Reversed and Remanded and Opinion filed April 13, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01261-CR

JAMES E. MERCHANT, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law
Walker County, Texas
Trial Court Cause No. 95-621

O P I N I O N

Appellant, James E. Merchant, Jr., pled guilty to a charge of driving while intoxicated, and was placed on community supervision. A few days before his community supervision was to expire, the State moved to revoke it. After a hearing, the court found that Merchant had not completed his community service requirement and the motion was granted. On appeal, he contends the trial court erred by denying his motion to dismiss; that the trial court erred in admitting a "chronology" compiled by probation officers; and that the evidence is legally insufficient to support the finding.

Legal Sufficiency of the Evidence

In his first point of error, appellant contends the evidence is legally insufficient to establish that he violated the community service requirement of his community supervision. We review for an abuse of discretion. *See Cardona v. State,* 665 S.W.2d 492, 493-94 (Tex. Crim. App.1984).

The State's burden of proof in a revocation proceeding is by a preponderance of the evidence. *See Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App.1993). Where the State has failed to meet its burden of proof, the trial court abuses its discretion in issuing an order to revoke community supervision. *See Cardona v. State,* 665 S.W.2d 492, 493-94 (Tex. Crim. App.1984). In reviewing the sufficiency of the evidence, we must consider all of the evidence introduced at the trial, whether properly admitted or not. *See Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App.1993). Further, we examine that evidence in a light most favorable to the trial court's findings. *See Jackson v. State*, 645 S.W.2d 303, 304 (Tex. Crim. App.1983).

To support its claim that appellant failed to perform the community service requirement of his probation, the State introduced a chronology prepared by various probation officers regarding appellant's partial performance of his community service. The chronology is difficult to comprehend because the entries on each page are in chronological order, but the pages themselves are in reverse chronological order. For its part, the State asserts in its brief that "[a] review of the record and of State's exhibit One will reveal that Appellant clearly did not comply with" the terms of his community supervision. This is not particularly helpful.

We have, however, examined the chronology and discovered that there are certain entries, dated after the expiration of the term of community service, which detail the number of hours left unperformed. Although the chronology is confusing, we find these entries constitute sufficient evidence to show that appellant did not complete his community service

requirement within his probationary period. *See Hardman v. State*, 614 S.W.2d 123, 128 (Tex. Crim. App. 1981) (saying that the lack of an entry in a "Probation Record" was sufficient evidence that required payments were not made). Thus, we cannot say that the trial court abused its discretion in revoking appellant's community supervision on the strength of this evidence.

Appellant's first point of error is overruled.

States Exhibit One

Although we find the chronology provides sufficient evidence to support the trial court's order, we now consider whether it was properly admitted into evidence. The document was entered, over objection, as a business record exception to the hearsay rule. Appellant argues that the person making the record lacked personal knowledge and that the records were unreliable because they were prepared in anticipation of litigation.

To establish the predicate for a document's admissibility as a record of a regularly conducted business activity, the proponent must establish: (1) the record was made and kept in the course of a regularly conducted business activity; (2) it was the regular practice of that business activity to make the record; (3) the record was made at or near the time of the event being recorded; and (4) the person making the record or submitting the information had personal knowledge of the events being recorded. *See* TEX. R. EVID. 803(6); *Philpot v. State*, 897 S.W.2d 848, 851-52 (Tex. App.–Dallas 1995, pet. ref'd). We review the admission of a document under the business record hearsay exception only for abuse of discretion. *See King v. State*, 953 S.W.2d 266, 269 (Tex. Crim. App.1997); *Coffin v. State*, 885 S.W.2d 140, 149 (Tex. Crim. App.1994).

Shelia Hugo, an employee of the Walker County Community Supervision Department, testified as follows:

Q: Do you have a chronology in there?

A: Yes, I do

Q: Is that a document that you keep in the regular course of business?

A: Yes, it is.

Q: Okay, are you the custodian of that record?

A: Yes, I am.

Q: Was that record made at or near the time the course – during the course of his probation?

A: As far as I know, yes, it was

Q: And was it made with your personal knowledge

A: As far as I know, yes it was.

This testimony establishes that Hugo had personal knowledge as to how the records were made and kept. However, the State failed to show that the officers who made the entries had personal knowledge of the events they were recording. The State did not lay a proper foundation to admit the chronology as a business record. Appellant preserved his complaint by a timely objection. Thus, the trial court erred in admitting the document into evidence.

The admission of hearsay evidence that does not fall within a recognized exception, denies the defendant his constitutional right to confront and cross-examine the witnesses against him. *See Huff v. State*, 897 S.W.2d 829, 839-40 (Tex. App.–Dallas 1995, pet. ref'd). Moreover, the document was the only evidence offered to prove that appellant failed to complete the community service requirement of his probation. Accordingly, we find the admission of the document was not harmless. *See* TEX. R. APP. P. 44.2. Appellant's second point of error is sustained.

Motion to Dismiss

Although the State filed its motion to revoke in the last few days of appellant's probationary period, appellant was not arrested until after the term of his community supervision had expired. Appellant filed a motion to dismiss the State's motion to revoke, alleging that the State failed to exercise due diligence in arresting him. In his final point of

error, appellant contends the trial court erred in overruling his motion and failing to dismiss the motion to revoke.

A trial court has jurisdiction to revoke community supervision after it expires if two conditions are met. First, the motion alleging a violation of requirements must be filed and a capias or arrest warrant issued prior to the term's expiration. Second, the State must exercise due diligence to apprehend the probationer and to hear and determine the allegations in the motion. *See Harris v. State*, 843 S.W.2d 34, 35-36 (Tex. Crim. App. 1992). Here, the motion to revoke was filed on January 23, 1998, and a capias was issued on January 28, 1999. Both of these events occurred before appellant's term of community supervision expired on January 31, 1998. Thus, it is undisputed that the first condition was met.

Appellant was arrested on February 19, 1998, approximately three weeks after the term of community supervision had expired. Appellant contends the State failed to exercise due diligence in apprehending him. Once a defendant at a revocation hearing raises the issue of due diligence, the burden shifts to the State to prove due diligence in making the arrest. *See Rodriguez v. State*, 804 S.W.2d 516, 518-19 (Tex. Crim. App. 1991). If the State fails to prove due diligence, the trial court must dismiss the State's motion to adjudicate. *See Harris*, 843 S.W.2d 2d at 35.

To show due diligence, the State presented the testimony of Deputy Acevado. He testified that he attempted to serve the warrant three or four time, and that while he could not remember any exact dates, he was sure one attempt was "within forty-eight hours after [the warrant] was issued." He testified that he remembered trying to serve the warrant because the appellant's street address was close to his office. Appellant characterized this testimony as "patently false and misleading." The trial court, however, is the exclusive judge of the credibility of the witnesses in a proceeding to revoke probation. *See Burke v. State*, 930 S.W.2d 230, 233 (Tex. App.–Houston[14 Dist.] 1996, pet. ref'd). The Deputy's testimony

establishes that the State exercised due diligence, and the trial judge was free to believe that testimony. Accordingly, appellant's third point of error is overruled.

Having sustained appellant's second point of error, we reverse the judgment of the trial court and remand the cause to the trial court for further proceedings consistent with this opinion.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed April 13, 2000.
Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.
Do Not Publish — TEX. R. APP. P. 47.3(b).