REL: MARCH 22, 2024

Alabama Court of Criminal Appeals

OCTOBER TERM, 2023-2024

CR-2023-0843

Kurtis La'Dair Thomas

v.

State of Alabama

Appeal from Montgomery Circuit Court
(CC-19-1209)

KELLUM, Judge.

The appellant, Kurtis La'Dair Thomas, appeals from the Montgomery Circuit Court's revocation of his community-corrections sentence.

The record indicates that Thomas pleaded guilty in January 2020 to possessing a firearm when he was in a class of certain persons forbidden to possess a firearm, see § 13A-11-72, Ala. Code 1975, receiving stolen property in the third degree, see § 13A-8-18.1, Ala. Code 1975, and resisting arrest, see § 13A-10-41, Ala. Code 1975. The circuit court sentenced Thomas to concurrent terms of 10 years' imprisonment for his felony convictions for being a certain person forbidden to possess a firearm and receiving stolen property; that sentence was split, and he was ordered to serve 2 years in community corrections, followed by 5 years' supervised probation. The court ordered Thomas to serve one year in prison for his misdemeanor conviction for resisting arrest.

While in community corrections, Thomas violated the conditions of his placement numerous times, was arrested, and was ultimately placed back in community corrections. The record indicates that Thomas was arrested in September 2020, in November 2021, and in March 2022, for violating the terms and conditions of the community-corrections program but was released from incarceration on each occasion.

On August 11, 2023, Thomas's community-corrections case manager filed a "delinquency charge," alleging that Thomas had been

arrested by the Montgomery Police Department for theft of property in the first degree.

On October 19, 2023, the circuit court conducted a revocation hearing at which Thomas was present and represented by counsel. Thomas admitted that he had received notice of the charged community-corrections violation, specifically that he had been charged with a new criminal offense of theft of property in the first degree. The State explained that Thomas had stolen a car parked at a fitness gym on the Eastern Boulevard. According to the State, video of the theft existed, and the victim had not given Thomas permission to take the car. At the hearing, the following transpired:

> "THE COURT: You want a formal hearing?
>
> "[Defense counsel]: No, Judge
> .
> "THE COURT: He wants to admit?
>
> "[Defense counsel]: He's already admitted.
>
> "THE COURT: Okay. So I'm catching up.
>
> "[Thomas]: Yes, sir.
>
> "THE COURT: All right. He's here for a decision.
>
> "[Defense counsel]: Yes, Judge. And I think he wants to address the Court as well.

"THE COURT: Well, what he's going to tell me?

"[Defense counsel]: He just expressed to me that he would like to talk.

"THE COURT: I know, but I'm saying what you're going to say?

"[Thomas]: No. I had wrote to you.

"THE COURT: What you're going to say?

"[Thomas]: Like this ain't – I'm just not going around, Your Honor, and just stealing folks' cars.

"THE COURT: No. Nobody said that.

"[Thomas]: You know, I'm not in the position –

"THE COURT: But you admit you stealing it, though.

"[Thomas]: Because if somebody give you something –

"THE COURT: No. Did you admit to stealing a car? Your lawyer, Mr. Holley, now. You better ask him. Ask him.

"[Defense counsel]: He told –

"THE COURT: Ask him. He told who?

"[Defense counsel]: He told the investigators –

"THE COURT: No. But has he admitted that he stole the vehicle?

"[Defense counsel]: Not in these proceedings.

"THE COURT: Well, that's what I'm saying. I asked you did you want a formal hearing.

"[Defense counsel]: Judge, I already told you – he expressed to me he wanted to waive a formal hearing.

"THE COURT: Well, you didn't say that. You said he already admitted it. That's something different.

"[Defense counsel]: Judge, he expressed to me –

"THE COURT: What was my question? My question had – didn't include the word 'admitted.' Did it?

"[Defense counsel]: It did not, Judge.

"THE COURT: It says does he – would he like a what?

"[Defense counsel]: A formal hearing.

"THE COURT: You didn't mention formal or – hearing or nothing, did you, in your response?

"[Defense counsel]: I didn't Judge.

"THE COURT: Well, why don't you do that.

"[Defense counsel]: I'll do that right now, Judge.

"THE COURT: Say it, then.

"[Defense counsel]: Judge, he's expressed to me that he would like to waive a formal hearing.

"THE COURT: Is that right, sir?

"[Thomas]: Yes, Your Honor.

"THE COURT: All right. Listen. Listen. I ain't got time[] for these games this morning.

"[Thomas]: I don't know what a formal hearing is, Your Honor.

"THE COURT: Well, do you want the State to prove that you – to me that you violated your conditions –

"[Thomas]: No –

"[Defense counsel]: I provided you with the rules and I explained to you what a hearing is.

"THE COURT: This is not a trial.

"[Thomas]: I'm not trying to contest what's going on, Your Honor.

"THE COURT: Well, but then you're telling me you didn't steal it. The two are not the same. Are they, [defense counsel]?

"[Defense counsel]: No, Judge, they're not.

"THE COURT: So, what – I mean, you got me confused. What are you saying? I'm listening.

"All right. Call your first witness."

(R. 5-8.)

The State called M. Harris,[1] the assistant director with Montgomery County Community Corrections, who testified that Thomas

[1]A first name is not given for Assistant Director Harris in the record on appeal.

signed a community-corrections order with the program on March 1, 2023. Harris testified that she reviewed the conditions of the program with Thomas, who appeared to understand them, and that he violated condition number eight that prohibits a defendant from violating any city, federal, or state laws while participating in the community-corrections program. A copy of the order Thomas signed was admitted into evidence. The order stated: "The offender will be subject to arrest for violation of any condition of the sentence executed, including the removal of the offender from the Community Corrections Program and confinement in the county jail or prison." (C. 377 emphasis in original.) Harris testified that she was aware that Thomas was arrested for stealing a vehicle because she had been contacted by someone at the Montgomery County Detention Facility. Harris found Thomas in jail, charged with theft of property in the first degree.

Thomas declined to offer any evidence, after which the following occurred:

> "THE COURT: All right. Well, the evidence is concluded. I'm reasonably satisfied that Mr. Thomas has violated the condition of his community-corrections placement, in that he has committed a new offense. Anything else?

> "[Defense counsel]: It's not whether he committed or did not commit. We would argue that the State did not present any non-hearsay that would indicate that he committed the offense.
>
> "THE COURT: Well, I think they did. I think the officer testified that she contacted him while he was in jail.
>
> "[Defense counsel]: And Your Honor has seen the caselaw that specifically states a mere arrest is not enough to revoke.
>
> "THE COURT: Well, maybe you're right. I hadn't seen it today."

(R. 13.)

On October 24, 2023, the circuit court entered an order revoking Thomas's placement in the community-corrections program, finding that it was "reasonably satisfied that [Thomas was] guilty of revocation." (C. 364.) This appeal followed.

On appeal, Thomas contends that the circuit court erred when it revoked his participation in the community-corrections program based on insufficient evidence. Specifically, Thomas contends that the circuit court relied solely on hearsay evidence to revoke, and that Thomas's arrest alone was insufficient grounds to revoke. We agree.

> "We first note that the revocation of a sentence served under a community-corrections program is treated the same as a probation revocation. See § 15-18-175(d) (3)b., Ala. Code 1975 ('A revocation hearing shall be conducted before the

> court prior to revocation of the community corrections sentence. The court shall apply the same due process safeguards as a probation revocation proceeding and may modify or revoke the community punishment sentence and impose the sentence that was suspended at the original hearing or any lesser sentence....'); Richardson v. State, 911 So. 2d 1114 (Ala. Crim. App. 2004) (treating the revocation of a community-corrections sentence as a probation revocation)."

Corbitt v. State, 369 So. 3d 682, 684 (Ala. Crim. App. 2022).

> "'It is well settled that hearsay evidence may not form the sole basis for revoking an individual's probation. See Clayton v. State, 669 So.2d 220, 222 (Ala. Cr. App. 1995); Chasteen v. State, 652 So.2d 319, 320 (Ala. Cr. App. 1994); and Mallette v. State, 572 So.2d 1316, 1317 (Ala. Cr. App. 1990). "The use of hearsay as the sole means of proving a violation of a condition of probation denies a probationer the right to confront and to cross-examine the persons originating the information that forms the basis of the revocation." Clayton, 669 So.2d at 222.'"

Glasscock v. State, [Ms. CR-2022-1106, Feb. 10, 2023] ___ So. 3d ___, ___ (Ala. Crim. App. 2023) (quoting Goodgain v. State, 755 So. 2d 591, 592 (Ala. Crim. App. 1999)).

> "However, 'hearsay evidence is admissible in a revocation proceeding,' Beckham v. State, 872 So. 2d 208, 211 (Ala. Crim. App. 2003), and a combination of both hearsay and nonhearsay evidence may be sufficient to warrant revocation. See, e.g., Askew v. State, 197 So. 3d 547, 548-49 (Ala. Crim. App. 2015). '[W]hen the State presents a mixture of hearsay and nonhearsay evidence to show that a defendant violated his probation by committing a new offense, the circuit court cannot revoke a defendant's probation for that violation unless the nonhearsay evidence connects the defendant to the

> alleged offense.' Walker v. State, 294 So. 3d 825, 832 (Ala. Crim. App. 2019) (emphasis in original)."

Corbitt, 369 So. 3d at 685.

Further, a "'mere arrest' or the filing of charges is an insufficient basis for revoking one's probation." Allen v. State, 644 So. 2d 45, 45-46 (Ala. Crim. App. 1994). See also Gates v. State, 629 So. 2d 719, 720 (Ala. Crim. App. 1993) ("The appellant admitted at the hearing that he had been arrested in Georgia; however, a 'mere arrest' or the filing of charges is an insufficient basis for revoking probation."). As this Court explained in Calhoun v. State, 854 So. 2d 1209 (Ala. Crim. App. 2002):

> "'If merely being arrested is sufficient for revocation of probation, then revocation would lie within the discretion of police officers rather than with judicial officers. In such a case, judges would only perform the ministerial duty of determining if an arrest had been made and then signing the revocation order. The decision to revoke probation is a judicial function and should be based upon the appellant's conduct and not upon an accusation only. The State must submit enough substantive evidence to reasonably satisfy the trier of the facts that a condition of probation was breached.'"

Calhoun, 854 So. 2d at 1210 (quoting Hill v. State, 350 So. 2d 716, 718 (Ala. Crim. App. 1977)).

In this case, the State presented a mixture of hearsay and nonhearsay evidence. Harris testified that she learned that Thomas had

been arrested when she was contacted by someone at the Montgomery County Detention Facility and that she corroborated this information when she found Thomas in jail. However, the only evidence presented at the revocation hearing that Thomas committed a new criminal offense was his arrest for theft of property in the first degree. The State offered no evidence, other than the argument of counsel, regarding the basis for the first-degree theft charge. See Gobble v. State, 104 So. 3d 920, 979 (Ala. Crim. App. 2010) ("Arguments of counsel are not evidence.").

Because the State failed to present any nonhearsay evidence to establish that Thomas had violated the terms and conditions of his community-corrections sentence and Thomas's arrest alone was insufficient to revoke the community-corrections sentence, the circuit court erred in revoking Thomas's community-corrections sentence. Accordingly, this Court reverses the circuit court's order revoking Thomas's community-corrections sentence and remands this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Windom, P.J., and McCool, Cole, and Minor, JJ., concur.