

IN THE COURT OF CRIMINAL APPEALS OF **TENNESSEE**

AT NASHVILLE

JUNE 1997 SESSION

**FILED**

September 30, 1997

Cecil W. Crowson  
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee

V.

ROBERT MOORE,

Appellant.

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No. 01C01-9608--CC-00335

DICKSON COUNTY

HON. ALLEN W. WALLACE,  
JUDGE

(Community Corrections Revocation)

For the Appellant:

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OPINION FILED: \_\_\_\_\_

REVERSED AND REMANDED

William M. Barker, Judge

## OPINION

The appellant, Robert Moore, pled guilty in the Circuit Court of Dickson County to twenty (20) counts of passing forged prescriptions. On July 16, 1993, the trial court ordered appellant to serve two (2) years on each count in community corrections. Three counts were ordered to be served consecutively for an effective sentence of six (6) years.<sup>1</sup> In January of 1996, after appellant violated three rules of the program, his case officer obtained an arrest warrant for violating community corrections. The trial court held a hearing and revoked appellant's alternative sentence. It ordered appellant to serve the remainder of his sentence in the Department of Correction.

On appeal, appellant does not contest the revocation of his alternative sentence. He does challenge, however, the trial court's refusal to grant him credit for time served while in the community corrections program. Finding the trial court in error in denying appellant such credit, we reverse that portion of the trial court's judgment and remand for a new sentencing hearing.

When revoking appellant's community corrections sentence, the trial court stated:

I'm not going to bump you up in the range. I probably could, but I'm not going to do it. I'm going to violate your Community Corrections and let you go to the Tennessee Department of Corrections [sic] and serve your time. You will not get credit for any time you've been on Community Corrections except the time you actually spent in jail and I want the order to reflect that, Ms. Lockert.

Such a denial is clearly contrary to the statutory mandate. The Community Corrections Act of 1985 provides:

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 any community-based alternative to incarceration.*

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<sup>1</sup>The judgment forms conflict on the length of appellant's sentence. See discussion *infra* page 3.

Tenn. Code Ann. §40-36-106(e)(4) (Supp. 1996) (emphasis added). Under the directive of this statute, it was error for the trial court to deny appellant credit for the time he had already served in the community corrections program. See State v. Reginald Searcy, No. 01C01-9205-CC-00153 (Tenn. Crim. App. at Nashville, November 12, 1992); State v. Randy A. Thomas, No. 01C01-9102-CR-00042 (Tenn. Crim. App. at Nashville, December 5, 1991).

The State argues that the trial court possessed the authority to increase appellant's sentence and that the denial of time served essentially accomplishes the same purpose, i.e. it increases the time he will spend incarcerated. As a result, it argues that the trial court's error was harmless. We disagree. Had the trial court intended to increase appellant's sentence, a new sentencing hearing would have been necessary with the trial court following the proper statutory procedure, considering enhancing and mitigating factors to justify any increased sentence. See State v. Ervin, 939 S.W.2d 581, 583 (Tenn. Crim. App. 1996). Denying an appellant credit for time served is not a permissible substitute for this procedure. Because the trial court has authority to increase appellant's sentence and appellant must be given credit for time he has already served in community corrections, a new sentencing hearing is necessary so that the trial court may properly exercise its authority under the statute. See Tenn. Code Ann. §40-36-106(e)(4) (Supp. 1996).

Although not raised by appellant, another error appears on the face of the record. The State and the appellant apparently agreed at the revocation hearing that appellant was serving a six (6) year sentence. Other documents in the record also reflect such sentence. However, the judgment forms conflict with that sentence length. For example, Count I indicates it is consecutive to Counts II and III. Count II indicates that it is consecutive to Counts I and III. In contrast, the judgment form for Count III reflects that it is concurrent to Counts I and II. Based upon this information, appellant's effective sentence appears to be four (4) years. We note that appellant

did not object to the characterization of his sentence as six (6) years at the revocation hearing and his brief is void of any reference to the sentence length. After conducting a new sentencing hearing, the trial court should ensure the correct sentence length is clearly indicated on the judgment forms.

Because it is contrary to statutory mandate, we reverse the portion of the trial court's order denying appellant credit for time served in community corrections. This cause is remanded to the trial court for a new sentencing hearing in conformity with the Sentencing Act. See Tenn. Code Ann. §40-35-210 (Supp. 1996). Upon the order of a new sentence, appellant is entitled to credit for the time he served in community corrections.

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William M. Barker, Judge

CONCUR:

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Joe B. Jones, Presiding Judge

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Thomas T. Woodall, Judge