

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH 1998 SESSION

FILED

April 29, 1998

Cecil Crowson, Jr.

Appellate Court Clerk

C.C.A. 03C01-9706-CC-00215

STATE OF TENNESSEE,

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Appellee,

vs.

RICKY DAVIS,

Appellant.

KNOX COUNTY

Hon. Ray L. Jenkins, Judge

(PROBATION VIOLATION)
Nos. 57933 & 58039

FOR THE APPELLANT:

MARK E. STEPHENS
District Public Defender

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OPINION FILED: _____

AFFIRMED

CORNELIA A. CLARK
Special Judge

OPINION

_____The appellant, Ricky Davis, appeals as of right from the revocation of his probation, alleging that the trial court abused its discretion by revoking his probation for reasons not set forth in the violation warrant and not articulated in the record. We affirm the decision of the trial court.____

On December 11, 1995, appellant Ricky Davis entered a guilty plea to one count of Robbery, a class C felony, in case number 57933, and one count of Robbery and one count of Theft, a class D felony, in case number 58039. On January 19, 1996, appellant received sentences of four years and three years on each of the robbery charges, and a sentence of two years on the theft charge. The sentences in case 58039 were run concurrently to one another but consecutive to the sentence imposed in case 57933, for an effective sentence of seven years. The sentences were suspended, and appellant was placed on probation for seven years in each case.

On March 28, 1996, a probation violation warrant was issued, alleging that the appellant (1) failed to report a new arrest for possession of marijuana and criminal impersonation on March 5, 1996, (2) failed to report to his probation officer despite several phone calls, (3) had marijuana in his possession on March 5, 1996, and (4) failed to pay fees and to do community service as ordered by the court.

A probation violation hearing was conducted March 6, 1997. Counsel for appellant and the State recited the apparently undisputed facts. Appellant was arrested in Knox County on March 4, 1996, on new charges of criminal impersonation and possession of marijuana. He missed his initial court date on those charges and a bond forfeiture was issued on March 12, 1996. Late in March he was arrested in Washington County on two felony sale of cocaine charges. Ultimately he was convicted of two counts of possession of cocaine for resale, and was sentenced to the Community Alternatives to

Prison Program (CAPP) for ten years. That sentence was run consecutively to the sentences at issue here. The new charges in Knox County

were adjudicated on March 5, 1997. As defense counsel described the situation:

MR. GALL: Actually, your Honor, those matters were in court-- I believe yesterday. Les Jeffress is Mr. Davis' attorney in those matters. Mr. Jeffress tells me that on those matters in Sessions Court, he was placed on probation with the proviso that if this Court placed him on the CAPP program that he would be supervised by the CAPP program on those two misdemeanors. If this Court chooses to revoke his probation and send him to the penitentiary, the Sessions Court judge intends to, according to Les, revoke his--or sentence him to serve those sentences down there. So they're sort of pending, but actually resolved, patiently awaiting your Honor's decision.

Appellant's attorney conceded at the revocation hearing that appellant violated the terms of his probation when he received new felony convictions, but he contended that appellant should be sentenced to the CAPP program. The State argued that appellant was ineligible for alternative sentencing because of his robbery convictions.

The trial court made no specific oral findings of fact on the record. The court revoked appellant's probation and remanded him to custody to serve the sentence originally imposed upon him. The revocation order contains a finding that "the appellant has been guilty of violating the laws of this State, and has otherwise violated the terms of his probation."

It is within the trial court's discretion to revoke the appellant's probation if it finds by a preponderance of the evidence that the appellant has violated a condition of his probation. Tenn. Code Ann. §§40-35-310, -311(d); State v. Mitchell, 810 S.W. 2d 733, 735 (Tenn. Crim. App. 1991). For an appellate court to find an abuse of discretion and reverse a trial court's revocation of probation, it must be demonstrated that the record contains no substantial evidence to support the conclusion of the trial court that a violation of the conditions of probation has occurred. State v. Harkins, 811 S.W. 2d 79, 82 (Tenn. 1991).

The appellant contends that the trial judge's reliance on his new felony convictions as grounds for revocation is inappropriate because they were not

listed on the revocation warrant. We agree that consideration of these new grounds was error. See Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 (1973); State v. Wade, 863 S.W. 2d 406, 408 (Tenn. 1993).

However, we must consider whether, absent the use of inappropriate

additional violations, there was substantial evidence to support the trial court's decision.

In this case appellant through counsel conceded that while on probation he had been convicted of the new misdemeanor offenses as charged in the warrant. That evidence alone supports a finding that he violated the terms of his probation. There also is no dispute that he failed to report to his probation officer for a long period of time. This issue is without merit.

The appellant finally contends that the trial court erred in failing to permit him to serve his sentence on Community Corrections (CAPP). However, Community Corrections is not generally available to an appellant who has been convicted of a violent felony such as robbery. Tenn. Code Ann. §40-36-106(a)(3); See State v. Staten, 787 S.W. 2d 934 (Tenn. Crim. App. 1989). This issue also is without merit.

The appellant also contends that the court did not make adequate findings of fact to support its decision. While due process requires the court conducting the probation revocation hearing to make written findings of fact, Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d. 656 (1973); State v. Delp, 614 S.W. 2d 395, 398 (Tenn. Crim. App. 1980), this omission is not dispositive in this case. The violation order contains a finding that "the appellant has been guilty of violating the laws of this State, and has otherwise violated the terms of his probation." While a more specific enumeration of how the appellant "otherwise violated" the conditions of his probation is preferable, any arguable deficiency is not prejudicial to appellant in light of the specific finding that he violated the laws of the State, which is itself a specific ground for revocation. Tenn. R. App. P. 36 (b); Tenn. R. Crim. P. 52 (a); see State v. Milton, 673 S.W. 2d 555, 557 (Tenn. Crim. App. 1984).

For the reasons set forth above, the judgment of the trial court is affirmed.

CONCUR:

JOHN H. PEAY
JUDGE

PAUL G. SUMMERS
JUDGE

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JUDGMENT

_____ Came the appellant, Ricky Davis, by counsel and also came the attorney general on behalf of the State, and this case was heard on the record on appeal from the Criminal Court of Knox County; and upon consideration thereof, this court is of the opinion that there is no reversible error in the judgment of the trial court.

Our opinion is hereby incorporated in this judgment as if set out verbatim.

It is, therefore, ordered and adjudged by this court that the judgment of the trial court is **AFFIRMED**, and the case is remanded to the Criminal Court of Knox County for execution of the judgment of that court and for collection of costs accrued below.

It appears that the appellant is indigent. Costs of this appeal will be paid by the State of Tennessee.

PER CURIAM

John H. Peay, Judge
Paul G. Summers, Judge
Cornelia A. Clark, Special Judge