

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 26, 2005 Session

STATE OF TENNESSEE v. JEROME HESTER ROBINSON

**Appeal from the Circuit Court for Blount County
Nos. C-14466 D. Kelly Thomas, Jr., Judge**

No. E2004-01890-CCA-R3-CD - Filed August 31, 2005

The defendant, Jerome Hester Robinson, was convicted of delivery of less than 0.5 grams of cocaine. See Tenn. Code Ann. § 39-17-417 (2003). The trial court imposed a three-year sentence, with nine months to be served in jail and the remainder in a community corrections program. Following a revocation hearing based upon violations of the terms of his sentence, the trial court increased his three-year sentence to a Range I five-year sentence. The defendant was ordered to serve one hundred and twenty additional days in jail. In this appeal as of right, the defendant argues that the trial court erred by increasing his sentence from three years to five years. The judgment 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 NORMA MCGEE OGLE, JJ., joined.

Julie A. Rice, Knoxville, Tennessee (on appeal), and Stacy D. Nordquist, Assistant District Public Defender (at trial), for the appellant, Jerome Hester Robinson.

Paul G. Summers, Attorney General & Reporter; David E. Coenen, Assistant Attorney General; and Mike Gallegos, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On February 22, 2003, the defendant, age twenty, had consensual sex with a fourteen-year-old female. A little over a month later, he was indicted for the delivery of less than 0.5 grams of cocaine as the result of a transaction that had taken place in July of 2002. On May 19, 2003, the defendant pled guilty to statutory rape as a result of the sexual encounter and received a two-year sentence to be served as sixty days in jail and the remainder on sex offender probation. He pleaded guilty to the delivery of cocaine offense one month later and the trial court ordered the defendant to serve nine months in jail with the balance of a three-year sentence to be served on community corrections.

On February 18, 2004, a warrant was filed wherein it was alleged that the defendant had violated both the terms of his probation for the statutory rape conviction and the terms of his community corrections sentence for the delivery of cocaine conviction. It was alleged that the defendant had failed to attend meetings required of sex offenders and had failed to make payment of either community corrections fees or fees incident to his sex offender treatment program. The warrant was amended to add that the defendant had absconded from the area.

At a hearing held after the defendant's arrest, Lisa Skiles of the community corrections program testified that on February 17, 2004, she notified the defendant by telephone that a violation warrant had been filed and asked him to turn himself in to authorities. She stated that the defendant did not report and that she did not see him from the time of that conversation until the date of the hearing, a period of almost six months. It was her testimony that the defendant was required to report once per week and that he had not reported at all since that telephone conversation. She explained that she had filed the warrant initially because he had missed a sex offender meeting and, after a warning, had missed another. She confirmed that the defendant had failed to pay the required fees for the community corrections program and had arrearages of seventy-five dollars. Ms. Skiles also testified that her recommendation was that the defendant be returned to jail for a period of sixty days and then be returned to the community corrections program because "as far as the Corrections part of it went . . . [the defendant] was doing what he was supposed to be doing."

The defendant acknowledged that he had not attended each of his meetings but contended that he had missed two of the sex offender sessions only because he had no transportation. He also admitted that he had not been in contact with his community corrections officer since the telephone conversation, describing his conduct as "irresponsible." He explained that he did not turn himself in as his community corrections officer instructed because he "wasn't ready to leave [his] son," who was seventeen months old. The defendant claimed that he did not leave the jurisdiction and had stayed at his listed address in Alcoa. He testified that his girlfriend was willing to provide transportation and that he was able to pay the seventy-five dollars he owed in arrearages and fees.

On cross-examination, the defendant admitted that he had been held in contempt in the General Sessions Court of Blount County for having failed to appear for a court date and for having failed to pay a fine on charges of evading arrest, disorderly conduct, criminal impersonation, assault, evading arrest, driving under the influence, driving without a license, and unlawful consumption. The defendant explained that he had simply forgotten the court date. The defendant denied having used illegal drugs, expressed a willingness to take a drug test, and acknowledged that he had not had steady employment during the several months prior to his hearing because of transportation problems.

The trial court concluded that the defendant violated the rules of his release by failing to attend the sex offender meetings and by failing to report to his community corrections officer after February 17, 2004. The trial court re-sentenced the defendant to five years, enhanced from his original sentence of three years, based upon the defendant's prior criminal history and his unwillingness to comply with the conditions of release into the community. See Tenn. Code

Ann. § 40-35-114(2), (9) (2003). The court required the defendant to serve an additional one hundred and twenty days in jail with credit from the time of his arrest on June 18, 2004 until the day of his hearing on the warrant, some twenty days.

In this appeal, the defendant argues that the trial court erred by revoking his community corrections sentence and increasing the term on the felony drug conviction based upon a violation of the terms of his probation on the statutory rape conviction. He also asserts that the trial court erred by re-sentencing him as punishment for violating the terms of his community corrections sentence. He contends that attending the sex offender probation classes was part of his probationary sentence on the statutory rape conviction and that no action was taken to revoke his probation in that case. It is his argument that because his failure to attend sex offender classes was unrelated to the community corrections sentence, the trial court erred by increasing the sentence on the felony drug offense. He also argues that the failure to pay the seventy-five dollars owed for the classes was unrelated to the drug conviction and should not have been utilized as a basis to increase the sentence. Secondly, he argues that even if those grounds were appropriate to consider, those and any other grounds were not a sufficient basis to increase the term from three years to five years or to require an additional one hundred and twenty days in jail.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401 (2003), Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

The purpose of the Community Corrections Act of 1985 was to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community-based alternatives to incarceration." Tenn. Code Ann. § 40-36-103 (2003). The community corrections sentence provides a desired degree of flexibility that may be both beneficial to the defendant and serve legitimate societal aims. State v. Griffith, 787 S.W.2d 340, 342 (Tenn. 1990). Even in cases where the defendant meets the minimum requirements, however, the defendant is not necessarily entitled to a community corrections sentence as a matter of law or right. State v. Taylor, 744 S.W.2d 919 (Tenn. Crim. App. 1987).

Once a defendant violates the terms of his community corrections program, the trial court may revoke the sentence and impose a new one:

The court shall also possess the power to revoke the sentence imposed at any time due to the conduct of the defendant or the termination or modification of the program to which the defendant has been sentenced, and the 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 the community-based alternative to incarceration.

Tenn. Code Ann. § 40-36-106(e)(4) (2003). The trial court may thus conduct a sentencing hearing pursuant to the principles of the 1989 Sentencing Reform Act, as amended, and may impose a greater sentence than the original sentence. Griffith, 787 S.W.2d at 342; State v. Cooper, 977 S.W.2d 130, 132 (Tenn. Crim. App. 1998).

In State v. Harkins, 811 S.W.2d 79 (Tenn. 1991), our supreme court ruled that a community corrections sentence is so similar to a probationary sentence as to require the application of the same standard of review. 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. Harkins, 811 S.W.2d at 82 (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 were improper when viewed in the light of the factual circumstances and the 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)). It is incumbent upon the trial judge to exercise a conscientious and intelligent judgment. See State v. Gregory, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997).

Regardless of the distinction between the conditions of probation for the statutory rape conviction and the conditions of the community corrections sentence for the delivery of cocaine conviction, the record establishes that Rule 6 of the community corrections sentence required the defendant to make payment of all costs and to complete all treatment deemed necessary. Also, Rule 11 required him to carry out all orders (oral or written) given by the community corrections officer. In this instance, the defendant acknowledged that he was directed by his community corrections officer to attend the sex offender meetings and that he missed at least two of those sessions. He also acknowledged that he had not paid the fees required and that he had not carried out the directions of his community corrections officer. Moreover, he had failed to report as required after the February 17, 2004, telephone conversation and failed to adhere to any conditions of either his probationary sentence or his community corrections sentence thereafter until his arrest on June 18, 2004. At a prior hearing, the defendant had admitted that he had sold crack cocaine at a neighborhood park in Alcoa in order to make money and had done so over a period of months before his initial arrest.

In our view, the trial court did not abuse its discretion by revoking the community corrections sentence. Moreover, the trial court made specific findings of fact, as required, upon increasing the sentence from three to five years. There was a factual basis for the conclusion that the defendant had a prior criminal history and had exhibited an unwillingness to comply with the conditions of release into the community. Tenn. Code Ann. § 40-35-114(2), (9) (2003).

Accordingly, the judgment is affirmed.

GARY R. WADE, PRESIDING JUDGE