

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs January 29, 2013

**STATE OF TENNESSEE v. ROY L. MCALISTER**

**Appeal from the Circuit Court of Robertson County  
No. 74CC3-2011-CR-310 John H. Gasaway III, Judge**

---

**No. M2012-01239-CCA-R3-CD - Filed February 11, 2013**

---

Roy L. McAlister (“the Defendant”) pleaded guilty to three counts of aggravated statutory rape and one count of sexual exploitation of a minor. Pursuant to the plea agreement, the Defendant was sentenced as a Range I, standard offender to an effective sentence of three years, to be suspended to supervised probation after service of 219 days in confinement. Upon the filing of a probation violation warrant, the Defendant was taken into custody, and a probation violation hearing was held. At the conclusion of the hearing, the trial court revoked the Defendant’s probation and ordered him to serve the remainder of his sentence in confinement. The Defendant appealed the trial court’s ruling. Based upon the record before us, we are compelled to vacate the judgment of the trial court and remand this action to the Robertson County Circuit Court for further findings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment  
of the Circuit Court Vacated and Remanded**

JEFFREY S. BIVINS, J., delivered the opinion of the Court, in which ALAN E. GLENN and ROGER A. PAGE, JJ., joined.

Garth Click (on appeal), and Anne Kroeger (at hearing), Assistant Public Defender, Springfield, Tennessee, for the appellant, Roy L. McAlister.

Robert E. Cooper, Jr., Attorney General & Reporter; Brent C. Cherry, Senior Counsel; John W. Carney, District Attorney General; and Jason White, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Factual and Procedural Background

On September 16, 2011, the Defendant pleaded guilty to three counts of aggravated statutory rape and one count of sexual exploitation of a minor. In accordance with the terms of the plea agreement, the trial court sentenced the Defendant as a Range I, standard offender to three years on each aggravated statutory rape conviction and to two years on the sexual exploitation conviction, to be served concurrently, for an effective sentence of three years. The trial court ordered the Defendant's sentence to be suspended to supervised probation after service of 219 days in the Robertson County Detention Center.

In January 2012, a probation violation warrant was filed. The trial court conducted a hearing on March 23, 2012. At the end of the hearing, the trial court revoked the Defendant's probation, sentenced him "to time served[,] and reinstated [probation] on the original terms." Shortly thereafter, on March 30, 2012, a second probation violation warrant was filed, which is the subject of this appeal, alleging the following violations:

Rule 1: I will obey the laws of the Unites States, or any State in which I may be, as well as any municipal ordinances.

Violation: [Tennessee Code Annotated section] 40-39-211(a), offender established a residence within 1000 feet of Madison Academy.

Rule 5: I will inform my Probation Officer before changing my residence or employment. I will get permission from my Probation Officer before leaving my county of residence or the state.

Violation: On or about March 27, 2012, this offender moved from Robertson County to Davidson County without permission.

The trial court held a hearing on these alleged violations on May 4, 2012. Sebrina Seaborne, a probation officer with the Board of Probation and Parole, testified that her job responsibilities included monitoring enhanced offenders and sexual offenders. She supervised the Defendant while he was released on probation in this case.

Seaborne testified that she also was involved in the Defendant's first probation violation hearing. She agreed that the first violation arose out of the Defendant's residing at an apartment on Cheyenne Boulevard in Davidson County, where the Defendant's wife lived. Seaborne testified that she previously visited that apartment and determined that it was

located within 1,000 feet of property owned by a school, Madison Academy. Seaborne testified that residing at that apartment is against the sex offender rules and conditions that apply to the Defendant. Seaborne also testified that, in the rules and conditions that the Defendant signed, he was required to get her permission before moving from Robertson County to another county.<sup>1</sup>

Seaborne testified that the Defendant was released from jail on March 23, 2012, after his first violation of probation hearing. The Defendant met with Seaborne on March 27, 2012, to discuss where the Defendant was living and to initiate a GPS tracking device. On March 27th, the Defendant told Seaborne that he was “back at his home; in the apartments on Cheyenne Boulevard.” Seaborne told the Defendant that living there was a violation of his probation and that he already had been violated for living there. According to her, the Defendant responded that “the Judge didn’t tell me I couldn’t go back there, and I don’t know why it’s any of your concern where I live.” Seaborne responded, “[I]t is my concern; the Judge did find you guilty of violating for living there[.]” Seaborne then asked the Defendant to sign an agreement that he knew he could not use the Cheyenne Boulevard address as his primary or secondary address. The Defendant did sign this agreement, and it was entered as an exhibit at the hearing. She again reiterated to the Defendant that he did not have permission to live at the apartment on Cheyenne Boulevard, and she further instructed him not to return there.

At the meeting on March 27th, Seaborne also placed a GPS tracking device on the Defendant. When the Defendant left this meeting, Seaborne believed that the Defendant was going to go back to the Cheyenne Boulevard residence. She stated, “His argument was that I really couldn’t tell him he couldn’t live there. So no matter how many times I had insisted I could tell him where to live, my understanding when he left was he was . . . just going to ignore my instruction.”

Seaborne testified that the following three days, March 28- 30, 2012, she checked the GPS system to determine the Defendant’s whereabouts. On each of these days, the “tracking maps” generated by the GPS system, which were entered as exhibits, showed that the Defendant was at the apartment complex on Cheyenne Boulevard. According to the tracking map for March 28th, the Defendant was at the apartment complex on Cheyenne Boulevard from 09:03:35 until 13:02:26 (9:03 a.m. until 1:02 p.m.). The tracking map for March 29th indicated that the Defendant was at the apartment complex on Cheyenne Boulevard from 09:03:50 until 13:02:22 (9:03 a.m. until 1:02 p.m.). The tracking map for March 30th indicated that the Defendant was at the apartment complex on Cheyenne Boulevard from

---

<sup>1</sup> The transcript does not indicate that the terms and conditions of the Defendant’s probation were made an exhibit at his second hearing, and they are not included in the record on appeal.

11:40:40 until 15:39:24 (11:40 a.m. until 3:39 p.m.). On March 30th, Seaborne filed a second probation violation warrant.

On cross-examination, Seaborne agreed that the document the Defendant signed prohibiting him from establishing a primary or secondary residence at the apartment on Cheyenne Boulevard did not prohibit him from visiting that apartment. Seaborne stated that she would define “a visit” as “less than 24 hours.” She agreed that she was basing her position that he was establishing a residence at the apartment on Cheyenne Boulevard on “the duration of time [the Defendant] was there and the number of days he was there.” Seaborne then added that “on the TBI instructions it says that he cannot maintain a presence there. Which doesn’t give you – it doesn’t give you a time frame, but it says that he cannot maintain a presence.” She stated that “maintain[ing] any kind of presence within a thousand feet[] – is – illegal” and that “it is a violation.” According to her, she also explained this fact to the Defendant.<sup>2</sup> However, the “TBI instructions” were not referenced in the probation violation warrant.

The Defendant testified that on March 23, 2012, at approximately 1:30 a.m., when he was released from jail after his first probation violation hearing, he went to the apartment on Cheyenne Boulevard with his wife. He added, “[W]e knew that I couldn’t live there, but there was nothing saying that I couldn’t go back over there.” The Defendant also stated, “I talked to the Madison Police Department down there, . . . and told them I would be in their area[.]” He asked the officers when he could “go check in with [his] wife and [his] stepdaughter and it’s like they told [him] as long as there was no school in progress, after hours, they didn’t have a problem with [him] being over there.” Thus, the Defendant testified, “I would stay gone up until 5:30 when the last bus . . . for Madison ran from downtown Nashville. And I’d go over there, and I’d stay, and then I would leave at 5:00 in the morning before school hours opened.”

The Defendant further testified that he informed Seaborne about this schedule. He claimed,

[S]he told me I couldn’t even go over there, that I was in violation at that point; and I told her I know I can’t live there; she said you can’t even be over there. And I was like nobody told me I couldn’t go over there[.] [T]hey just said I couldn’t live there. And she said no, you were well instructed that you can’t be there. I was like – well, we had the little disagreement there. And I

---

<sup>2</sup> The “TBI instructions” were not admitted as an exhibit during the probation violation hearing and, accordingly, are not in the record on appeal.

told her, I was like I'm going to go over there and see my wife; I don't see why I can't do that; I understand I can't live there.

So she put the ankle monitor on and told me if I went back on the property then I would be immediately in violation; that she [sic] was already in violation for being over there to start with. And I informed her well, if I'm in violation then I'm going to spend as much time as I can with what I've got, because I've done lost everything in this world over this charge. And she said well, you do what you're going to do, because I – and I understand her situation, but that's the reason why I went back over there.

Defense counsel then asked, “[T]hat would explain March 29th and March 30th as well; is that right?” The Defendant responded,

Yes. Because I figured I was already in violation. And if you look on that GPS I didn't move from that address; I didn't go w[a]ndering around. And she wants you to be in by 9:00 at night. I was already listed as homeless, where could I – I mean, you got to be in; where am I supposed to be in at?

On cross-examination by the State, the Defendant admitted that on March 27, 2012, Seaborne told him that he “[c]ouldn't even step foot on the premises.” He also agreed that he signed a paper stating he could not establish a primary or secondary residence there. He further agreed that he went and “stayed . . . that night the 28th, 29th, 30th and so forth until [his] warrant was served.”<sup>3</sup> The State then asked, “[A]nd [you] stayed there the entire time . . . opposite of what you signed and what her instruction was, correct?” The Defendant responded, “Yes.”

At the conclusion of the hearing, the trial court found by a preponderance of the evidence that the Defendant had violated the terms and conditions of his probation “*by maintaining a presence* at the Cheyenne Boulevard residence in Davison County” (emphasis added) and that “[h]is presence there was something that he did in the face of a direct instruction not to do so.” The trial court also stated, “Given his insistence that he's not going to do what he's required to do on a release status there's no reasonable expectation that he will obey any future instructions.” Accordingly, the trial court revoked the Defendant's probation and ordered that he serve the remainder of his three-year sentence in the Tennessee Department of Correction.

---

<sup>3</sup> According to the warrant, it was served on April 12, 2012.

Thereafter, the trial court issued a written order reflecting its findings. In the written order, the trial court listed the following grounds as its basis for revoking the Defendant's probation:

[T]he court found beyond a preponderance of the evidence that the [D]efendant violated the terms and conditions of his probation due to *establishing a presence* at a residence within 1,000.00 [sic] feet of a school's property after being directly told not to by his probation officer. [emphasis added].

This appeal followed.

### Analysis

The Defendant asserts that the trial court erred in revoking his probation and that it erred in ordering him to serve the remainder of his three-year sentence in confinement.

Tennessee Code Annotated section 40-35-311 provides that, upon a probation revocation proceeding, the court "may enter judgment upon the question of the charges as the trial judge may deem right and proper under the evidence adduced before the trial judge." Tenn. Code Ann. § 40-35-311(d) (Supp. 2011). And,

[i]f the trial judge finds that the defendant has violated the conditions of probation and suspension by a preponderance of the evidence, the trial judge shall have the right by order duly entered upon the minutes of the court to revoke the probation and suspension of sentence, and:

(A) Cause the defendant to commence the execution of the judgment as originally entered, or otherwise, in accordance with [section] 40-35-310; or

(B) Resentence the defendant for the remainder of the unexpired term to any community-based alternative to incarceration authorized by chapter 36 of this title; provided, that the violation of probation and suspension is a technical one and does not involve the commission of a new offense.

Id. § 40-35-311(e)(1). Thus, the State must prove that the defendant violated the terms of his or her probation only by a preponderance of the evidence. Id. Once the State has met its burden of proof, the subsequent decision regarding revocation lies within the sound discretion of the trial judge. See, e.g., State v. Walker, 307 S.W.3d 260, 263 (Tenn. Crim. App. 2009); State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991).

Therefore, on appeal, we will not disturb the trial court’s decision to revoke probation absent an abuse of discretion. State v. Farrar, 355 S.W.3d 582, 585 (Tenn. Crim. App. 2011); see also State v. Shaffer, 45 S.W.3d 553, 554 (Tenn. 2001). Generally, “[a] trial court abuses its discretion when it applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party.” Farrar, 355 S.W.3d at 586 (quoting State v. Phelps, 329 S.W.3d 436, 443 (Tenn. 2010)).

We initially note that the trial court made no findings with respect to the second alleged violation of probation listed in the warrant – that the Defendant “moved from Robertson County to Davidson County without permission.” The record, however, does not support a violation of probation on this ground because no proof was presented at the hearing that the Defendant lived in Robertson County. Thus, the Defendant’s probation cannot be revoked on this basis.

The trial court did find that the Defendant violated the terms and conditions of his probation “by maintaining a presence” or “establishing a presence” at the apartment on Cheyenne Boulevard. This language, based upon the testimony of Seaborne, appears to be from the “TBI instructions” purportedly applicable to the Defendant. Unfortunately, the “TBI instructions” are not listed as a ground for revocation in the warrant and do not appear anywhere in the record. Under these circumstances, the “TBI instructions” cannot be the basis of the revocation. Moreover, we cannot determine whether the trial court intended to revoke the Defendant’s probation based upon a violation of the first ground listed in the warrant, that the Defendant established a primary or secondary residence within 1,000 feet of Madison Academy, or whether the trial court actually intended to revoke the Defendant’s probation based solely upon a violation of the “TBI instructions.” Because the trial court’s findings are ambiguous, we are unable to determine whether the trial court properly revoked the Defendant’s probation based upon a ground alleged in the warrant. Consequently, we are compelled to vacate the trial court’s judgment and remand the case for the trial court to clarify and expound upon its findings and conclusions regarding whether the Defendant established a primary or secondary residence within 1,000 feet of Madison Academy.

## **CONCLUSION**

For the reasons set forth above, the judgment of the trial court is vacated, and this matter is remanded to the trial court for further findings in accordance with this opinion.

---

JEFFREY S. BIVINS, JUDGE