

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
APRIL SESSION, 1998

FILED

June 11, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee)

vs.)

BRUCE COLE,)

Appellant)

No. 02C01-9708-CC-00324

GIBSON COUNTY

Hon. DICK JERMAN, JR., Judge

(Sentencing)

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OPINION FILED: _____

REVERSED; REMANDED FOR ENTRY OF JUDGMENTS OF CONVICTION

David G. Hayes
Judge

OPINION

The appellant, Bruce Cole, appeals the sentences imposed by the Humboldt Law Court following revocation of his five Community Corrections sentences. The appellant's placement in the Community Corrections program stemmed from his guilty pleas to five class B felony sales of cocaine resulting in five concurrent ten year sentences. Following revocation of these offenses, the trial court enhanced each of the ten year sentences to twelve years and ordered one twelve year sentence to be served consecutive to the remaining sentences for an effective sentence of twenty-four years. The appellant perfected an appeal to this court arguing that imposition of the twenty-four year sentence was improper. This court remanded the case to the trial court for resentencing because the court had not placed its findings on the record. See State v. Cole, No. 02C01-9510-CC-00290 (Tenn. Crim. App. at Jackson, Dec. 12, 1996). On February 17, 1997, a resentencing hearing was held, at which time, the trial court reimposed the effective twenty-four year Department of Correction sentence. In this appeal, the appellant contends that the record is "de void of evidence justifying an enhancement or consecutive sentences."

After a review of the record, we vacate the effective twenty-four year sentence imposed by the trial court. This cause is remanded to the trial court for reinstatement of the ten year sentences imposed in the original judgments of conviction.

On June 22, 1992, pursuant to a plea agreement, the appellant pled guilty to five counts of sale of cocaine and received five concurrent ten year sentences to be served in the Department of Correction. On this date, the appellant was already under probationary supervision, arising from his convictions for robbery and assault. The robbery and assault convictions were entered on February 27, 1992, resulting in a three year split confinement sentence with forty-five days to be served in the jail.

The appellant's TDOC confinement, which apparently was served in the "boot camp" program, was short-lived. In June 1983, probation violation warrants were issued in each of the above six felony convictions (five drug convictions plus the

robbery). On October 25, 1993, the trial court revoked the appellant's probation on all six felonies and reinstated the original sentences with all sentences to be served in Community Corrections.

In November 1994, the appellant was charged with violation of his "behavioral contract" by "frequenting bars," by "failing to be at home when required," and due to new convictions for public drunkenness and marijuana possession. The appellant admitted these violations, and, on June 19, 1995, the trial court revoked the appellant's Community Corrections sentence and imposed an effective twenty-four year sentence in the Department of Correction, which is the subject of this appeal.¹

While appellate review is generally limited to the issues presented, the appellate courts of this state have been empowered to consider issues which have not been presented for review. State v. Braden, 867 S.W.2d 750, 764 (Tenn. Crim. App. 1993) (citations omitted). As a general rule, an "illegal" sentence may be corrected at any time, even if it has become final. See State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978) (citations omitted). Upon review, we note that upon revoking the appellant's probationary status in October 1993, the trial court was without the authority to impose community corrections sentences and, therefore, the sentences were "illegally" imposed. Accordingly, the subsequent arising issues of consecutive sentencing and enhancement of his sentences are rendered moot.

The relevant statutory provisions regarding the appellant's 1993 probation revocation include:

Tenn. Code Ann. § 40-20-206 (1990): "[s]hould an offender fail to comply with the terms and conditions of supervision imposed by the department after successful completion of the [boot camp] program, the release on supervision may be revoked by the trial judge pursuant to § 40-35-311.

Tenn. Code Ann. § 40-35-311(d) (1990): "[i]f the trial judge should find that the defendant has violated the conditions of his probation and suspension by a preponderance of the evidence, the trial judge shall

¹Although the appellant's robbery conviction was included in his initial appeal, there is no mention in the record before this court, as to the status of this three year sentence. The trial court failed to explicitly address this conviction at both the revocation hearing and the resentencing hearing. The appellant contends that this sentence had expired prior to the revocation. In its brief, the State submits that disposition is still pending for resentencing. The record appears to support the State's position.

have the right. . . to revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered, or otherwise in accordance with § 40-35-310. . . .^[2]

Tenn. Code Ann. § 40-35-308 (1990) authorizes the trial court, upon revocation of probation, to:

- (b) . . . make the conditions of supervision more onerous than those originally imposed. . . .
- (c) . . . extend the defendant's period of probation supervision for any period not in excess of two years.

Thus, as outlined by these statutory provisions, the sentencing court, upon revocation of probation, has two sentencing options: (1) cause execution of the original judgment as it was originally entered, or (2) modify the defendant's conditions of supervision, including extending the defendant's probationary period for up to two years. See Tenn. Code Ann. §§ 40-35-308; -310; -311; State v. Bowling, 958 S.W.2d 362, 363 (Tenn. Crim. App. 1997). In the instant case, the trial court, following revocation, imposed Community Corrections sentences. There is no authority in the Criminal Sentencing Reform Act of 1989 for the imposition of a community correction sentence following revocation of probation. See Bowling, 958 S.W.2d at 364.

As recognized in Bowling, the statutory distinction between a community corrections sentence and placement in a community corrections program as a condition of probation is apparent. Bowling, 958 S.W.2d at 364; Tenn. Code Ann. § 40-36-106(e)(1) and Tenn. Code Ann. § 40-36-106(f). The former statute permits sentencing to a "community-based alternative" sentence in lieu of a penitentiary or jail sentence, while the latter permits imposition of community corrections as a condition of probation. An individual who is placed on probation is not entitled to jail credit during the period of the probationary status.³ Accordingly, the probationer who is placed in a community corrections program as a condition of probation is not entitled to sentence credit for time spent under community corrections supervision. A procedural distinction

²Tenn. Code Ann. § 40-35-310 (1990) permits the trial court, upon revocation of a defendant's probation," to order the term of imprisonment imposed by the original judgment be served consecutively to any sentence which was imposed upon such conviction."

³Only those receiving a community corrections sentence are entitled to receive credit for time actually served in the community corrections program. Tenn. Code Ann. § 40-36-106(4). Clearly, this statutory provision when read in conjunction with the preceding provisions, Tenn. Code Ann. § 40-36-106(3)(A)(B) applies to those who are sentenced to community corrections as opposed to those who are on probation.

between the two is also apparent, *i.e.*, violation of a community corrections sentence subjects the offender to potential enhancement of his sentence, while violation of probation subjects the offender to reinstatement of his original sentence.⁴ See Bowling, 958 S.W.2d at 363.

The record before us indicates that, in October 1993, the trial court imposed, after revoking the appellant's probation, community corrections sentences. As this sentence was not authorized, we construe the appellant's placement in the community corrections program as a condition of probation. Upon *de novo* review of the record, the proof reflects a criminal history consisting of approximately twenty-two prior convictions. Moreover, the record establishes the appellant's unamenability for continued probation based upon his failures in previous non-incarcerative alternative sentences, including total probation, split confinement, and the TDOC boot camp program. We find reinstatement of his ten year sentences as originally entered appropriate.

Accordingly, the judgments of the trial court are vacated and this case is remanded to the trial court for reinstatement of the ten year sentences imposed in the original judgments of conviction. The appellant is to receive credit for all jail time served, but not for any time served in the community corrections program.

DAVID G. HAYES, Judge

⁴Granting a probationer credit for time served in a community corrections program would only encourage the probationer to intentionally violate probation after completion of his release eligibility date which would, in effect, in most cases, permit termination of his sentence and all further supervision.

CONCUR:

WILLIAM M. BARKER, Judge

JOE G. RILEY, Judge