

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 18, 2008

STATE OF TENNESSEE v. BRYAN JAMES FARVE

**Direct Appeal from the Criminal Court for Sullivan County
No. 251414 Robert N. Montgomery, Judge**

No. E2008-00939-CCA-R3-CD - Filed March 23, 2009

The Defendant, Bryan James Farve, pled guilty to two counts of attempt to commit aggravated sexual battery, and the trial court sentenced him to eight years of probation. A revocation warrant was issued, charging that the Defendant had violated his probation, and, after a hearing, the trial court revoked the Defendant's probation and ordered him to serve the balance of his sentence in prison. The Defendant now appeals, contending that the trial court erred when it revoked his probation and when it permitted a witness to testify as an expert. After thoroughly reviewing the record and applicable authorities, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Clifton Corker, Johnson City, Tennessee, for the Appellant, Bryan James Farve.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; David H. Findley, Assistant Attorney General; H. Greeley Wells, District Attorney General; Barry Staubus, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A Sullivan County Grand Jury indicted the Defendant on two counts of aggravated sexual battery, alleging that he engaged in sexual conduct with a child under the age of thirteen. He pled guilty to attempted aggravated sexual battery, and the trial court sentenced him to eight years of probation.

On March 6, 2008, a probation revocation warrant was issued, charging that the Defendant had violated the conditions of his probation by admitting he had smoked marijuana. At the hearing to determine whether the Defendant had violated his probation, the following evidence was presented: Wendy Minton, the Defendant's probation officer, testified that the Defendant began his probation in December 2007. She explained to him that he was subject to both the general rules of probation as well as a special set of rules due to his status as a sex offender. After Minton explained each rule, the Defendant signed a copy of the rules pledging his compliance. In Rule No. 7, the Defendant agreed not to use intoxicants of any kind to excess or to use or to have in his possession narcotics, drugs or marijuana. In Rule No. 4, of the special sex offender directives, the Defendant agreed that he would not use or possess any alcoholic beverage or other mind-altering substance.

Minton testified that, while the Defendant was on probation, he resided at the "Hay House." The Defendant was residing at the Hay House until Minton could arrange transport for him to Louisiana or until the Defendant found a job and established himself. Minton met with the Defendant on March 4, 2008, during which she asked the Defendant about an affidavit from a staff member at the Hay House in which staff member reported that the Defendant admitted to using marijuana. The Defendant admitted to her that he had smoked marijuana with another probationer/parolee at his place of employment, the Texas Roadhouse.

Minton said that, as a result of the Defendant's admission, she sent the Defendant to be drug tested. She also had the Defendant sign a statement in which he admitted he had used marijuana. No drugs were detected in the Defendant's urine. Minton testified the Defendant had resided at the Hay House for less than three weeks at the time that he smoked marijuana. Minton said that, during the three weeks the Defendant was at Hay House, he reported as instructed, but she did not think that he "whole-heartedly" looked for employment.

On cross-examination, Minton testified that the Defendant began serving probation in December, and she knew that he had previously been incarcerated, but she did not know for how long. Minton agreed that the Defendant reported as instructed from December through March. Minton conceded that she was unaware of any other violations by the Defendant but stated, "[S]moking pot on probation is a major violation, though." Minton testified that the Defendant had successfully passed the one previous drug test that she had ordered him to undergo. Minton said that the Defendant admitted to her that he and another offender were smoking marijuana, but he did not say how much he smoked.

Patrick Campbell, an employee at the Aegis Science Corporation in Nashville, testified that he is a certifying scientist and a mass spectrometrists in drug testing. He said that he did not analyze the Defendant's urine, but he reviewed the results of that analysis. The State offered Campbell as an expert, and before the trial court ruled on the issue, defense counsel conducted a voir dire of the witness.

During voir dire, Campbell testified that he had never before been qualified as an expert to testify in court, but he had multiple subpoenas to do so. In the cases where he had been subpoenaed, the defendant had either pled guilty or Campbell's testimony had not been required.

Campbell said that he received a Bachelor of Science in environmental science with a minor in chemistry. He testified he worked at Aegis and had been accepted by the federal urine drug testing program as an “alternative responsible person” for the laboratory. This meant that, if his supervisor was unavailable for a period of more than two weeks, Campbell was responsible for the laboratory. Campbell explained that another requirement of an “alternative responsible person” was to be “qualifiable as an expert witness” with respect to drug testing and results interpretation. Campbell maintained that he had been specifically trained with respect to results interpretation. That training, which he received from the Laboratory Director, Dr. Tim Robert, involved lectures that went in stages from non-regulated specimen analysis through regulated specimen analysis. All of his training led to the “alternate responsible person” job title. Defense counsel objected to Campbell’s testimony with regard to interpreting the results of the Defendant’s urine test. The trial court found:

I think based upon what I see Mr. Campbell’s training and experience, the fact that he’s also a certifying scientist for federally regulated urine drug testing and non-regulated specimen analysis is such that I think he’s qualified to render an opinion in that area so I’m going to overrule your objection and allow him to testify and form an opinion on those particular issues.

Campbell then testified as an expert that the fact that the Defendant’s drug test was negative did not necessarily mean he did not use marijuana. Campbell explained that, for a person who is not a habitual marijuana user, the half-life of the drug in the human system is such that it would be at non-detectible levels within five to seven days. After five to seven days, it would be flushed from the system and would not show up on a drug test. Campbell noted that the Defendant admitted using marijuana on February 24, and the drug sample was not taken until March 4. Therefore, the sample was taken more than seven days from the day the Defendant admitted using marijuana.

On cross-examination, Campbell testified that the test used to detect drugs in urine is fairly sensitive and would return positive if urine was taken from someone who had used drugs within five to seven days. Campbell testified that he had not done any experiments to prove the five to seven day time frame but said that this time frame was generally accepted in the industry. Campbell testified that he did not agree that if someone smoked marijuana it would remain in their system for thirty days. He said, however, that marijuana would be detectible longer in the system of a chronic user. How long it was detectible depended on how much marijuana they smoked.

Responding to questions by the trial court, Campbell testified that the data he had from the Defendant’s sample would have detected extremely low levels but that it was possible that a marijuana metabolite was present in the sample but not reported. On recross-examination, Campbell testified that the Defendant’s screen was negative, even though it would detect even very low levels of drugs in his system. Therefore, he would have expected to see a positive result if he had smoked marijuana within the time frame. He explained that if the screen had detected marijuana, the Defendant’s urine would have been tested further for quantities of drugs found.

The Defendant submitted a letter from his supervisor at Texas Roadhouse in which the supervisor stated that the Defendant was well-liked at work and had done a good job.

Defense counsel argued to the trial court that the negative test result could have been because the Defendant either was mistaken about smoking marijuana or that he smoked such a small amount. Based upon the evidence, and the arguments of counsel, the trial court found:

Well, [defense counsel], [the Defendant is] not charged with a crime and so number one, the level . . . of evidence is not beyond a reasonable doubt but by a preponderance of the evidence. The other thing is, . . . that . . . an admission certainly can be a basis, I don't think there's anything in the case law that says otherwise, that an admission can be a basis for a violation of probation if the Court finds that it was a legitimate admission, that it was not coerced or forced or anything else. And of course the letter that he sent to me . . . was not obviously . . . there's nothing to indicate that that was in any way forced or coerced, which seems to follow up with what he said to the officer in this case. So I find . . . based upon the evidence that I've heard here today and by a preponderance of the evidence that he has violated the terms and conditions of his probation by using the marijuana. . . . [T]he other thing I would point out, too, about marijuana is that . . . marijuana tends not to be one of those drugs that has, how shall I say it, fake marijuana. I mean either it is or it isn't. And you know if you've used marijuana before you know what it is, you know what it smells like [S]o I don't find that that would be a credible explanation. Maybe if you had for his not showing up on the screen . . . maybe if you were dealing with a drug that readily has counterfeit drugs that might be a whole different story, but we're not there in this case in my opinion. So I do find that the State has proven it by a preponderance of the evidence. I find you guilty of violating terms and conditions of your probation, both violation of Rule No. 7 as well as the sex offender directive no. 4.

The trial court then turned to decide the disposition of the remainder of the Defendant's sentence. In that regard, the Defendant testified that he had admitted he smoked marijuana on February 25, and he agreed he wrote a letter to the trial judge acknowledging that fact. The Defendant said that he took just one "hit" before he realized it was wrong and walked away. He admitted using the marijuana and said he felt guilty about his actions. He said he felt so guilty that he went immediately to the Hay House and told the staff there about what he had done. The Defendant testified that, before this incident, he had been working at the Texas Roadhouse for three weeks and was doing well there. The Defendant asked the court to put him back in the Hay House, saying that he felt he could "make a difference." He said that he did not want to go to jail. The Defendant said that he had learned from this experience that "marijuana is not something that you want to do on probation and, you know, it puts a lot at stake."

On cross-examination, the Defendant agreed that he waited a week to tell the Hay House staff about the fact that he had smoked marijuana. He agreed that he only told them because he

believed that he was going to be drug tested and thought that it would look better if he admitted what he had done before his test came back positive.

The trial court found:

[T]he real disturbing thing about all this is . . . that as the District Attorney pointed out, . . . this occurred . . . February 25th and the only thing that I've heard here today that really caused you to make the decision to tell anybody was the fact that it was getting ready to come up and you were going to be screened when you went to see Ms[.] Minton the next day for your annual visit. And so I mean, yes, I mean you did confess. Yes, you did disclose, but it was only because people brought it to your mind that, "Hey, bad things are going to happen if I test positive," not because you realized you made a mistake and you went and told somebody. And you know, one of the foundations of somebody being on probation is to be open and honest with your probation officer, whether it be the people at community corrections or whether it be Ms[.] Minton. . . . [W]hile some people might disagree . . . I, based on my experience both as a Judge and also as a prosecutor, the probation people, the community corrections people, they're not trying to get you to go back to jail. . . . [B]ecause . . . when someone is in jail or when someone is in prison that's a cost to all of us . . . you're not being a productive person. But on the other hand they also expect you to be honest and straight forward with them and . . . not committing new crimes because that's what the public expects. That's what all of us expect, is that people ought to be able to operate in life without committing new crimes.

Now, in my opinion, [defense counsel], . . . the appropriate thing to do, taking all those factors into consideration, is to order him to serve his sentence. As I say he'll have . . . the credit for over two years.¹ I just think that taking all those things in consideration that's the appropriate thing to do. So I'm going to order him to serve his sentence of eight years as a Range II multiple offender.

It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends that the trial court abused its discretion when it revoked the Defendant's probation and ordered him to serve his sentence because the trial court's finding was based upon the Defendant's uncorroborated confession. Next, he contends that the trial court abused its discretion when it allowed Campbell to testify as an expert witness.

A. Defendant's Confession

¹We note that, because the Defendant was originally sentenced to probation rather than community corrections, he would not be entitled to "street time" credit on his eight-year prison sentence.

In support of his contention that the trial court abused its discretion when it ordered confinement, the Defendant cites *State v. Housler*, for the proposition that a defendant may not be convicted of a crime based upon an uncorroborated confession. 193 S.W.3d 476, 490 (Tenn. 2006). He asserts that because an uncorroborated confession is insufficient evidence upon which to base a conviction it should also be insufficient evidence upon which the trial court may rely to order him to serve the balance of a sentence in confinement. The State counters that the Defendant's admission is sufficient to support the revocation of his probation and that, considering the seriousness of his original charges and his inability to abide by the rules of probation, the Defendant should serve the remainder of his sentence in confinement.

When a trial court determines by a preponderance of the evidence that a probationer has violated the conditions of his or her probation, the trial court has the authority to revoke probation. T.C.A. § 40-35-311(e) (2006). Upon finding that the defendant has violated the conditions of probation, the trial court may revoke the probation and either: (1) order incarceration; (2) order the original probationary period to commence anew; or (3) extend the remaining probationary period for up to two additional years. *State v. Hunter*, 1 S.W.3d 643, 644 (Tenn. 1999); see T.C.A. § 40-35-310, -308(c), and -311(e) (2006). The defendant has the right to appeal the revocation of his probation and entry of his original sentence. T.C.A. § 40-35-311(e). Upon a finding of a violation, the trial court is vested with the statutory authority to "revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered . . ." T.C.A. § 40-35-311(e); *Hunter*, 1 S.W.3d at 646 (holding that the trial court retains the discretionary authority to order the defendant to serve his or her original sentence in confinement). Furthermore, when probation is revoked, "the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension . . ." T.C.A. § 40-35-310. The trial judge retains the discretionary authority to order the defendant to serve the original sentence. See *State v. Duke*, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995).

The decision to revoke probation is in the sound discretion of the trial judge. *State v. Kendrick*, 178 S.W.3d 734, 738 (Tenn. Crim. App. 2005); *State v. Mitchell*, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). The judgment of the trial court to revoke probation will be upheld on appeal unless there has been an abuse of discretion. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). To find an abuse of discretion in a probation revocation case, the record must be void of any substantial evidence that would support the trial court's decision that a violation of the conditions of probation occurred. *Id.*; *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). Proof of a probation violation is sufficient if it allows the trial court to make a conscientious and intelligent judgment. *State v. Milton*, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984). In reviewing the trial court's finding, it is our obligation to examine the record and determine whether the trial court has exercised a conscientious judgment rather than an arbitrary one. *Mitchell*, 810 S.W.2d at 735.

The Defendant asserts that, pursuant to *State v. Housler*, a defendant may not be convicted of a crime based upon an uncorroborated confession and the same should be true for proof to support the trial court's revocation of probation. We respectfully disagree. The burden of proof required to convict in criminal cases is different from the burden of proof in a violation

of probation proceeding. In order to convict a defendant of a crime, the State must prove guilt beyond a reasonable doubt. *See* T.C.A. § 39-11-201 (2006). The State need only prove by a preponderance of the evidence that a defendant violated the terms of his probation. T.C.A. § 40-35-311(e) (2006); *see State v. Leach*, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995) (stating that a judge need not find a violation of the terms of probation has occurred beyond a reasonable doubt). This Court has previously held that a defendant's own admission alone is substantial evidence to support the trial court's revocation order. *See State v. Christopher Nathaniel Richardson*, No. M2006-01060-CCA-R3-CD, 2007 WL 776876, at *4 (Tenn. Crim. App., at Nashville, Mar. 15, 2007), *no Tenn. R. App. P. 11 application filed*; *State v. Eric D. Devaney*, No. E2005-01986-CCA-R3-CD, 2006 WL 2373469, at *4 (Tenn. Crim. App., at Knoxville, Aug. 17, 2006), *no Tenn. R. App. P. 11 application filed*; *State v. Michael Emler*, No. 01C01-9512-CC-00424, 1996 WL 691018, at *2 (Tenn. Crim. App., at Nashville, Nov. 27, 1996) (holding that where the defendant admits a violation of the terms of probation, revocation by the trial court is neither arbitrary nor capricious), *no Tenn. R. App. P. 11 application filed*.

In this case, the Defendant admitted that he used marijuana while on probation. The Defendant first told staff at the Hay House about his drug use, and the trial court found that he did so only because he thought that he was going to test positive on an impending drug test. The Defendant's terms of probation included that he would refrain from all drug use, and he did not do so. We conclude that the trial court did not abuse its discretion when making this finding. Accordingly, the Defendant is not entitled to relief on this issue.

B. Expert Testimony

The Defendant next contends that the trial court abused its discretion when it allowed Campbell to testify as an expert witness in the area of interpreting negative drug screen tests. The Defendant contends that Campbell, who had not previously been recognized as an expert, had no specialized education in the area of blood chemistry or the half-life of the THC (marijuana) metabolites. The State counters that the rules of evidence do not apply at revocation hearings and, given the Defendant's three admissions of guilt, any error in admitting Campbell's testimony was harmless.

It is the trial court's "duty at such a hearing to exercise liberal discretion in receiving and hearing evidence." *Barker v. State*, 483 S.W.2d 586, 589 (Tenn. 1972) "It is well established that trial courts have broad discretion in determining the admissibility of evidence, and [generally] their rulings will not be reversed absent an abuse of discretion." *State v. McLeod*, 937 S.W.2d 867, 871 (Tenn. 1996); *State v. James Otis Butler*, No. W2006-1300-CCA-R3-CD, 2006 WL 3837238, at *2 (Tenn. Crim.App., at Jackson, Dec. 28, 2006) (applying this standard to the trial court's admission of evidence at a probation revocation hearing), *no Tenn. R. App. P. 11 application filed*. Furthermore, this Court has held that "revocation proceedings are informal in nature, as evidenced by relaxed rules regarding the admissibility of evidence, the absence of a jury, and a preponderance of the evidence burden of proof." *State v. Scottie Ellis Clark*, No. M2006-00693-CCA-R3-CD, 2007 WL 776872, at *4 (Tenn. Crim. App., at Nashville, Mar. 8, 2007) (citing T.C.A. § 40-35-311(c) - (e) (2006) and *Barker*, 483 S.W.2d 586), *perm. appeal denied* (Tenn. June 18, 2007). In *Barker*, the Tennessee Supreme Court held that probationers

are not entitled to receive the full range of due process rights that are accorded to a person who is not yet convicted. *Barker*, 483 S.W.2d at 589.

We conclude that the trial court did not abuse its discretion when it allowed Campbell to testify as an expert at the probation revocation hearing. Campbell testified that he was an “alternative responsible person” and accepted by the federal urine testing program, which required him to be “qualifiable as an expert witness” with respect to drug testing and results interpretation. Further, Campbell said he had been specifically trained with respect to results interpretation. The Defendant has failed to prove that the trial court abused its discretion when it admitted Campbell’s testimony, especially in light of the informal nature and relaxed rules in a probation revocation hearing. *See* Tenn. R. Evid. 702. The Defendant is not entitled to relief on this issue.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgment of the trial court.

ROBERT W. WEDEMEYER, JUDGE