapter if the sentence actually imposed upon such defendant is eight (8) years or less." Tenn. Code Ann. § 40-35-303(a). In this case, the sentence actually imposed was twelve years. In consequence, the defendant was statutorily ineligible for probation granted by the trial court. It was only because the defendant received the benefit of a special provision of the law that he received probation from the Board of Probation and Parole in the first place. See Tenn. Code Ann. § 40-20-206. The trial court did not err by denying the motion.

Accordingly, the judgment of the trial court is affirmed.

GARY R. WADE, PRESIDING JUDGE