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NORA. LEGAL

## INTRODUCTION

May it please the Court, this is an appeal as of right pursuant to Tenn.R.App.P. Rule 3(b) from the order of the trial court revoking Appellant [REDACTED]'s probation and ordering Appellant to serve the balance of his sentence.

On February [REDACTED], Mr. [REDACTED] entered into a plea agreement which included a period of supervised probation. On April [REDACTED], a Violation of Probation hearing was held at the [REDACTED] County Criminal Court, sitting at [REDACTED], before the Honorable [REDACTED]. At the conclusion of the hearing, the trial court determined that Mr. [REDACTED] was guilty of violating his probation and ordered Mr. [REDACTED] to serve his sentence even though: (1) it was [REDACTED] first probation violation of his first felony conviction; (2) the trial court based its decision on alleged criminal acts that were known to the trial court at the time [REDACTED] probation was granted; and (3) the trial court based its decision on an unsupported conclusion regarding the presence of weapons. A Notice of Appeal was timely filed on [REDACTED].

The parties will be referred to as Appellant or Mr. [REDACTED] and the State, respectively. References to the Record on Appeal will be to volume (I or II) and page number. References to the violation of probation hearing transcript shall be "(Tr. page:line)".

### ISSUES PRESENTED FOR REVIEW

**I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REVOKED MR. [REDACTED] PROBATION AND ORDERED HIM TO SERVE HIS SENTENCE, EVEN THOUGH IT WAS MR. [REDACTED] FIRST VIOLATION AND EVEN THOUGH OTHER ALTERNATIVES WERE AVAILABLE.**

**II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT BASED REVOCATION OF PROBATION ON CRIMINAL ACTS THAT WERE KNOWN AT THE TIME PROBATION WAS GRANTED.**

**III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DETERMINED, CONTRARY TO THE EVIDENCE, THAT APPELLANT POSSESSED WEAPONS.**



the premises, the trial court determined otherwise: [REDACTED] [REDACTED].” (Tr. 68:16-69:3).

In addition to this faulty conclusion, the trial court *sua sponte* raised a prior allegation of criminal conduct against Mr. [REDACTED] that was known to the trial court before the time the plea agreement took effect:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

(Tr. 69:9-16).

The trial court abused its discretion when it: (1) revoked Mr. [REDACTED] probation and ordered him to serve his sentence even though it was Mr. [REDACTED] first violation and even though other options were available and should have been considered, particularly in light of Mr. [REDACTED] recent relapse; (2) based its decision on alleged criminal acts that were known to the trial court at the time probation was granted; and (3) based its decision on an unsupported conclusion regarding the presence of weapons.

**A. Factual Background.**

Appellant [REDACTED] is an only child, and an only grandchild. (Tr. 53:7-8). He is the father of a sixteen-year-old son. (Tr. 57:16-19). He was an integral worker at his father’s farm. (I:113-114). Mr. [REDACTED] father suffered serious health issues during the trial court action, including thirty-seven days in the intensive care unit. (Tr. 53:4).

On September [REDACTED], the trial court granted the State’s September [REDACTED] motion to revoke bond. (I:67,90). At the bail revocation hearing, [REDACTED], a local pawn shop



██████████ to purchase a car charger for the GPS monitoring unit. (Tr. 54:2-22). Mr. ██████████ charger was replaced on at least two occasions. (I:126). There was no evidence that Mr. ██████████ ever tampered with the GPS monitoring unit. (I:126). There was no evidence that Mr. ██████████ ever removed the GPS monitoring unit from his body. (Tr. 10:21-23).

Mr. ██████████ testified that he was an avid hunter. (Tr. 55:6-20). However, once he began his probation, Mr. ██████████ gave his firearms to his father and no firearms were located at the property where Mr. ██████████ resided. (Tr. 56:1-25).

On November ██████████, based on what turned to be inaccurate allegations of a female being held against her will, Probation Officer ██████████ headed to Mr. ██████████ house. (I:126). Mr. ██████████ woke up to Mr. ██████████ standing over his bed. (Tr. 55:10-15; I:124-126). Mr. ██████████ GPS monitoring device lost its charge while Officer ██████████ was en route to Mr. ██████████ home. (Tr. 10:11-17). Officer ██████████ noted there was no evidence of Mr. ██████████ tampering with the GPS monitoring device, but Mr. ██████████ had allowed the GPS monitoring unit to go dead. (Tr. 49:5-8). The GPS unit was located on Mr. ██████████ body. (Tr. 10:21-23) Officer ██████████ acknowledged that Mr. ██████████ had previously raised issues regarding the GPS monitoring device holding its charge. (I:126). Officer ██████████ assessed multiple violations based on the GPS unit losing its charge immediately before Officer ██████████ arrived. (Tr. 44:8-45:10).

Officer ██████████ did not locate any firearms at the premises of Mr. ██████████ and confirmed that statement at the probation revocation hearing: “Q: No weapons? A: No weapons.” (Tr. 44:6-7). Officer ██████████ noted bullet casings and other contraband were located at the property, which is six-thousand and one square feet and includes a “██████████” with Mr. ██████████ collection of ██████████ (Tr. 55:18-25; 57:12-15; I:125-126). Mr. ██████████ passed random drug screens on four previous occasions. (I:126). It was admitted by Mr. ██████████ that he “██████████” and used







A trial court's revocation of probation is reviewed for an abuse of discretion. *State v. Farrar*, 355 S.W.3d 582, 586 (Tenn. Crim. App. 2011). "Generally, '[a] trial court abuses its discretion when it applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party.'" *Id.* (citing *State v. Terry Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010)). "In order for a reviewing court to be warranted in finding an abuse of discretion in a probation revocation case, it must be established that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred." *Id.* (citation omitted).

**B. The Trial Court abused its discretion in revoking Mr. [REDACTED] probation and ordering him to serve his sentence when Mr. [REDACTED] had no prior probation violation.**

Section 40-35-311 of the Tennessee Code addresses a trial court's authority to revoke one's probation. Probationers are routinely afforded a second chance to comply with their probation prior to facing the harshest penalty of revocation and incarceration. *State v. Harris*, 2011 WL 6016918, at \*3 (Tenn. Crim. App. Dec. 5, 2011) ("appellant previously violated the terms of his probation, and the trial court allowed him to remain on probation instead of requiring confinement"), *State v. Dobbs, Jr.*, 2017 WL 5952932, at \*3 (Tenn. Crim. App. Nov. 30, 2017) (noting it was not defendant's first probation violation which led the trial court to order defendant to serve the remainder of the original sentence incarcerated) (emphasis added); *State v. Hamilton*, 2009 WL 4723363, at \*3 (Tenn. Crim. App. Dec. 10, 2009) (noting the trial court stated "[T]wice I've given [the Defendant] what I consider to be chances to try to improve ... [,]"); *State v. Nolan*, 2012 WL 830230, at \*3 (Tenn. Crim. App. Mar. 12, 2012) ("The defendant was given the opportunity to again comply with the terms of probation, rather than having a

violation warrant immediately issued.”); *State v. Lewis*, 2009 WL 2922561, at \*4 (Tenn. Crim. App. Sept. 11, 2009) (“[T]he Defendant had previously violated his probation but was allowed to remain on probation rather than serve his sentence in prison.”); *State v. Ruiz*, 2010 WL 1644247, at \*1 (Tenn. Crim. App. Apr. 23, 2010) (“after his first violation, the trial court had allowed him to serve 90 days and then return to probation”); *State v. Dye*, 715 S.W.2d 36, 41 (Tenn. 1986) (fundamental fairness requires that defendant remain on probation despite a failure to make restitution).

The trial court abused its discretion when it failed to afford Mr. ██████ an opportunity to comply with the terms of his probation prior to revoking Mr. ██████ probation and ordering him to serve out his sentence incarcerated. The main probation violation was Mr. ██████ relapse into drug use, for which Mr. ██████ conceded with remorse. (Tr. 59:9-12). Mr. ██████ had previously passed four random drug screenings while on probation. (I:126). Mr. ██████ had attended an outpatient rehabilitation program. (Tr. 60:13-17). Mr. ██████ demonstrated great promise, but for one relapse.

According to his probation officer, Mr. ██████ was generally compliant with his obligations while on probation. (I:126). Mr. ██████ repeatedly complied with his obligation to seek permission to leave the county for work. (I:140-150; II:154-155). Mr. ██████ complied with the financial obligations of probation. (I:126). Mr. ██████ complied with his obligation to allow the Probation Officer to inspect his premises. (I:126). Mr. ██████ complied with his obligation to attend drug treatment. (Tr. 60:13-17). Mr. ██████ maintained regular contact with Probation Officer ██████ (I:126; Tr. 61:16-19). Mr. ██████ complied with his obligation to report as instructed. (I:126). As the cases above demonstrate, even those who are generally not compliant are given second chances prior to facing incarceration. Moreover, the subject

probation violation was Mr. ██████ first. (Tr. 69:24-70:2). Mr. ██████ probation resulted from his first felony conviction. (Tr. 56:16-18). Mr. ██████ should have been given an opportunity to comply with the terms of his probation.

**C. The Trial Court abused its discretion in revoking Mr. ██████ probation when it failed to consider another option.**

Under Tennessee law, “[i]f a trial court revokes a defendant’s probation, options include ordering confinement, ordering the sentence into execution as originally entered, returning the defendant to probation on modified conditions as appropriate, or extending the defendant’s period of probation by up to two years.” *State v. Scronce*, 2016 WL 3563667, at \*2 (Tenn. Crim. App. June 22, 2016) (citing T.C.A. § 40-35-308(a),(c),-310 (2014) and *State v. Hunter*, 1 S.W.3d 643, 648 (Tenn. 1999)). “[T]rial courts have the discretionary authority to impose something less than the original sentence, depending on the circumstances of the case.” *State v. Beard*, 189 S.W.3d 730, 736 (Tenn. Crim. App. 2005). Section 40-35-308(c), T.C.A., provides that “at the conclusion of a probation revocation hearing, the court shall have the authority to extend the defendant’s period of probation supervision for any period not in excess of two (2) years.” Tenn. Code Ann. § 40-35-308(c).

The record reflects that the trial court failed to consider modifying the terms of Mr. ██████ probation or extending the Mr. ██████ probation. The trial court did not consider any alternative to incarceration even though Mr. ██████ had relapsed, thereby indicating treatment was necessary. The trial court erred when it failed to consider other alternatives prior to ordering Mr. ██████ to serve his sentence.

**II. The Trial Court abused its discretion when it based revocation of probation on criminal acts that were known at the time probation was granted.**

Under Tennessee law,

it is not permissible for trial courts to base revocation on criminal acts that were known at the time probation was granted. In *Stubblefield*, this court confirmed that proposition of law. *Stubblefield*, 953 S.W.2d at 226; see *State v. Shannon Lee Beckner*, No. 923, 1991 WL 43545 (Tenn.Crim.App., at Knoxville Apr. 2, 1991). Other jurisdictions have held that trial courts, which have knowledge of the defendant's prior criminal conduct and then choose to grant probation, should not be allowed to base a subsequent revocation upon that same criminal conduct.

*State v. Beard*, 189 S.W.3d 730, 735 (Tenn. Crim. App. 2005) (citations omitted). At the time of the plea agreement, the Trial Court was aware that [REDACTED] had accused Mr. [REDACTED] of attempting to purchase weapons while on bond. Subsequently, at the probation revocation hearing, the Trial Court *sua sponte* raised, and explicitly considered, that alleged prior criminal conduct. (Tr. 69:9-16). The Trial Court appeared to base its ruling, at least in part, on that alleged prior conduct:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

Tr. 69:9-16. The trial court's consideration of an alleged act already known and accounted for is plainly improper. The justice system already accounted for [REDACTED] allegations against Mr. [REDACTED]. Consideration of the same offense constitutes an abuse of discretion. *Beard*, 189 S.W.3d at 735.

**III. The Trial Court abused its discretion when it determined, contrary to the evidence, that Mr. [REDACTED] possessed guns in his home and based its ruling on that finding.**

“Generally, ‘[a] trial court abuses its discretion when it applies incorrect legal standards, reaches an illogical conclusion, **bases its ruling on a clearly erroneous assessment of the**

**proof, or applies reasoning that causes an injustice to the complaining party.”** *Farrar*, 355 S.W.3d at 586 (citation omitted) (emphasis added).

The trial court based its ruling on a clearly erroneous assessment of the proof and applied reasoning that caused injustice to Mr. [REDACTED] when the trial court determined that Mr. [REDACTED] did in fact have guns at his home. At the probation revocation hearing, Mr. [REDACTED] testified that he gave his guns to his father, in order to comply with the terms of probation. (Tr. 56:1-25). Officer [REDACTED] testified that “no weapons” were located at the premises. (Tr. 44:6-7). Despite the complete absence of evidence that weapons were located, the trial court determined otherwise:

[REDACTED]

Tr. 68:16-69:3. (emphasis added). The trial court’s conclusion constitutes a clearly erroneous assessment of the proof because there was **no proof** of any weapon, let alone “weapons”, at the premises. The transcript reveals that the trial court placed great weight on the presence of weapons, even though there was no evidence to support that conclusion. This error, standing alone, or coupled with the trial court’s consideration of [REDACTED] allegations, constitutes reasoning that causes an injustice to Mr. [REDACTED] and thus, is an abuse of discretion.

### CONCLUSION

The trial court abused its discretion when it: (1) revoked Mr. [REDACTED] probation and ordered him to serve his sentence even though it was Mr. [REDACTED] first violation and even though other options were available and should have been considered, particularly in light of Mr. [REDACTED] recent relapse; (2) based its decision on alleged criminal acts that were known to the

trial court at the time Mr. [REDACTED] probation was granted; and (3) based its decision on an unsupported conclusion regarding the presence of weapons.

[REDACTED]

By: \_\_\_\_\_

[REDACTED]

Attorney for [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing brief has been mailed [REDACTED] [REDACTED], on this the [REDACTED] day of December [REDACTED], by placing the same in the U.S. Mail with sufficient postage thereon to carry it to its destination.

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NORRALEGOAL