Affirmed and Opinion filed September 14, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-97-01390-CR and 14-98-00910-CR

———————————

OMARI DANTE BARNES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court Cause No. 22,356-272 & 23,808-272

O P I N I O N

Appellant, Omari Dante Barnes, was placed on probation in 1994 for delivery of cocaine. During his probationary period, he pleaded guilty to a second delivery offense, and was again placed on probation. In 1997, motions to revoke probation were filed in both cases, alleging aggravated robbery and failure to pay probationary fees, fines and court costs. After hearing evidence, the trial court found "true" to the revocation allegations, revoked appellant's probation and sentenced him to eight and ten years' confinement, the sentences to run cumulatively, not concurrently. Appellant presents three points of error on appeal. We affirm.

By his first point of error, appellant alleges insufficiency of the evidence to prove the alleged aggravated robbery, which had partially formed the basis of the motion to revoke probation. At the revocation hearing, the State presented testimony from the witness who had been present with appellant at the robbery. The witness testified that he and appellant had set up a "strong arm" robbery, where they purported to buy marijuana from "some Mexicans" but stole the drugs instead. The witness stated that during the drug deal, appellant had exhibited what appeared to be a gun of some sort, and had fired it into the air. The Mexicans became "scared," and he and appellant took the drugs and ran off.

Appellant, on the other hand, directs our attention to his own testimony that he had not used a gun, and to testimony from one of the investigating officers, who stated that a neighbor in the area had seen an unidentified black male running from the scene empty-handed. Appellant further points to testimony from his girlfriend who stated that although appellant returned home with a bag of marijuana, he had not shown up with a gun.

The trial court heard all of this testimony, and determined the appropriate weight and credibility to be given to each witness. In a motion to revoke probation hearing, the decision whether to revoke rests within the discretion of the trial court. *Wester v. State*, 542 S.W.2d 403, 405 (Tex.Crim. App.1976). Even so, this discretion is not absolute. *Scamardo v. State*, 517 S.W.2d 293 (Tex. Crim. App.1974). The trial court is not authorized to revoke probation without a showing that the probationer has violated a condition of the probation imposed by the court. *DeGay v. State*, 741 S.W.2d 445, 449 (Tex. Crim. App.1987). The burden of proof in a probation revocation hearing is by a preponderance of the evidence. *Cardona v. State*, 665 S.W.2d 492 (Tex. Crim. App.1984).

We find that the State proved each and every element of the aggravated robbery offense alleged as a violation of appellant's condition of probation by a preponderance of the evidence, and the first point of error is overruled.

By his second point of error, appellant complains that the trial court erred in revoking his probation for failure to pay probationary fees, as he proved his affirmative defense of

inability to pay. Where the State seeks revocation of probation based on failure to pay probation fees, the inability to pay such fees is an affirmative defense that the defendant must raise and prove by a preponderance of the evidence. *Stanfield v. State*, 718 S.W.2d 734, 737-38 (Tex. Crim. App. 1986). If the defendant raises the issue of inability to pay, the State must prove that he intentionally failed to pay. *Id*.

While appellant alleges that he himself testified as to his inability to pay, we have carefully reviewed his testimony from the hearing and fail to find any references to his inability to pay. To the contrary, appellant himself testified that he can work, that he has no health problems except as to a problem with his hand at times, that he has his GED, and has held prior jobs. His girlfriend also testified that appellant had worked in the past, but that he quit at least one job because "it wasn't his kind of work," and that he was unable to pay his fees because he was unemployed. She testified that they were able to make a few car payments to a relative and that appellant helped buy gas, but that appellant "never had a lot of money."

Clearly, the record shows that appellant was able to work, had been employed at times and voluntarily quit at least one paying job. Moreover, although appellant took the stand and testified, he never stated he was unable to pay his fees. We find that the State proved by a preponderance of the evidence that appellant failed to pay his probationary fees, and there was no error by the trial court in revoking his probation based on failure to pay fees. Appellant failed to meet his burden of proving the affirmative defense of inability to pay, and, even assuming he had raised such a defense, that the State met its burden of proving that his failure to pay was intentional.

Appellant's second point of error is overruled.

Under his third and final point of error, appellant argues that the trial court erred in ordering the sentences in the two cases to be served consecutively, as he had already begun to serve the sentence in each case. Following the revocation hearing, the trial court revoked probation in both cases and ordered the sentence in case 23,808 to commence after the sentence in case 22,356 ceased to operate. Under case 22,356, appellant had been sentenced

to the State Boot Camp Program under TEX. CODE CRIM. PROC. ANN. art. 42.12, section 8, and he had completed that program prior to commencement of his probation. However, in case 23,808, sentence was suspended and appellant placed on probation. As a condition of probation, he had been ordered to successfully complete the SAFP substance abuse program of the Texas Department of Criminal Justice.

Appellant's position is that as he already commenced serving a portion of both sentences, it was improper for the trial court to now order the sentences to be served consecutively. Appellant is correct in arguing that the trial court was without authority to modify the sentence in case 22,356 to order it or case 23,808 to run consecutively, as appellant had already commenced serving the sentence in case 22,356 prior to revocation of probation. *See Barley v. State*, 842 S.W.2d 694 (Tex. Crim. App. 1992). However, this is not what the trial court did. The judgments in both cases clearly show that only the judgment in case 23,808 reflects that the sentence in case 23,808 is to commence after completion of the sentence in case 22,356. The trial court did not violate *Barley*. The cumulation order was attached only to case 23,808, and not to case 22,356. *See Haliburton v. State*, No. 10-99-007-CR, 2000 WL 862818 (Tex. App. – Waco, 2000), which discusses the controlling distinction between a *Barley* fact situation and a non-*Barley* fact situation.

Appellant further argues, however, that as he had also already commenced serving his sentence in case 23,808 prior to revocation of his probation, a *Barley* violation still occurred, as the cumulation order was attached to case 23,808. We disagree that appellant had commenced serving his sentence in case 23,808 prior to revocation of his probation. Appellant's "boot camp" incarceration in case 22,356 has been recognized as "commencement" of a sentence for purposes of a cumulation order, as shown in *Barley* and subsequent cases. This is to be distinguished from appellant's completion of his drug abuse program, which was a *condition* of probation under case 23,808. As explained by the Court of Criminal Appeals in *Barley*, "boot camp" is an alternative incarceration that takes place prior to being placed on probation, and effectively "commences" the sentence. Here, however, appellant merely completed a drug program *after* he had been placed on probation, and did

nothing more than comply with a condition of his probation in case 23,808. He had not commenced serving the underlying sentence. Appellant does not direct our attention to any cases supporting his position that compliance with a condition of probation is tantamount to commencing to serve a sentence, and, indeed, we are not aware of any such cases. The trial court did not err in ordering the sentence in case 23,808 to be served commencing after the sentence in case 22,356 ceased to operate.

Appellant's third point of error is overruled.

The judgments are affirmed.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed September 14, 2000.
Panel consists of Justices Cannon, Draughn and Lee.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee sitting by assignment.