# COURT OF APPEALS
**SECOND DISTRICT OF TEXAS**
**FORT WORTH**

**NO. 02-15-00086-CR**

MICHAEL ROSEBERRY — APPELLANT

V.

THE STATE OF TEXAS — STATE

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FROM THE 158TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. F-2009-0367-B

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## MEMORANDUM OPINION[1]

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In August 2009, Appellant Michael Roseberry pled guilty to aggravated robbery, was placed on ten years' deferred adjudication community supervision (DACS), and was ordered to pay a $2,000 fine. While he was on DACS, the trial court extended it for one year. In February 2015, after a hearing, the trial court revoked Appellant's DACS, adjudicated his guilt, and sentenced him to fifteen years' confinement. In three issues, Appellant contends that the trial court had

[1]*See* Tex. R. App. P. 47.4.

no jurisdiction to revoke his DACS because the entire length of DACS imposed when considering the one-year extension exceeded the statutory maximum period for DACS and further contends that the trial court abused its discretion by finding two violations true. Because the trial court had jurisdiction to revoke Appellant's DACS and because Appellant does not challenge the trial court's findings of "true" on all violations alleged and a preponderance of the evidence supports revocation, we affirm the trial court's judgment.

**Procedural Facts**

In April 2010, about eight months after the trial court placed Appellant on DACS, the State filed a motion to adjudicate his guilt, alleging several violations of the conditions of DACS. More than six months later, in November 2010, the trial court chose not to revoke Appellant's DACS and instead extended it for an additional year, requiring that Appellant also plead true to the allegations in the motion. Appellant signed the trial court's order that extended his DACS until August 20, 2020, eleven years from when his DACS was originally imposed.

More than eight months after that modification, on July 29, 2011, Appellant's DACS was again amended to require him to complete a drug-offender education program. Appellant signed the order imposing this new condition of his DACS to show that he agreed to and accepted the modification of his DACS terms.

Almost a year later, in June 2012, the State filed a second motion to adjudicate Appellant's guilt, citing several violations of his DACS conditions.

Appellant pled not true to all the allegations. More than two and a half years later, the trial court conducted a hearing, found all the allegations true, revoked Appellant's DACS, adjudicated his guilt, and sentenced him. Appellant timely appealed.

**Trial Court's Jurisdiction to Revoke**

In his first issue, Appellant contends that the November 12, 2010 modification order extending the DACS beyond the statutory maximum of ten years voids the order placing him on DACS; he therefore reasons that the trial court had no jurisdiction to revoke his DACS at any time after the November 12, 2010 modification. The State does not dispute that the extended eleven-year period of community supervision exceeds the statutory maximum.[2] As explained below, we conclude that extending the DACS term to eleven years exceeded the trial court's statutory authority, but the trial court still had jurisdiction to adjudicate Appellant and revoke his DACS within the original ten-year period of DACS.

Because Appellant had pled guilty to aggravated robbery, a first-degree felony,[3] he was subject to ten years' maximum DACS.[4] In arguing that the trial court's erroneous extension of his DACS period to eleven years voided the

[2]*See* Tex. Code Crim. Proc. Ann. art. 42.12, §§ 3(b)(1), 22(c) (West Supp. 2016) (providing that the maximum period of community supervision allowed for a person who pleads guilty to a first-degree felony, including any extensions, is ten years).

[3]*See* Tex. Penal Code Ann. § 29.03(a)–(b) (West 2011) (providing aggravated robbery is a first-degree felony).

[4]*See* Tex. Code Crim. Proc. Ann. art. 42.12, §§ 3(b)(1), 22(c).

November 2010 modification order and the 2015 revocation that is the subject of this appeal, Appellant mistakenly equates sentences with periods of community supervision. As the Texas Court of Criminal Appeals explained in *Speth v. State*,[5]

> [C]ommunity supervision is not a sentence or even a part of a sentence.
>
> The Code of Criminal Procedure defines community supervision as involving a *suspension of the sentence.* In other words, community supervision is an arrangement *in lieu of* the sentence, *not as part of* the sentence.
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> . . . .
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> Moreover, imposition of a sentence is profoundly different from the granting of community supervision. . . . [A] defendant has an absolute and nonwaiveable right to be sentenced within the proper range of punishment established by the Legislature. The granting of community supervision is a *privilege,* not a right. The decision whether to grant probation is wholly discretionary and nonreviewable. . . . We have likened the granting of probation to an extension of clemency that is contractual in nature[.][6]

Drawing on the Texas Court of Criminal Appeals's distinctions between community supervision and a sentence, we rely on two cases, one from that court and one from ours,[7] to conclude that the November 2010 order and subsequent 2015 revocation are not void ab initio.

In *Pedraza v. State*, the Texas Court of Criminal Appeals addressed the

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[5]6 S.W.3d 530 (Tex. Crim. App. 1999), *cert. denied*, 529 US 1088 (2000).

[6]*Id.* at 532–35 (citations and footnotes omitted).

[7]*Pedraza v. State*, 562 S.W.2d 259 (Tex. Crim. App. [Panel Op.] 1978); *Warmoth v. State*, 946 S.W.2d 526 (Tex. App.—Fort Worth 1997, no pet.).

effects of an original probation order that placed Pedraza on probation for a term beyond the statutory maximum.[8] Pedraza sought to have the entire order placing him on probation declared void.[9] But the Texas Court of Criminal Appeals held the order

> void only to the extent it purported to subject [Pedraza] to probationary supervision beyond the time authorized by law. This is not review of an improper assessment of punishment in a sentence that is indefinite or unauthorized in its directions to the executive authority charged with execution of sentence, such as would require reassessment of punishment before the executive would have a lawful order clearly directing him in the punishment to be imposed. Probation is not such an assessment of punishment; it suspends punishment and is in the nature of clemency. When probation is granted, the probationer is under the supervision of the court granting probation.
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> The probationary period runs continuously until it expires. Had the maximum period of probation to which [Pedraza] could lawfully be subjected (one year) expired prior to the violation and revocation of his probation, a different situation would be presented. Here, probation was granted on November 3, 1976, and consequently, any violation of its terms and conditions after November 3, 1977, could not support a revocation order. However, the date of the motion to revoke was June 27, 1977, which was clearly within the one year term, and the offense for which probation was revoked occurred on April 9, 1977, also within the term. We find no error constituting an abuse of discretion by the supervising court. . . .
>
> The court acted within its power when it revoked [Pedraza's] probation.[10]

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[8] *Pedraza*, 562 S.W.2d at 259–60.

[9] *Id.*

[10] *Id.* at 260 (citations and footnotes omitted).

This court's 1997 opinion, *Warmoth v. State*,[11] is even closer to the facts before us now. On April 16, 1992, Warmoth was convicted of misdemeanor theft and received a sentence of 120 days' confinement.[12] Imposition of sentence was suspended, however, and he was placed on twenty-four months' community supervision.[13] Almost a year later, in March 1993, the State filed a motion to revoke his community supervision.[14] On March 22, 1994, the State withdrew its motion.[15] On March 29, 1994, less than a month before Warmoth's original term of community supervision was to expire, the trial court amended the terms and conditions of supervision to extend community supervision for eighteen months from March 22, 1994.[16] "Warmoth specifically agreed to this extension."[17] On October 31, 1994, the State filed a second motion to revoke.[18] In August 1995, the trial court granted the motion, revoked Warmoth's community supervision, and sentenced him.[19]

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[11]946 S.W.2d at 526–28.

[12]*Id.* at 526–27.

[13]*Id.* at 527.

[14]*Id.*

[15]*Id.*

[16]*Id.*

[17]*Id.*

[18]*Id.*

[19]*Id.*

In one of his points on appeal, Warmoth contended that the trial court's order extending probation '"beyond the maximum three years [was] void and ineffective to support the (State's) Motion to Revoke."'[20] "Warmoth contend[ed] that the order was void in its entirety, while the State maintain[ed] that it [was] void only as to the period after April 16, 1995," that is, the period exceeding three years from the date he was originally placed on community supervision.[21]

Relying on *Pedraza*, we held that the motion to revoke was filed within the period of community supervision authorized by the statute and "that only that part of the . . . order extending Warmoth's supervision five months and six days past the maximum time allowed by law [was] void. Thus, the revocation of August 28, 1995 based on the October 31, 1994 motion to revoke, was authorized by law."[22]

The November 12, 2010 modification order in the case presently before us provides,

> On the 12th day of November, 2010, came on to be heard the matter of determining whether or not the community supervision in the above-entitled and -numbered cause should be revoked and the sentence imposed, and the defendant appeared in person and by his attorney, . . . the State appeared by her Assistant Criminal District Attorney, . . . and the Community Supervision Officer of this Court, and the Court, after hearing the evidence submitted and having received from the Denton County Community Supervision Department a written presentence investigation report, complying with all the requirements set forth in Article 42.12, Section 9 of the Texas Code of Criminal [P]rocedure, is of the opinion, and so finds,

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[20] *Id.*

[21] *Id.*; *see also* Tex. Code Crim. Proc. Ann. art. 42.12, § 22(c).

[22] *Warmoth*, 946 S.W.2d at 528.

> that the defendant's community supervision should not be revoked at this particular time.
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> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the term of deferred probation is extended for ONE (1) YEAR with all terms and conditions in original judgment continued in full force and effect, and subject further [to] the following conditions which are to modify and supplement the original conditions:
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> (1) Defendant's deferred probation extended until August 20, 2020;
>
> (2) Defendant plead true to allegation[s.]

Here, DACS of ten years was granted August 21, 2009; therefore, statutorily, it would end August 20, 2019.[23] The State filed its second motion to adjudicate in June 2012, well within the ten-year period of DACS authorized by the legislature. Following *Pedraza* and *Warmoth*, we hold that the November 12, 2010 modification order was void only to the extent that it purported to subject Appellant to DACS beyond the statutory maximum, that is, an extra year.[24] We further hold that because the State's motion was filed during the ten-year period, the trial court's revocation of Appellant's DACS, adjudication of his guilt, and imposition of his sentence were well within the trial court's jurisdiction.[25] We overrule Appellant's first issue.

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[23]Tex. Code Crim. Proc. Ann. art. 42.12, §§ 3(b)(1), 22(c).

[24]*See id.*; *see also Pedraza*, 562 S.W.2d at 260; *Warmoth*, 946 S.W.2d at 528.

[25]*See Pedraza*, 562 S.W.2d at 260; *Warmoth*, 946 S.W.2d at 528.

**Unchallenged Findings of Violated Conditions Supported by Evidence**

In his second and third issues, Appellant challenges the trial court's findings that violations of term (e) and term (bb) were true. Appellant does not challenge all the trial court's "true" findings regarding the violations of DACS alleged in the State's motion. The trial court therefore did not abuse its discretion by revoking his DACS and adjudicating his guilt.

We review an order revoking community supervision under an abuse of discretion standard.[26] In a revocation proceeding, the State must prove by a preponderance of the evidence that the defendant violated the terms and conditions of community supervision.[27] The trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and we review the evidence in the light most favorable to the trial court's ruling.[28] If the State fails to meet its burden of proof, the trial court abuses its discretion in revoking the community supervision.[29] Proof by a preponderance of the evidence of any *one* of the alleged violations of the conditions of community

[26]*Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006); *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984).

[27]*Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993).

[28]*Cardona*, 665 S.W.2d at 493; *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. [Panel Op.] 1981).

[29]*Cardona*, 665 S.W.2d at 493–94.

supervision is sufficient to support a revocation order.[30]

In its motion to adjudicate, the State alleged that Appellant had violated the terms and conditions of DACS in several ways. Condition (b) required Appellant to "[a]void the use of illegal narcotics, barbiturates, or controlled substances." The State alleged that Appellant violated condition (b) in four ways:

- by admitting to possessing and using THC on or about January 26, 2012;
- by possessing and using THC, as confirmed by a positive urine sample on or about January 26, 2012;
- by admitting to possessing and using THC on or about April 12, 2012; and
- by possessing and using THC, as confirmed by a positive urine sample on or about April 12, 2012.

During the revocation hearing, the State abandoned the two allegations based on positive urine samples.

Condition (e) required Appellant to "pay the Community Supervision and Corrections Department of Denton, Texas, a supervision fee in the amount of $50.00 on or before the 20th day of September, 2009, and . . . on or before the 20th day of each month thereafter during the period of community supervision." The State alleged that Appellant violated condition (e) by failing to pay the $50 supervision fee on or before the 20th day of each month from May 2010 through May 2012.

Condition (u) required Appellant to complete a drug/alcohol evaluation through an agency approved by his community supervision officer but also, "[i]f

[30]*Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980); *Sanchez v. State*, 603 S.W.2d 869, 871 (Tex. Crim. App. [Panel Op.] 1980).

treatment is deemed necessary," to follow any "treatment directives." The State alleged that Appellant violated this condition by failing "to complete recommendations deemed necessary by the drug/alcohol evaluation."

Condition (aa) required Appellant to, among other things, complete a psychological evaluation, and condition (bb) required him to complete life-skills training. The State alleged that Appellant violated each of these conditions by failing to complete the psychological evaluation and life-skills training respectively.

Condition *(*dd) required Appellant to "[s]uccessfully complete, within 181 days, the Drug Offender Education Program" and to "provide written proof of completion of the program within 10 days of the date of completion[.]" The State alleged that Appellant violated this condition by failing to complete the program within 181 days and by failing to provide proof within ten days of the date of completion.

While Appellant challenges the "true" findings on the allegations that he violated conditions (e) (requiring monthly community supervision fees of $50) and (bb) (requiring him to complete life-skills training), the trial court found all the live allegations "true" and subsequently entered a judgment adjudicating guilt. Jerri Barnes, a probation officer for Dallas County Adult Probation, testified that she handled transfer cases and that Appellant was on her caseload. She further testified that he admitted to her orally and in writing that he possessed and used THC on January 26, 2012, and again on April 12, 2012. On cross-examination,

Appellant admitted that the allegations that he possessed and used THC on or about January 26, 2012, and on or about April 12, 2012, were true. We hold that this evidence is proof by a preponderance of the evidence that Appellant violated condition of supervision (b), which required him to "[a]void the use of illegal narcotics, barbiturates, or controlled substances," as alleged in the State's motion. Proof by a preponderance of the evidence of any *one* of the alleged violations of the conditions of community supervision is sufficient to support a revocation order.[31] Accordingly, the trial court did not abuse its discretion by revoking Appellant's DACS, adjudicating his guilt, and sentencing him. We therefore overrule his second and third issues, which complain about the trial court's findings on other conditions of supervision, without reaching their merits.[32]

**Conclusion**

Having overruled Appellant's three issues, we affirm the trial court's judgment.

[31]*Moore*, 605 S.W.2d at 926; *Sanchez*, 603 S.W.2d at 871.

[32]*See Moore*, 605 S.W.2d at 926; *Sanchez*, 603 S.W.2d at 871; *see also* Tex. R. App. P. 47.1.

/s/ Lee Ann Dauphinot
LEE ANN DAUPHINOT
JUSTICE

PANEL: DAUPHINOT, WALKER, and MEIER, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 11, 2016