TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00213-CR

Freddie Lee Scott, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF MILLS COUNTY, 35TH JUDICIAL DISTRICT
NO. 3016, HONORABLE STEPHEN ELLIS, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant Freddie Lee Scott pleaded guilty to the state jail felony offense of possession of a controlled substance, *see* Tex. Health & Safety Code § 481.115(b), and was placed on four years' deferred adjudication community supervision, *see* Tex. Code Crim. Proc. art. 42A.101. Less than two years later, the trial court adjudged appellant guilty and assessed his punishment at confinement for eighteen months in the State Jail Division of the Texas Department of Criminal Justice. *See* Tex. Penal Code § 12.35(a) (stating range of confinement for state jail felony punishment). The trial court found that appellant had violated conditions of his community supervision, including committing a subsequent offense. On appeal, appellant challenges the State's burden of proof and argues that the trial court abused its discretion in revoking appellant's community supervision. For the following reasons, we affirm the judgment adjudicating guilt.

Background[1]

In November 2014, appellant was placed on deferred adjudication community supervision after he pleaded guilty to possession of a controlled substance. The terms and conditions of his community supervision included that he would not commit a subsequent offense and that he would complete 120 hours of Community Service Restitution and a Drug Offender Education Program as ordered. Appellant also was required to pay court costs, a fine, and fees.

On September 1, 2015, appellant was driving his vehicle without any passengers when a police officer pulled him over. During the traffic stop, police officers searched his vehicle and discovered a substance that was later tested and determined to be methamphetamine. Two months after the traffic stop, the State filed the motion to adjudicate guilt that is the subject of this appeal. The State alleged multiple violations of appellant's conditions of community supervision, including that appellant had committed a subsequent offense.

The trial court held two hearings on the State's motion to adjudicate in February 2016. During the first hearing on February 3, 2016, appellant pleaded not true to the alleged violations except he pleaded true to the allegations that he failed to complete Community Service Restitution and that he failed to complete a Drug Offender Education Program. The parties then presented evidence, including testimony that primarily addressed the alleged violation that appellant had committed a subsequent offense. The State contended that appellant had committed the

[1] Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced during the hearing on the State's motion to adjudicate guilt, we provide only a general overview of the facts of the case here. We provide additional facts in the opinion as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4.

subsequent offense of possession of a controlled substance on September 1, 2015. The State's witnesses included the police officer who initiated the traffic stop and a forensic scientist with the Texas Department of Public Safety crime laboratory. The police officer testified about the traffic stop, including his observations of appellant and the search of appellant's vehicle. The officer testified that he knew appellant "from prior dealings with him" and that, at the time of the stop, appellant seemed to be under the influence of methamphetamine by the way he was acting. A canine officer also responded to the location of the traffic stop. After the canine made a "positive alert," the officers searched appellant's vehicle with appellant's consent, and they discovered a "clear baggie with white crystal-like substance in it" underneath the floor mat on the driver's side of the vehicle that, according to the officer, appeared to be methamphetamine. The forensic scientist testified that she tested the substance that was found in appellant's vehicle and that the baggie contained 0.24 grams of methamphetamine.

Appellant testified that the substance found in his vehicle "was not [his]" and denied knowing that it was in his vehicle. His position was that he was either "set up" by the police or his wife. He explained that he was having marital problems and that his wife had been threatening that she was "going to get him" after she "got arrested during divorce court." He also testified that his drug tests after his arrest in September 2015 had been negative but that he had seen his wife with methamphetamine in their house after November 2014. At the conclusion of the evidence, the trial court found true the State's allegations that appellant had committed the subsequent offense of possession of a controlled substance on September 1, 2015; that he had failed to complete Community Service Restitution; and that he had failed to complete the Drug Offender Education

Program. The trial court recessed the hearing, advising the parties that it intended to proceed to adjudicate guilt and to resume the hearing to consider punishment. Appellant was taken into custody after the hearing was recessed.

The hearing on the State's motion to adjudicate guilt resumed on February 17, 2016. Appellant again testified as well as his supervising probation officer. The probation officer testified that appellant had tested positive for amphetamine and methamphetamine after being taken into custody on February 3, 2016. During his testimony, appellant admitted that he had a substance abuse problem and that there were pending charges against him in another county for possession of a controlled substance and theft, but he requested treatment in lieu of a prison sentence. At the conclusion of the hearing, the trial court adjudged appellant guilty and sentenced him to eighteen months' confinement. The trial court thereafter signed and entered its judgment adjudicating guilt on March 7, 2016. This appeal followed.

Analysis

Standard of Review

We review the decision to adjudicate guilt in the same manner as a community supervision revocation in which an adjudication of guilt was not deferred. *See Leonard v. State*, 385 S.W.3d 570, 571 n.1 (Tex. Crim. App. 2012). A trial court's decision to revoke community supervision is reviewed for an abuse of the trial court's discretion. *See Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006). "A trial court abuses its discretion when the decision lies outside the zone of reasonable disagreement." *Tapia v. State*, 462 S.W.3d 29, 41 n.14 (Tex. Crim. App. 2015) (citing *Apolinar v. State*, 155 S.W.3d 184, 186 (Tex. Crim. App. 2005)).

In determining questions regarding the sufficiency of the evidence to support a motion to adjudicate guilt, the State's burden of proof is by a preponderance of the evidence. *Id.*; *see Moreno v. State*, 22 S.W.3d 482, 488 (Tex. Crim. App. 1999) ("The burden of proof in probation revocation is a preponderance of evidence."). In this context, "'a preponderance of the evidence' means 'that greater weight of the credible evidence which would create a reasonable belief that the defendant has violated a condition of his probation.'" *Hacker v. State*, 389 S.W.3d 860, 864–65 (Tex. Crim. App. 2013) (quoting *Rickels*, 202 S.W.3d at 764). We consider the evidence presented at the hearing in the light most favorable to the trial court's findings. *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. 1981).

Burden of Proof

In his first issue, appellant argues that "Due Process of Law requires proof of a violation of a condition of community supervision to be beyond a reasonable doubt rather than by a preponderance of the evidence." He asks this Court "to reverse and remand the case for a new hearing where the State is required to prove its case against [appellant] in accordance with Due Process of Law and beyond a reasonable doubt."

The Texas Court of Criminal Appeals, however, has held otherwise. *See Kelly v. State*, 483 S.W.2d 467, 469–70 (Tex. Crim. App. 1972); *Jones v. State*, 472 S.W.3d 322, 324 (Tex. App.—Eastland 2015, pet. ref'd) (declining "to hold [on due process grounds] that a violation of community supervision must be proven beyond a reasonable doubt" and citing prior holdings of Texas Court of Criminal Appeals as authority for its holding); *see, e.g.*, *Tapia*, 462 S.W.3d at 41–42 (listing due process requirements that must be observed in community supervision revocation

hearings); *Hacker*, 389 S.W.3d at 864–65 (stating that State "need prove the violation of a condition of probation only by a preponderance of the evidence"); *Ex parte Doan*, 369 S.W.3d 205, 210 (Tex. Crim. App. 2012) (stating that burden of proof required to prove community supervision violation is "preponderance of the evidence, which is lower than the burden of proof beyond a reasonable doubt that is required to prove a new criminal offense").

Bound by precedent, we conclude that a defendant's right to due process of law does not require the State to prove beyond a reasonable doubt that the defendant violated a condition of community supervision. Further, we note that appellant's trial counsel did not raise his due process argument concerning the State's burden of proof with the trial court. *See* Tex. R. App. P. 33.1. We overrule appellant's first issue.[2]

Sufficiency of Evidence

In his second issue, appellant argues that the trial court abused its discretion by revoking his community supervision because the evidence was insufficient "even under a preponderance standard" to support the trial court's finding that appellant committed the subsequent offense of possession of a controlled substance. Appellant does not dispute that proof of one violation is sufficient to support a trial court's decision to revoke community supervision. *See Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. 1980) (explaining that "one sufficient ground

[2] To the extent appellant raises a due process concern because the officer did not have "first-hand knowledge of the canine search" of appellant's vehicle, we disagree with his characterization of the relevant testimony. The officer testified that, although another officer initially found the baggie containing the substance, he also personally observed it in the location where it was found—underneath the floor mat—and then took possession of it.

for revocation will support the court's order to revoke probation"); *Jones*, 472 S.W.3d at 324 (explaining that "proof of any one of the alleged violations is sufficient to uphold the trial court's decision to revoke"). And he does not dispute that he pleaded true to two of the alleged violations of the conditions of his community supervision—the failure to complete Community Service Restitution and the failure to complete the Drug Offender Education Program.

Rather, appellant argues that "[i]t cannot be determined that had the trial court only found those two allegations true, [appellant] would still have been sentenced to eighteen of a possible twenty four month sentence," *see* Tex. Penal Code § 12.35(a) (stating that "individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days"), and that "[t]he trial court could have chosen an alternative to imprisonment had only the allegations about community service and a drug offender program been true." Relying on these arguments, appellant asks this Court to remand the case to the trial court for a new disposition hearing that is based only on those two violations of the conditions of his community supervision. We decline to do so. *See Jones*, 472 S.W.3d at 324–25 (upholding trial court's decision to revoke community supervision and its assessment of punishment and rejecting appellant's request to remand case so that trial court could reassess punishment in light of number of community-supervision violations that State proved); *see also Silber v. State*, 371 S.W.3d 605, 611 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (explaining that "finding of a single violation of the terms of community supervision is sufficient to support revocations" and "[t]hus, in order to prevail on appeal, the defendant must successfully challenge all of the findings that support the revocation order").

Furthermore, based on our review of the evidence, in the light most favorable to the trial court's ruling, we conclude that the evidence was sufficient to support the trial court's finding that appellant violated the conditions of his community supervision by committing a subsequent offense of possession of a controlled substance. Facing conflicting evidence, the trial court could have found appellant's testimony denying possession of a controlled substance not to be credible and the State's evidence that supported a finding of his possession to be credible. *See Hacker*, 389 S.W.3d at 865 (explaining that, "in probation-revocation cases, . . . the judge is the sole judge of the credibility of the witnesses and the weight to be given to their testimony"). Although appellant testified that the substance that was found in his vehicle did not belong to him and that he was "set up," the evidence was undisputed that he did not have passengers in the vehicle at the time of the traffic stop. The officer who made the traffic stop also testified that he was familiar with appellant and that appellant appeared to be under the influence of methamphetamine by the way he was acting at the time of the stop. The forensic scientist, who tested the substance that was found in appellant's vehicle, testified that it contained methamphetamine. Given this evidence, the trial court could have determined that the greater weight of the credible evidence created a reasonable belief that appellant had committed the subsequent offense of possession of a controlled substance on September 1, 2015. *See id.* at 864–65.

For these reasons, we conclude that the trial court did not abuse its discretion in revoking appellant's community supervision, adjudicating appellant guilty, and assessing his punishment at eighteen months' confinement. *See Tapia*, 462 S.W.3d at 41, 46 (stating that "trial

judge is given wide latitude to determine the appropriate sentence in a given case"); *Rickels*, 202 S.W.3d at 763. We overrule appellant's second issue.

Conclusion

Having overruled appellant's issues, we affirm the judgment adjudicating guilt.

Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

Filed: September 7, 2017

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