In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-15-00077-CR

ANTHONY SCOTT ROPER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 276th District Court
Titus County, Texas
Trial Court No. 16,480

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Burgess

MEMORANDUM OPINION

In September 2010, the 76th Judicial District Court of Titus County, Texas (76th District Court), placed Anthony Scott Roper on deferred adjudication community supervision for a period of five years for the offense of failure to register as a sex offender.[1] The State subsequently moved to revoke Roper's community supervision. Following a hearing, the 276th Judicial District Court of Titus County, Texas (the 276th District Court or trial court), found the allegations in the State's motion to be true, revoked Roper's community supervision, adjudicated him guilty of the offense of failure to register as a sex offender, and sentenced him to three years' imprisonment. Roper appeals his revocation and the subsequent adjudication of his guilt maintaining (1) that the trial court erred when it refused to transfer the revocation hearing to the 76th District Court, (2) that the State failed to exercise due diligence pursuant to Article 42.12 of the Texas Code of Criminal Procedure, and (3) that the State failed to prove by a preponderance of the evidence that Roper violated the terms of his community supervision. For the reasons below, we affirm the trial court's judgment.

[1]The indictment against Roper states, in part, that Roper

> [d]id then and there while being a person required to register with the local law enforcement authority in the municipality where the defendant resided or intended to reside for more than seven days, to wit: Mt. Pleasant, Texas, because of a reportable conviction for aggravated sexual assault, intentionally, knowingly, or recklessly fail to register with the local law enforcement authority in said municipality, to-wit: the Mt. Pleasant Police Department.

For purposes of this opinion, we will refer to the offense as "failure to register as a sex offender."

I. Background

In September 2010, Judge Jimmy L. White, sitting for the 76th District Court,[2] deferred adjudication of Roper's criminal charge and placed him on community supervision for a period of five years. In addition to a number of other standard conditions of community supervision, Roper was ordered to (1) report to his community supervision officer on the first working day beginning in October 2010, and to continue doing so each month unless his community supervision officer directed him to report on a different day of the month, (2) make a payment of $32.00 per month for court costs, restitution, fines, defense attorney fees, and check fees,[3] and (3) make a payment of $60.00 per month for community supervision fees.

In January 2015, the State filed a motion to proceed to adjudication in the "76th/276th District Court" alleging that Roper had failed to report to his community supervision officer for the months of March, April, and September 2013 and that he had failed to pay the "court ordered fees" and the community supervision fees for the months of February 2013 through January 2015. Roper pled not true to the allegations contained in the State's motion to adjudicate. On April 23, 2015, Roper filed a motion to transfer his revocation/adjudication proceeding from the 276th District Court, arguing that,

[2]Judge White was the presiding judge of the 276th District Court, but was sitting for the 76th District Court when Roper originally pled guilty and received deferred adjudication community supervision. Judge Robert Rolston is currently the judge of the 276th District Court, but was sitting for the 76th District Court when he revoked Roper's community supervision and adjudicated him guilty. As will be explained below, the judges of the 76th and 276th Judicial District Courts are authorized to sit for one another in Titus County.

[3]Per Roper's community supervision order, Roper's costs, fines, and fees included court costs in the amount of $392.00, a fine in the amount of $1,500.00, and community supervision fees in the amount of $3,600.00.

> 3. The presiding judge of the above court, the Honorable Robert Rolston, is not the Judge of the Court in which the defendant was tried. 'Only the Court in which the defendant was tried . . . may revoke the community supervision, . . . [sic]" The defendant was tried in the 76th Judicial District Court.
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> 4. Therefore, pursuant to Article 42.12, Sec. 10 (a) of the Texas Code of Criminal Procedure, request is made that this cause be transferred to the following court: 76th Judicial District Court.

The next day, Judge Rolston, sitting for the 76th District Court, denied Roper's motion and held a hearing on the State's motion to adjudicate. Following the hearing, the trial court found the allegations in the State's motion to be true, adjudicated Roper guilty of failure to register as a sex offender, and sentenced him to three years' imprisonment. This appeal followed.

II. Standard of Review

The State must prove by a preponderance of the evidence that the defendant violated the terms and conditions of community supervision. *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). The State satisfies its burden when the greater weight of the credible evidence before the trial court creates a reasonable belief that it is more probable than not that the defendant violated a condition of his community supervision as alleged in the State's motion. *Id.* In a revocation hearing, the trial court is the sole trier of the facts and determines the credibility of the witnesses and the weight to be given to their testimony. *In re T.R.S.*, 115 S.W.3d 318, 321 (Tex. App.—Texarkana 2003, no pet.). If the State fails to meet its burden of proof, then revocation would be an abuse of the trial court's discretion. *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). Proof by a preponderance of the evidence as to any *one* of the alleged violations is sufficient to support a trial court's decision to revoke community supervision. *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980). We review a decision to adjudicate

guilt in the same manner as we review a decision to revoke community supervision—for abuse of discretion. *Little v. State*, 376 S.W.3d 217, 219 (Tex. App.—Fort Worth 2012, pet. ref'd) (citing *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006)).

III. Analysis

A. The Denial of Roper's Motion to Transfer

In his transfer motion, Roper argued that because the presiding judge of the 76th District Court placed him on community supervision, only the 76th District Court could revoke his community supervision.[4] Due to the fact that Judge Rolston, who presided over the 276th District Court, was scheduled to hear the State's motion to adjudicate, Roper asked that his case be transferred to the 76th District Court. Roper points to Article 42.12, Section 10(a) of the Texas Code of Criminal Procedure, which states, "Only the court in which the defendant was tried may grant community supervision, impose conditions, revoke the community supervision, or discharge the defendant, unless the judge has transferred jurisdiction of the case to another court with the latter's consent." *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 10(a) (West Supp. 2015).

In response, the State cites Section 24.178(d) of the Texas Government Code, Section 24.178(d), which states,

> In Camp, Morris, and Titus counties, the 76th District Court has concurrent jurisdiction with the 276th District Court. The judges of the courts may transfer any case to be tried in Camp County, Morris County, or Titus County with the consent of the court to which the case is to be transferred. *Each judge may sit in the other court without transferring the case.*

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[4]In his brief, Roper explains that the judge sitting for the 76th District Court who placed him on community supervision was deceased at the time of the hearing on the State's motion to adjudicate; however, according to Roper, the vacancy had been filled by the time the hearing took place. Although there is no evidence in the record to support his contentions, we have no reason to disbelieve them nor does the State offer any information to the contrary.

TEX. GOV'T CODE ANN. § 24.178(d) (West 2004) (emphasis added). Prior to the hearing on the State's motion, the trial court issued its ruling denying Roper's request, stating,

> And I think it's pretty well common knowledge to this Court's knowledge that Judge Woodson and I have concurrent jurisdiction. We had jurisdiction in all cases. We handle each other's cases, handle the same criminal cases, and so I find that the *Wise vs[.] The State of Texas* does control in this case, and your motion will be denied.

In *Wise*, Wise pled guilty to the offense of sexual assault before Judge Temple Driver. *Wise v. State*, 477 S.W.2d 578, 579 (Tex. Crim. App. 1972). Wise was assessed punishment of ten years' imprisonment, the imposition of his sentence was suspended, and he was placed on community supervision. *Id.* The State eventually filed a motion to revoke his community supervision. *Id.* Following a hearing on the State's motion, Judge Arthur Tipps revoked Wise's community supervision and adjudicated him guilty of the offense. *Id.* On appeal, Wise maintained that the 30th District Court was without authority to revoke his community supervision because the original proceedings were held in the 89th District Court, and the 89th District Court, the argument continued, had neither transferred jurisdiction to the 30th District Court nor obtained the 30th District Court's consent to transfer the case. *Id.* The Court of Criminal Appeals stated,

> The original trial was before Judge Temple Driver. The motion to revoke [community supervision] was before Judge Arthur Tipps. Apparently, [Wise's] complaint stems from the fact that the judge who presided at the original conviction did not hear the motion to revoke [community supervision].
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> Included in the record is an order of the Hon. Louis Holland, Presiding Judge of the Eighth Administrative District, which reflects that the District Judges of the 89th, 30th[,] and 78th Judicial Districts, in Wichita County, each are assigned for trial of cases to the other Judicial Districts of Wichita County. (The said numbered courts being all of the District Courts in Wichita County).

> Judge Arthur Tipps was, at all times, pertinent to this case, the regular Judge of the 30th District Court. Judge Temple Driver was, at all times, pertinent to this case, the regular Judge of the 89th District Court.

Id. at 579–80. Rejecting Wise's argument and finding no error in the proceedings below, the Court of Criminal Appeals affirmed the trial court's judgment. *Id* at 580.

In this case, the Legislature mandated by statute that the 76th District Court and the 276th District Court have concurrent jurisdiction. Further, the judges of the two courts may sit for one another in each other's cases without the necessity of formally transferring the cases. The trial court did not err in denying Roper's motion to transfer. We overrule Roper's first point of error.

B. Due Diligence

Citing to Article 42.12, Section 24 of the Code of Criminal Procedure, Roper contends that "the State of Texas failed to exercise due diligence in regard to the allegation that [he] did not report as directed." TEX. CODE CRIM. PROC. ANN. art. 42.12, § 24 (West Supp. 2015). Roper claims that proof that the State failed to exercise due diligence in contacting him constitutes an affirmative defense to the offense of failure to report, and he contends that he established this affirmative defense below. Roper's contention is misplaced.

In 2003, the 78th Legislature addressed a trial court's continuing jurisdiction to revoke community supervision after the expiration of the term of community supervision. *See* Act of May 30, 2003, 78th Leg., R.S., ch. 250, §§ 2–3, 2003 Tex. Gen. Laws 1158, 1158 (current version at TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 21(e), 24 (West Supp. 2015). To Section 21 of Article 42.12, the Legislature added paragraph (e):

> A court retains jurisdiction to hold a hearing under Subsection (b-2) and to revoke, continue, or modify community supervision, regardless of whether the period of

> community supervision imposed on the defendant has expired, if before the expiration the attorney representing the state files a motion to revoke, continue, or modify community supervision *and a capias is issued for the arrest of the defendant.*

TEX. CODE CRIM. PROC. ANN. art. 42.12, § 21(e) (West Supp. 2015) (emphasis added). In addition to paragraph (e), the Legislature replaced the common law due diligence requirement with Section 24 of Article 42.12.

> For purposes of a hearing under Section . . . 21(b-2), it is an affirmative defense to revocation for an alleged failure to report to a supervision officer as directed or to remain within a specified place that a supervision officer, peace officer, or other officer *with the power of arrest under a warrant* issued by a judge for that alleged violation failed to contact or attempt to contact the defendant in person at the defendant's last known address or last known employment address, as reflected in the files of the department serving the county in which the order of community supervision was entered.

TEX. CODE CRIM. PROC. ANN. art. 42.12, § 24 (emphasis added).

The Court of Criminal Appeals has concluded that "the legislative history [behind the 2003 amendments] reveals that the legislature intended to replace the common law requirements with the due-diligence statute to reallocate the burden of proof in those instances in which the State has timely alleged violations but has not arrested the defendant before the community-supervision period has expired." *Garcia v. State*, 387 S.W.3d 20, 25 (Tex. Crim. App. 2012). Accordingly, the 2003 statutory amendments: (1) made due diligence an affirmative defense, thereby shifting the burden to the defendant; (2) limited the State's duty to contacting or attempting to contact the defendant at his last-known home address or place of employment, whereas the common law required reasonable investigative efforts to apprehend the defendant; and (3) limited the

availability of the defense to those charged with failure to report and/or failure to remain within a specified place. *Id*. at 23–24.

Nevertheless, the due diligence requirement in Section 24 only applies to the State's duty to timely serve the arrest warrant on a defendant in order to extend the trial court's jurisdiction beyond expiration of the original community supervision term. It does not, as Roper claims, create a duty on the State to track him down and make sure that he reports to his community supervision officer as ordered. The fact that the community supervision officer took the extra step of attempting to notify Roper of his missed appointments, but failed to use his most recent address in doing so, does not excuse him from his duty to report as ordered. Roper's second point of error is overruled.

C. Sufficient Evidence Exists to Support Revocation and Adjudication of Guilt

In its motion to proceed to adjudication, the State alleged that Roper failed to report to his community supervision officer and that he failed to pay the "court ordered fees" and his community supervision fees.[5] In support of its motion to adjudicate, the State called Rance Hockaday, who had been assigned as Roper's community supervision officer. Hockaday testified that Roper failed to report to the community supervision office for the months of March, April, and September 2013. During cross-examination, Hockaday testified that he did not contact Roper in March, April, or September after he failed to report, but that he did contact him in October.

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[5]Because we find sufficient evidence exists to support the trial court's judgment revoking Roper's community supervision based on Roper's failure to report to his community supervision officer, we decline to address Roper's contentions relating to his alleged failure to pay the "court ordered fees" and his community supervision fees. *See Nurridin v. State*, 154 S.W.3d 920, 924 (Tex. App.—Dallas 2005, no pet.).

Following Hockaday's contact with Roper in October, Roper began reporting on a regular basis. Hockaday testified that during the first two months that Roper failed to report, he "never heard from him," and he did not recall Roper giving him an excuse for his failure to report "other than maybe he didn't have a ride up there." Hockaday stated that he had last visited Roper's residence in December 2014 during the afternoon and that he believed he had awakened Roper upon his arrival.

Roper testified that Hockaday had given him permission to report by telephone in February 2013 in order to prevent him from having to take off work early. Roper stated that when he attempted to contact Hockaday by telephone for the month of March, he was unable to speak to him, but he left a message on Hockaday's answering machine. Roper testified that he contacted Hockaday by telephone in April, at which time Hockaday "chewed [him] out." Roper stated that because Hockaday "chewed [him] out," he believe[d] he met with Hockaday in person that month as well.

On cross-examination, Hockaday testified that he had never given Roper permission to report by telephone "due to the high[-]profile [nature] of sex offender cases." Hockaday explained that when Roper was employed at "Big Tex," he informed Roper that if he could not report on a specific date, then he could call Hockaday and reschedule an in-person meeting. Hockaday also stated that he sent word via another person who was on community supervision that Roper needed to report in person to the community supervision office. Lastly, Hockaday testified that prior to initiating the motion to adjudicate, he attempted to locate Roper at his residence and on at least

one occasion, he left his card, though he did not go to "Big Tex" because he did not want Roper to lose his job.

Here, the State alleged that Roper failed to report to his community supervision officer for the months of March, April, and September 2013. While the trial court heard conflicting evidence as to Roper's understanding of the means by which he was to report, it was well within the trial court's discretion to accept or reject any or all of Roper's and Hockaday's testimony. *Maddox v. State*, 466 S.W.2d 755, 757 (Tex. Crim. App. 1971). Regardless, the evidence was clear that Roper did not report in person as required by the conditions of his community supervision. Roper's failure to report provided a sufficient reason for the trial court to revoke his community supervision. *See Flournoy v. State*, 589 S.W.2d 705, 709–10 (Tex. Crim. App. [Panel Op.] 1979); *Greer v. State*, 999 S.W.2d 484, 489 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (no abuse of discretion to revoke for failing to report for single month).

A trial court may revoke a defendant's community supervision by finding a violation of any one of the allegations in the State's motion, including a single "technical" violation. *See Nurridin*, 154 S.W.3d at 924. The trial court was the sole trier of the facts and was in the best position to determine both Roper's and Hockaday's credibility, as well as the weight that should be given to their testimony. *See T.R.S.*, 115 S.W.3d at 321. After hearing the evidence, the trial court found that Roper failed to report to his community supervision officer as required by the conditions of his community supervision. Viewing the evidence in the light most favorable to the trial court's ruling, we find that the trial court did not abuse its discretion when it revoked Roper's

deferred adjudication community supervision and found him guilty of failure to register as a sex offender.

IV. Conclusion

We affirm the trial court's judgment.

Ralph K. Burgess
Justice

Date Submitted: October 6, 2015
Date Decided: February 1, 2016

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