

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 27, 2009

STATE OF TENNESSEE v. SHANE THOMAS COX

**Appeal from the Criminal Court for Monroe County
No. 08018 Carroll L. Ross, Judge**

No. E2009-00628-CCA-R3-CD - January 12, 2010

The Defendant, Shane Thomas Cox, appeals the trial court's order revoking his probation for aggravated burglary, a Class C felony, and theft of property over \$500, a Class E felony, and ordering him to serve his effective three-year sentence in the Department of Correction. We hold that the trial court failed to give the Defendant a proper hearing. The judgment of the trial court is reversed, and the case is remanded for a new revocation hearing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed,
Case Remanded**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

Charles Richard Hughes, Jr., District Public Defender, and Chessia Cox, Assistant Public Defender, for the appellant, Shane Thomas Cox.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Robert Steve Bebb, District Attorney General; and Paul Donald Rush, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On June 16, 2008, the Defendant was convicted on his guilty pleas and placed on probation. On December 8, 2008, a probation violation warrant was filed alleging that the Defendant violated the rules of probation by obtaining a new arrest in Knox County for violating probation and theft, by failing to report his arrest to his probation officer, by failing to maintain any employment since September 2008, by leaving his home county without his probation officer's permission, and by failing to pay court costs since August 2008 and supervision fees since October 2008.

The trial court conducted a revocation hearing, at which the Defendant's probation officer, Mike Caldwell, testified that the Defendant made only one \$50 payment while on probation. He said he was aware the Defendant's family made a payment of \$150 on the morning of the hearing. He said that the Defendant had not worked since August 2008. He said he was aware the Defendant had been laid off from his job in Powell and did not have any information that the Defendant had been fired for misconduct. He said he had no information about the Defendant's working at Timberland Tree Solutions in October because for the months of September and October the Defendant had listed his employment as "N/A." He said that he received notification on November 20 or 21 that the Defendant was arrested on the shoplifting and probation violation charges on November 19 at 4:30 p.m. but that the Defendant was not the person who notified him. He acknowledged that the Defendant did report regularly but stated that he "always had to make him a second appointment because he never did bring everything he was supposed to on the first appointment." He said the Defendant's arrest in Knoxville was proof of a probation violation by leaving the county.

The trial court cautioned counsel that it wanted "questions that deal with the violation. . . . That's what we're here to decide, whether he's violated the terms of his probation[.]" Karen Cox then testified that she was the Defendant's mother. She said the Defendant's Knox County shoplifting charge arose at a Kohl's Department Store. She said the Defendant began employment with Timberland Tree Service in late October 2008. She said she did not know why the Defendant would not have informed his probation officer about his job. When asked why the Defendant would not have made payments toward his fees and costs, she said the Defendant had been without work, had bill collectors coming to his home, and had purchased diapers for his baby.

The defense called Tisha McElvey as a witness. Before the defense questioned her, the trial court began questioning the witness. The record reflects that the trial court was frustrated by the length of the docket and the number of defense witnesses being called to testify in revocation proceedings on the docket and by the nature of these witnesses' testimony. The record also reflects that the trial court expressed its frustration at length and then revoked the Defendant's probation without allowing the Defendant an opportunity to present his evidence. The court did not make any findings about the basis for the probation revocation, either orally or in its written order.

On appeal, the Defendant challenges the trial court's order revoking his probation and ordering him to serve his sentence in the Department of Correction. The State responds that the evidence of record established that the Defendant violated his probation and that the court did not err in revoking probation and ordering incarceration. We hold that the trial court erred in denying the Defendant a fair hearing and in failing to make the appropriate factual findings and that the Defendant is entitled to a new revocation hearing.

A trial court may revoke a suspended sentence upon its finding by a preponderance of the evidence that a violation of the conditions of release has occurred. T.C.A. § 40-35-311(e) (2006). If a trial court revokes a defendant's probation, its options include ordering confinement, ordering the sentence into execution as originally entered, returning the defendant to probation on modified conditions as appropriate, or extending the defendant's period of probation by up to two years. T.C.A. §§ 40-35-308(a), (c), -310; see State v. Hunter, 1 S.W.3d 643, 648 (Tenn. 1999). The judgment of the trial court in a revocation proceeding will not be disturbed on appeal unless it appears that there has been an abuse of discretion. See State v. Williamson, 619 S.W.2d 145, 146 (Tenn. Crim. App. 1981).

A defendant's rights when he is charged with a probation violation are provided by both state and federal law. Tennessee Code Annotated section 40-35-311 provides:

- (b) Whenever any person is arrested for the violation of probation and suspension of sentence, the trial judge's successor, or any judge of equal jurisdiction who is requested by the trial judge to do so shall, at the earliest practicable time, inquire into the charges and determine whether or not a violation has occurred, and at the inquiry, the defendant must be present and is entitled to be represented by counsel and has the right to introduce testimony in the defendant's behalf.

T.C.A. § 40-35-311(b) (2006); see id. at -310 (empowering trial judge to revoke probation). The Rules of Criminal Procedure provide that a trial court "may revoke probation only after a hearing conducted according to law." Tenn. R. Crim. P. 32(g).

In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the United States Supreme Court held that a probationer is entitled to due process when a state attempts to remove his probationary status and have him incarcerated. Gagnon, 411 U.S. at 785-86. A probationer's due process rights include:

- (1) written notice of the claimed violations of probation;
- (2) disclosure to the probationer of evidence against him or her;
- (3) opportunity to be heard in person and to present witnesses and documentary evidence;
- (4) the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation;

- (5) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
- (6) a written statement by the fact finders as to the evidence relied on and reasons for revoking probation.

Id. at 786; Practy v. State, 525 S.W.2d 677, 680 (Tenn. Crim. App. 1974).

In the present case, the trial court failed to afford the Defendant a fair hearing at which the Defendant had the opportunity to present evidence. The court abridged the Defendant's presentation of evidence when it made extensive remarks about the length of the docket and the type of witnesses the Defendant attempted to call. The court's remarks made clear that the presentation of defense proof was pointless and would serve to inflame the court further.

In addition, the court issued a ruling without making any factual findings of the basis or bases for revoking probation. The State's only proof that the Defendant violated probation by committing a new crime was the probation officer's testimony that he had been arrested and had not reported the arrest. This court has said that the mere fact of an arrest, as shown by the probation officer's testimony, is not sufficient proof to revoke probation. State v. James R. Butler, No. M2008-01842-CCA-R3-CD, Davidson County (Tenn. Crim. App. Oct. 20, 2009); State v. Calvin Austin, No. W2005-02592-CCA-R3-CD, Shelby County (Tenn. Crim. App. Aug. 9, 2006). In addition, the Defendant disputed the State's proof that he did not report, and even the probation officer acknowledged that the Defendant reported, although the Defendant presented without all of his required information and required a second appointment. The proof was that although the Defendant had been without work after being laid off, he obtained other employment. The proof that the Defendant left his home county consisted of the probation officer's testimony of the arrest. There was proof the Defendant had fallen behind on his bills after being out of work, but the court made no finding that the Defendant's failure to pay his costs and fees was willful. See State v. Dye, 715 S.W.2d 36, 40 (Tenn. 1986); State v. Massey, 929 S.W.2d 399, 402 (Tenn. Crim. App. 1996).

We conclude that the trial court erred in denying the Defendant a proper hearing by abridging the probation revocation hearing before the Defendant had the opportunity to present his proof and that the court erred in revoking probation and ordering incarceration without adequate fact-finding to support its ruling. The Defendant is entitled to a new revocation hearing.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is reversed, and the case is remanded for further proceedings consistent with this opinion.

JOSEPH M. TIPTON, PRESIDING JUDGE