NO. 12-11-00155-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

JAMES EDWARD COOK, APPELLANT	***§***	***APPEAL FROM THE 2ND***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***CHEROKEE COUNTY, TEXAS***

MEMORANDUM OPINION

James Edward Cook appeals the trial court's order revoking his community supervision, following which he was sentenced to imprisonment for two years. Appellant raises nine issues on appeal. We dismiss for want of jurisdiction in part and affirm in part.

BACKGROUND

Appellant was charged by indictment with delivery of a controlled substance and pleaded "guilty." The trial court found Appellant "guilty" as charged and sentenced him to imprisonment for two years, but suspended the sentence and placed Appellant on community supervision for five years. On October 29, 2010, the State filed a motion to revoke Appellant's community supervision alleging that Appellant had violated the terms and conditions thereof by, among other things, committing the offense of identity theft as follows:

> On or about the 20th day of October[] 2010, the Defendant, **JAMES EDWARD COOK**, in Cherokee County, Texas did then and there, with intent to harm or defraud another, and without the consent of **Gerald Lee Grimes**, possess less than five items of identifying information of **Gerald Lee Grimes**, which is a violation of Defendant's terms and conditions of community supervision.

On December 16, 2010, the trial court conducted a hearing on the State's motion. Appellant pleaded "not true" to the allegations in the State's motion. Following an evidentiary hearing, the trial court found the allegations in the State's motion to be "true," revoked Appellant's community supervision, and sentenced Appellant to imprisonment for two years. This appeal followed.

REVOCATION OF COMMUNITY SUPERVISION

In his first issue, Appellant argues that the trial court abused its discretion in revoking his community supervision based on a finding of "true" to the allegation that he committed the offense of identity theft.

Appellate review of an order revoking community supervision is limited to abuse of the trial court's discretion. *See* ***Cardona v. State***, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). In order to satisfy its burden of proof, the state must prove that the greater weight of the credible evidence before the trial court creates a reasonable belief that a condition of community supervision has been violated as alleged in the motion to revoke. *See* ***Cobb v. State***, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). When the state has failed to meet its burden of proof, the trial court abuses its discretion in issuing an order to revoke community supervision. *See* ***Cardona***, 665 S.W.2d at 493-94. When the state's proof of any of the alleged violations of community supervision is sufficient to support a revocation of community supervision, the revocation should be affirmed. *See* ***Smith v. State***, 932 S.W.2d 279, 283 (Tex. App.–Texarkana 1996, no pet.).

As a general matter, a trial court possesses broad discretion in supervising those defendants who are placed on community supervision. *See* ***Speth v. State***, 6 S.W.3d 530, 533 (Tex. Crim. App. 1999); ***Becker v. State***, 33 S.W.3d 64, 66 (Tex. App.–El Paso 2000, no pet.). The degree of the trial court's discretion extends to revocation proceedings such that the trial court has considerable discretion to modify, revoke, or continue the community supervision. ***Ex parte Tarver***, 725 S.W.2d 195, 200 (Tex. Crim. App. 1986); ***Becker***, 33 S.W.3d at 66. As such, the trial court is the exclusive judge of the credibility of the witnesses and determines if the allegations in the motion are sufficiently demonstrated. *See* ***Greer v. State***, 999 S.W.2d 484, 486 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd). We review the evidence in the light most favorable to the trial court's order. ***Id***.

In the case at hand, among the terms and conditions of Appellant's community supervision was a requirement that Appellant not commit an offense against the laws of Texas, any other state, or the United States. In its motion to revoke, the State alleged that Appellant violated this condition by committing the crime of identity theft. Accordingly, the State was required to prove that Appellant, with the intent to harm or defraud another, possessed or used[1] an item of identifying information of another person without the other person's consent. *See* TEX. PENAL CODE ANN. § 32.51(b) (West 2011).

At the hearing on the State's motion, Loretta Aguirre testified that she previously found a wallet containing various identifying information of Gerald Grimes. Aguirre testified that Appellant lived with her "off and on" and that she assumed Appellant was her common law husband. Aguirre stated that she had pleaded "guilty" to using Grimes's identifying information to procure electrical services and that Appellant was not involved in this offense. Rather, Aguirre testified that her son's cousin, Shaun Monroe, had assisted her in procuring these services. The trial court made numerous inquiries of Aguirre that indicated its doubt of the veracity of her testimony.

Tommy Kerzee testified that he was Appellant's community supervision officer when Appellant was first placed on probation. Kerzee further testified that he was asked to listen to a recording at the Rusk Police Department to see if he recognized a voice on it. Kerzee stated that on the recording, a lady was attempting to change the name on her electric service to "Mr. Grimes." Kerzee stated that the representative of the electric company told the lady that she would have to speak to Mr. Grimes. Thereafter, according to Kerzee, a male voice was heard on the recording identifying himself as Mr. Grimes. Kerzee testified that he recognized the male voice as Appellant's.

Trey Hassell, who succeeded Kerzee as Appellant's community supervision officer,

[1] We recognize that the State did not allege in its motion that Appellant "used" Grimes's identifying information. However, where, as here, the State alleges a violation of the condition that a probationer refrain from committing an offense against the law, the state need not use the same precise terms as necessary in an indictment allegation. *See* ***Pierce v. State***, 113 S.W.3d 431, 436 (Tex. App.–Texarkana 2003, pet. ref'd). At a hearing on an application to revoke community supervision, guilt or innocence is not at issue, and the trial court need not determine the defendant's original criminal culpability. ***Id.*** The trial court determines only whether the defendant broke the contract he made with the trial court to receive a community supervision. ***Id.*** Revocation is proper if the evidence is sufficient to support the trial court's finding that the defendant committed an offense in violation of the condition of community supervision that he commit no offense against state or federal law. *See* ***id.*** at 436-37.

testified that he listened to a recording in which a woman named Loretta Monroe identified herself as the daughter of Gerald Grimes. According to Hassell's written statement made after he heard the recording, he recognized Appellant as the man on the recording representing himself to be Gerald Grimes to the electric company.

Finally, Gerald Grimes testified that he did not know Appellant. Grimes further testified that he did not give Appellant permission to use his identifying information.

Based on the foregoing evidence, which we consider in the light most favorable to the trial court's order, we conclude that the State met its burden to prove by a preponderance of the evidence that Appellant committed an offense under the laws of the State of Texas in violation of the terms and conditions of his community supervision. Although Aguirre testified that Appellant was not involved, the trial court was entitled to disbelieve her testimony and rely instead on the testimonies offered by Kerzee and Hassell. *See* ***Greer***, 999 S.W.2d at 486. Accordingly, we hold that the trial court did not abuse its discretion in revoking Appellant's community supervision based on this finding. Appellant's first issue is overruled.[2]

RESTITUTION

In his eighth issue, Appellant argues that the original judgment of the trial court should be reversed and modified because it orders payment to the Texas Department of Public Safety in the sum of one hundred forty dollars as restitution.[3] This court lacks jurisdiction to hear an untimely challenge to a judgment of conviction brought after the imposition of community supervision. *See* ***Baily v. State***, 160 S.W.3d 11, 13 (Tex. Crim. App. 2004); ***Manuel v. State***, 994 S.W.2d 658, 660 (Tex. Crim. App. 1999) (defendant's right to appeal conviction and punishment accrues when defendant is placed on community supervision).

In the case at hand, the trial court ordered that Appellant pay restitution in conjunction with his original conviction for delivery of a controlled substance. The trial court further ordered

[2] Because we have overruled Appellant's first issue, we need not address Appellant's second, third, fourth, fifth, sixth, and seventh issues. *See* ***Smith v. State***, 932 S.W.2d 279, 283 (Tex. App.–Texarkana 1996, no pet.) (when proof of any of alleged violations of community supervision is sufficient to support revocation, revocation should be affirmed).

[3] Appellant does not argue that the trial court's judgment of conviction entered following its revocation of his community supervision contains an improper order that he pay restitution. Indeed, the postrevocation judgment contains no order that Appellant pay restitution. Furthermore, the trial court did not order that Appellant pay restitution as part of its pronouncement of Appellant's sentence.

Appellant pay restitution as a condition of his community supervision. To the extent Appellant seeks to modify the trial court's original judgment, we lack jurisdiction to consider Appellant's eighth issue. On the other hand, to the extent that Appellant argues that the trial court could not order restitution to a nonvictim as a condition of his community supervision, there is no indication in the record that Appellant preserved this issue by objecting to the trial court when the conditions of community supervision were imposed. *See* ***Ivey v. State***, 16 S.W.3d 75, 76 (Tex. App.–Houston [1st Dist.] 2000, no pet.) (citing ***Speth v. State***, 6 S.W.3d 530, 534-35 (Tex. Crim. App. 1999)). To the extent we have jurisdiction to consider Appellant's eighth issue, it is overruled.

SENTENCING HEARING

In his ninth issue, Appellant argues that he was denied a fair and impartial sentencing hearing because an "ex parte communication" made by Aguirre was subsequently related to the trial court by the prosecuting attorney in open court.

The Fourteenth Amendment provides that the state may not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV; *see also* TEX. CONST. art. I, § 19. Due process requires that the trial court conduct itself in a neutral and detached manner. ***Gagnon v. Scarpelli***, 411 U.S. 778, 786, 93 S. Ct. 1756, 1762, 36 L. Ed. 2d 656 (1973); ***Brumit v. State***, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006); ***Jaenicke v. State***, 109 S.W.3d 793, 796 (Tex. App.–Houston [1st Dist.] 2003, pet. ref'd). However, absent a clear showing of bias, we presume the trial court's actions were correct. ***Brumit***, 206 S.W.3d at 645. Bias is not shown when (1) the trial court hears extensive evidence before assessing punishment, (2) the record contains explicit evidence that the trial court considered the full range of punishment, and (3) the trial court made no comments indicating consideration of less than the full range of punishment. *See* ***id***.

Under Texas Code of Judicial Conduct, Canon 3(B), a judge is prohibited from initiating, permitting, or considering ex parte communications concerning the merits of a pending case. TEX. CODE JUD. CONDUCT, Canon 3(B); ***Morgan v. State***, No. 05-08-00694-CR, 2009 WL 4283104, at *1 (Tex. App.–Dallas Dec. 2, 2009, no pet.). An ex parte communication is one that involves fewer than all parties who are legally entitled to be present during the discussion of any matter. ***Erskine v. Baker***, 22 S.W.3d 537, 539 (Tex. App.–El Paso 2000, pet. denied). The purpose

behind prohibiting ex parte communications is to ensure that all legally interested parties are given their full right to be heard under the law and to ensure equal treatment of all parties. ***Abdygapparova v. State***, 243 S.W.3d 191, 207 (Tex. App.–San Antonio 2007, pet. ref'd).

Appellant contends that he received an unfair sentencing hearing because of ex parte conversations during which Aguirre told Kerzee in Hassell's presence that she had perjured herself during the hearing on the State's motion. Aguirre's statement to Kerzee was related to the trial court by the prosecuting attorney in open court on the record with Appellant and his attorney present. The trial court's consideration of this statement, Appellant contends, violated his due process right to an impartial judge during sentencing.

During the sentencing phase, but prior to pronouncing Appellant's two year sentence, the trial court addressed Appellant, in pertinent part, as follows:

> [W]ith your history, it's hard to believe they gave you probation, and you were dealing dope. Shame on you. I regret I can't give you but two years. I did, at one time I looked at this case, probably - - and I did tell the lawyers, you know, *see if y'all can work something out,* but when I look at the background, Mr. Cook, you're a crime wave at times. That's your problem. But when you're out, it's ours. Maybe she will get to join you, I don't know. But I'm going to sentence you to the maximum, two years, 24 months, State Jail Division of the Texas Department of Criminal Justice. Same and all shall be the Order and Judgment of this Court.
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> . . . .
>
> Mr. Cook, the next time you commit a felony, they are going to have so many priors to use against you, you'll be looking, I think, at a minimum of 25 to life, just for your own knowledge. This state jail felony, it's going to - - you'll have it worked out pretty quick, but there's one thing about it, you get out of line and they catch you again, shame on you. That judge ain't going to give you probation. All they are going to look at is a minimum of 25. I would give you 25 here today, but I can't.

In ***Abdygapparova***, the trial judge and the prosecutor exchanged numerous notes during voir dire providing guidance to the prosecutor on the presentation of his case with the expectation that the notes would remain private. *See* ***Abdygapparova***, 243 S.W.3d at 207-08. The court of appeals held that such communications showed bias on the part of the trial judge and prevented Abdygapparova from receiving a fair and impartial trial. ***Id.*** at 209.

Here, even assuming arguendo that the statement at issue is an ex parte communication, it is apparent from the record that the trial court firmly believed that Aguiree was perjuring herself, even before her admission of this fact was announced in open court. The alleged ex parte statement later related to the trial court undoubtedly confirmed this belief. Indeed, the trial court

made reference to Aguirre's testimony prior to finding the allegations in the State's motion to be "true."[4] However, the trial court made no reference to Aguirre or her testimony from the sentencing phase of the trial through pronouncing Appellant's sentence. Rather, the trial court indicated to Appellant that the maximum punishment he could receive was imprisonment for two years.[5] The trial court considered the testimonies of several witnesses and the argument of counsel. The trial court further made its own inquiry concerning whether Appellant had young children and who was caring for these children. The trial court also inquired of the State concerning the existence of a presentence investigation report at the outset of the hearing and noted Appellant's extensive criminal history prior to pronouncing Appellant's sentence.

Throughout the punishment hearing, the trial court made no statements that indicated bias. We decline to hold that the statement communicated to the trial court concerning Aguirre's admission of perjury, without more, supports an inference that the trial court was biased in its sentencing of Appellant. Therefore, we conclude Appellant was not denied due process and due course of law. Appellant's ninth issue is overruled.

DISPOSITION

We lack jurisdiction to consider the part of Appellant's eighth issue that challenges the trial court's original judgment of conviction. Accordingly, we ***dismiss*** the portion of Appellant's appeal concerning the trial court's restitution order in its original judgment for ***want of jurisdiction***. Having overruled Appellant's first and ninth issues, and the remainder of Appellant's eighth issue and having further concluded that we need not address his second through seventh issues, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered November 2, 2011.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.
(DO NOT PUBLISH)

[4] Appellant does not argue that his due process rights were violated with regard to the trial court's finding that he had violated the terms and conditions of his community supervision. Specifically, immediately prior to finding the allegations in the State's motion to be "true," the trial court stated, "[S]he's about the worst witness I've ever seen in my life. I don't know if it's just stupidity, whatever, but she's going to -- I'm going to -- I encourage the State to get after her. But it doesn't say much for Mr. Cook that he was involved with her."

[5] Appellant does not argue that the trial court failed to consider the full range of punishment.