

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs October 7, 2008

**STATE OF TENNESSEE v. JOHN WILLIAM WALLER**

**Direct Appeal from the Criminal Court for Davidson County  
No. 2000-B-1003     Randall Wyatt, Jr., Judge**

---

**No. M2007-02688-CCA-R3-CD - Filed February 2, 2009**

---

This case presents an appeal as of right by Defendant-Appellant, John William Waller (hereinafter "Waller"), from a judgment by the Honorable Randall Wyatt, Judge of the Davidson County Criminal Court, revoking his probation. The only question submitted for this court's review is whether the trial court properly revoked Waller's probation. Upon a thorough review of the record and applicable law, we affirm the judgment of the trial court.

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

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Jeffrey A. DeVasher, Assistant Public Defender (on appeal), and Jonathan F. Wing, Assistant Public Defender (at trial), Nashville, Tennessee, for the appellant, John William Waller.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bernie McEvoy, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Facts.** On June 13, 2000, the appellant, John William Waller, was indicted in Davidson County Criminal Court for one count of rape of a child and two counts of aggravated sexual battery. Subsequently, on April 20, 2001, Waller pled guilty to one count of rape and was sentenced to eight years' split confinement with twelve months to be served in confinement at one-hundred percent and the remaining seven years to be served on probation.

In July of 2003, Waller's probation was revoked for failure to maintain employment; failure to comply with the terms of his sex offender treatment plan; for changing addresses without notifying his probation officer or the Tennessee Sex Offender Registry; and for living with a known sex offender. Upon revoking his probation, the trial court ordered that Waller be confined for eight

months day for day and then be placed back on probation. In May of 2005, Waller's probation was again revoked for failing to comply with the terms of his probation. In particular, the trial court found Waller had failed to maintain employment; failed to inform his probation officer of his change of address; failed to adequately maintain his registration with the Tennessee Sex Offender's Registry; and failed to refrain from obtaining prohibited sexually explicit materials. The court ordered Waller to remain on probation, to continue to comply with the terms of his probation, and to receive further mental health treatment from a private physician.

On March 19, 2007, Waller was again charged with violating the terms of his probation. The warrant alleged Waller had failed to verify that he was employed; failed to schedule a mandatory polygraph examination; failed to re-enroll in a sex offender treatment program; failed to pay applicable fees; and failed to update his status with the Tennessee Sex Offender Registry. An amended warrant sworn on April 26, 2007, additionally alleged that Waller had improper contact with another sex offender and possibly engaged in improper internet usage. A hearing on the warrant was held and the trial judge found that Waller had once again violated the terms of his probation. Thus, the trial court revoked Waller's probation and ordered him to serve his entire sentence in confinement with credit given for time previously served.

**Probation Revocation Hearing.** At the hearing on the instant revocation warrant, Amy Levy,<sup>1</sup> Waller's probation officer, testified that Waller had violated the terms of his probation by failing to provide verification of full time employment; failing to follow her instructions to have a mandatory polygraph examination; failing to re-enroll in a sex offender treatment program; failing to pay certain fees associated with his conviction and probation; and failing to properly register with the Tennessee Sex Offender Registry. She stated that due to Waller's failure to meet these terms of his probation, she filed for a revocation warrant. Levy further testified that she filed an amended warrant because she was notified that Waller had been in contact with Thomas Watson, a known sex offender who was the subject of one of Waller's earlier revocations.

Levy stated that Waller had a history of (1) failing to maintain full time employment, (2) falling behind in treatment and polygraph requirements, and (3) late payment of fees. She testified that convicted sex offenders are required as a condition of probation to submit twice a year to a polygraph examination. Levy stated that such examinations are part of a containment model for supervising sex offenders and are used to determine whether the offender has committed any additional offenses. She stated that Waller had not submitted to a polygraph examination in over a year. She stated that the polygraph examination usually costs \$150 to administer; however, she stated that she and Waller's counsel had sought and received approval from the court to reduce Waller's cost to \$50 per test.

---

<sup>1</sup>This court notes that the Transcript of Evidence for the probation revocation hearing lists the probation officer's name as "Amy Levy;" however, the affidavit in support of the probation revocation warrant lists her name as "Amy Lieby."

\_\_\_\_\_ David Elliot testified that he was assigned to the sex crimes unit for the Metro Nashville Police Department and stated that he was the person in charge of the sex offender registry for Davidson County. He stated that in March of 2005 he went to the residence of Thomas Watson, a known sex offender, to issue a warrant for Watson's arrest. Officer Elliot testified that during the execution of the warrant he observed Waller in Watson's residence. He stated that Waller was typing on the keyboard of Watson's computer.

Kenneth A. Berry testified that he runs New Creations Ministry, an organization that maintains a number of halfway houses. He advised that Waller's parents had provided funds for Waller to maintain a residence in one of their facilities. Berry testified that there were full time counselors and monitors at the facility and a nightly curfew; however, he acknowledged that the facility could not verify the whereabouts of its residents during the day. He stated that the organization had a partnership with Mental Health Co-Op and could accommodate persons with mental illness so long as their conditions were not too severe. However, Berry stated that he had not reviewed Waller's medical records and had never actually met Waller until the day of the hearing.

Gene Waller, Waller's father, testified that Waller has been diagnosed as schizophrenic and is not able to consistently maintain employment. However, he indicated that Waller performs adequately as long as he regularly takes his medication. Mr. Waller stated that he had paid for his son to go to the halfway house because if Waller was not living with him he could qualify for public assistance which would assist him in paying for his medication. He stated that he gave Waller \$150 to have a polygraph examination but that Waller lost the money.

Waller testified that he had been living with his parents since his last revocation except for certain occasions when his parents had overnight guests. He stated that, during these times, he stayed at a hotel; however, he claimed he always informed his probation officer of where he was staying. Additionally, he claimed he was working until approximately six months prior to his current revocation warrant. He contends he had panic attacks which caused him to lose his job. Waller acknowledged that he had contact with Thomas Watson in 2005. Although he knew he was not allowed to live with Watson, he did not know he was not allowed to have contact with Watson. He acknowledged using Watson's computer but denied using the internet. Waller confirmed that his parents gave him money to have a polygraph examination but that he lost the money. However, on cross-examination, he acknowledged that had he taken the polygraph examination when it was originally scheduled, he would have been able to afford the examination because he was working. Although Waller preferred to be in treatment, he claimed he could not afford it. He stated that he was willing to stay at the halfway house.

Mr. Grant <sup>2</sup> testified that in June of 2007 he took over Waller's case from Amy Levy. He stated that he reviewed Waller's probation file. Grant testified that Levy had maintained detailed notes and indicated that the file reflected Waller had first been notified in September of 2006 that

---

<sup>2</sup>This Court notes that the Transcript of the Evidence for the probation revocation hearing identifies this witness only as "Mr. Grant." No first name was provided.

he needed to have a polygraph examination. He stated that there was no note in the file indicating Waller informed Levy that he had lost the money provided to him for the polygraph examination. He stated that traditionally the fee for the examination was \$150; however, if the court found a petitioner to be indigent, the fee could be reduced to \$50 or waived. Finally, Grant testified that Dr. Rankin, Waller's therapist, had sent a letter to Levy in March indicating that he was continuing to see Waller "for nothing" because "it frightens" him to have Waller "on the streets with no treatment." Thus, Grant stated that it appeared treatment was still available to Waller regardless of his ability to pay.

**Analysis.** Waller makes several arguments contending the trial court improperly revoked his probation. First, he contends that certain violations of his probation were the result of his inability to pay and mental illness. Next, he alleges that the rules of his probation do not specifically prohibit contact with other known sex offenders. He further argues that the State has failed to provide sufficient proof to support the remaining allegations. Finally, Waller contends that his failure to comply with the conditions of his probation should not have resulted in the trial court placing his entire sentence into effect. In response, the State contends that the trial court properly revoked Waller's sentence. We agree with the State.

Tennessee Code Annotated Section 40-35-310 gives the trial court statutory authority to revoke probation whenever it finds that a probationer has violated the conditions of probation. State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). If a probationer is arrested for any breach of the laws of this State or violates the conditions of probation, the trial judge shall have the power to determine whether a violation occurred at a due process hearing, and, if the court finds by a preponderance of the evidence that a probationer is guilty of the alleged violation, the trial court may cause execution of the original judgment. T. C. A. § 40-35-311. Moreover, 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 revocation of a suspended sentence is within the sound discretion of the trial judge. Mitchell, 810 S.W.2d at 735 (citing Finley v. State, 214 Tenn. 149, 378 S.W.2d 169 (1964)). At the probation revocation hearing, the credibility of the witnesses is to be determined by the trial judge. Id. (citing Carver v. State, 570 S.W.2d 872 (Tenn. Crim. App. 1978)). The trial judge must receive sufficient evidence to allow him to make an intelligent determination. Id. (citing Barker v. State, 483 S.W.2d 586 (Tenn. Crim. App. 1972)).

In determining whether to revoke probation, the trial judge need not find a violation of the terms of probation has occurred beyond a reasonable doubt. The evidence need only show the trial judge has exercised conscientious judgment in making the decision rather than acting arbitrarily.

State v. Leach, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995) (quoting Stamps v. State, 614 S.W.2d 71, 73 (Tenn. Crim. App. 1980)).

The judgment of the trial court will not be disturbed on appeal absent an abuse of discretion. Leach, 914 S.W.2d at 106. For an appellate court to be warranted in finding an abuse of discretion in a probation revocation case, it must be established that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991).

Once a trial judge has determined a violation of probation has occurred, the trial judge retains discretionary authority to order the defendant to: (1) serve his sentence in incarceration; (2) serve the probationary term, beginning anew; or (3) serve a probationary period that is extended for up to an additional two years. State v. Hunter, 1 S.W.3d 643 (Tenn. 1999). This determination of the proper consequence of the probation violation embodies a separate exercise of discretion. Id. at 647; State v. Duke, 902 S.W.2d 424 (Tenn. 1995); State v. Ricio L. Conner, No. 02C01-9807-CR-00201, 1999 WL 1095649 at \* 2 (Tenn. Crim. App., at Jackson, October 31, 1999).

Based on this court's review of the evidence presented at the revocation hearing, we conclude that there is ample evidence to support the conclusion of the trial judge that a violation of the conditions of Waller's probation has occurred. The record clearly indicates that the trial judge exercised conscientious judgment in making the decision and did not act arbitrarily. Additionally, we conclude the court did not abuse its discretion in ordering Waller to serve his full sentence in confinement.

While Waller is correct in asserting that the severity of his crimes should not be used by the trial court as the sole reason for revoking his probation and denying him some alternative to incarceration, a trial court is not entirely precluded from considering the circumstances of the offense for which an accused was placed on probation when determining if revocation is appropriate. See Stiller v. State, 516 S.W.2d 617, 621 (Tenn. 1974). Here, the trial judge stated that he was basing his decision on "a lot of different things." Although he certainly emphasized the severity of Waller's crime, he likewise focused on the testimony offered by Waller's supervising probation officer and family and emphasized Waller's past failed attempts at probation. The trial court specifically stated that Waller "hasn't been doing right all of these years." The trial court noted that Waller had been given several opportunities to abide by the rules of his probation and had failed to comply. The trial judge stated:

And so, let's look at that a little bit. You know, I'm being asked again, for about the fifth time, to do something and you say you're tired of this. Well, the Court is tired of it and everyone else is tired. . . . But the point, of it is, that not too long after he got on probation, there was a violation warrant for different factors about employment and residence and moving without consent, terminated from the sex offenders program, whatever his excuse was, going to sleep in class and not being there once. He did some good things. I'm not ignoring that. . . . But he had those problems. So he had a violation then. That was in '03.

Then in '04, he's failing to register as a sex offender. His employment's a problem, again. He's changing addresses again.

Then a little later on, a third violation warrant, again, about the employment thing. . . So that's a third time.

Then there's another violation. He's hanging around some sex offender, apparently, Mr. Watson. He's saying well, he didn't know this and didn't know that. And he's got some access to the internet. He said he didn't use internet; he used the computer.

. . . But, the fact remains and the fact is, is that after all these different times, when you're here to begin with with a very, very serious charge . . . enough is enough. And he's been on these programs, doing all these different things. And he just keeps on having these problems. . . . But he's had numerous times to do what he's supposed to be doing and he has just completely and consistently avoided doing what he need[s] to do.

Where the defendant admits a violation of the terms of his probation, revocation by the trial court is not arbitrary or capricious. State v. Duke, 902 S.W.2d 424 (Tenn. 1995); State v. Mitzi Ann Boyd, No. 03C01-9508-CC-00246, 1996 WL 634218 (Tenn. Crim. App., at Knoxville, Nov. 1, 1996). At the revocation hearing, Waller admitted to being in contact with Watson, a known sex offender. However, he argued that he did not know he was not allowed to contact Watson. Although, he was informed through a previous violation that he could not live with Watson, he stated he was not aware that he was required to refrain from having any contact with Watson. It is not clear to this court whether contact with Watson specifically violated the terms of Waller's probation. However, as part of his probation, Waller agreed to "carry out all lawful instructions" his probation officer gives to him. Waller's probation officer asserts Waller was "repeatedly instructed to avoid contact with other sex offenders." Thus, it appears, at the very least, Waller failed to properly comply with his probation officer's instructions. Such an infraction clearly violated the terms of his probation.

Additionally, Waller admitted to using the computer but denied using the internet. He contends computer usage did not violate the terms of his probation. However, Waller's probation officer testified that as part of the specialized conditions for sex offenders on probation, Waller is prohibited from having access to a computer or internet. She stated that, in addition to this general prohibition, Waller had been "given repeated verbal instructions that he is not to have access to computers because he has a history involving child pornography on the computer."

Waller further admitted to failing to maintain employment and failing to submit to a mandatory annual polygraph examination. However, he contends he was unable to work due to his mental illness and, thus, could not afford the fee required to perform the polygraph examination. While he admits his parents provided funds for him to complete the mandatory polygraph, he contends he lost the money. Regardless, Waller acknowledged that had he scheduled his polygraph when he was initially instructed to do so, he would have been able to pay for the examination.

Waller's probation officer testified that the polygraph examinations were a critical component to Waller's probation. She explained that as part of a containment model for supervising sex offenders, the polygraph allows authorities to determine whether a sex offender on probation has committed additional offenses or had inappropriate contact with children. She testified that sex offenders are required to submit to two polygraph examinations a year and indicated that Waller had not completed a polygraph examination in nearly a year. Certainly, in the instant case, given that Waller had previously violated the terms of his probation by inappropriately accessing pornographic materials and living with a known sex offender, the trial court was particularly concerned about Waller's failure to comply with the polygraph requirement of his probation.

Finally, Waller contends he was thrown out of sex offender treatment for failure to pay. However, Waller's current probation officer testified that Waller's file contained a letter from Dr. Rankin, the counselor assigned to oversee Waller's sex offender treatment plan, stating that he would continue to see Waller for "nothing," because "it frightens [him] to have [Waller] on the streets without any form of treatment." Thus, it appears, contrary to Waller's assertion, that treatment was available despite his inability to pay. Moreover, Grant testified that Rankin indicated that Waller had been late for treatment on one occasion and on another occasion had slept through the treatment session.

We conclude that trial court did not abuse its discretion in determining that a violation of the terms of Waller's probation had occurred. Similarly, this court concludes the trial court did not abuse its discretion in determining that such violation, in light of Waller's past infractions, warranted the service of Waller's full sentence in incarceration. It is clear from the record that the trial court determined it was not prudent to continue to allow Waller the opportunity to serve his sentence on probation given his past infractions combined with the current violations. The trial judge found that, although Waller had been given multiple opportunities to comply with the terms of his probation and had the support of his father who had attempted to assist Waller in complying with the mandates of probation, Waller continued a pattern of refusing to comply with the mandates of his probation and the instructions of his probation officer. The trial judge further found that, although Waller clearly suffered from a mental illness, his noncompliance was not the result of his inability to comply but, rather was the result of his refusal to comply. Thus, the trial judge found that confinement was an appropriate consequence for the current infractions committed by Waller. Our review of the record shows that the trial judge reviewed all the evidence and exercised conscientious judgment that further probation was not warranted. The record clearly supports the findings of the trial judge.

### **Conclusion**

We conclude that the trial judge did not abuse its discretion in determining that Waller had violated the terms of his probation. Therefore, we conclude the trial court properly revoked Waller's probation. Furthermore, we conclude that, upon revocation, the trial court did not abuse its discretion in ordering Waller to serve his sentence in confinement. Accordingly, the decision of the trial court is affirmed.

---

CAMILLE R. MCMULLEN, JUDGE