NUMBERS 13-19-00240-CR AND 13-19-00241-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

LUIS MERINO III, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 117th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Perkes, and Tijerina
Memorandum Opinion by Justice Perkes

Luis Merino III appeals from the revocation of his community supervision in two cases.[1] Merino contends that the trial court abused its discretion by: (1) denying his

[1] Because the issues in each appeal are identical, we are issuing a single memorandum opinion in the interest of judicial economy.

request for placement in a Substance Abuse Felony Punishment Facility (SAFPF) as an alternative to revocation; and (2) denying his "Motion for New Trial and for Reconsideration" based on newly discovered evidence. We affirm.

I. BACKGROUND

In 2013, Merino was indicted on three counts of robbery, second-degree felonies, and a separate count of retaliation, a third-degree felony. *See* TEX. PENAL CODE ANN. §§ 29.02, 36.06. Pursuant to plea-bargain agreements, Merino pleaded guilty in both cases, and the trial court deferred adjudication of guilt on each case for six years under terms and conditions of community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 27.13.

In September 2014, the State filed a motion to revoke probation in the retaliation case, alleging Merino violated the terms of his community supervision by: (1) failing to report for four months; (2) failing to complete a screening assessment for substance abuse; (3) failing to pay supervision fees; and (4) being discharged for noncompliance from Behavioral Health Center services. Merino pleaded "true" to the allegations, and the trial court continued Merino on probation and sanctioned him to an Intermediate Sanction Facility (ISF) to complete the cognitive intervention program.

In December 2015, the State filed a motion to revoke probation in the retaliation case, alleging Merino violated the terms of his community supervision by: (1) failing to report for a month; (2) failing to attend the Felony Victim Impact Panel Program, Anger Management Program, and appointments for the Mental Health Specialized Caseload; (3) failing to pay supervision fees; and (4) failing to attend orientation for community service restitution. Merino pleaded "true" to the allegations, and the trial court continued

Merino on probation with modified conditions, including a requirement that he report twice a month to probation, and sanctioned him to thirty days in county jail.

In August 2016, the State filed a motion to revoke probation in the retaliation case, alleging Merino violated the terms of his community supervision by: (1) failing to report for two months; and (2) failing to pay court costs.[2] Merino pleaded "true" to the allegations, and the trial court continued Merino on probation and sanctioned him to ISF to complete the cognitive intervention program for a second time.

In April 2018, the State filed identical first amended motions to revoke community supervision in each case, alleging Merino violated the terms of his community supervision by: (1) failing to report nineteen times between April 2017 and March 2018; (2) failing to pay court costs, supervision fees, restitution, and fines; (3) failing to attend the Felony Victim Impact Panel Program, Anger Management Program, and the Theft Rehabilitation Program; (4) failing to complete 160 hours of community supervision; and (5) violating the "zero tolerance" condition of his supervision. Merino pleaded "not true" to the allegations and a contested hearing was held on May 3, 2018.

During her testimony, Merino's probation officer, Rachel Hernandez, confirmed each of the violations alleged against Merino. She explained that Merino was previously sanctioned to ISF twice and successfully completed the cognitive program each time. After his latest release from ISF on March 29, 2017, Merino failed to report in April, May, June, and July of 2017. When the motion to revoke was filed in March 2018, Merino had not reported since November 14, 2017. When asked on cross-examination why she waited to seek Merino's revocation, Hernandez explained, "I was trying to give him every

[2] The State also alleged, but ultimately abandoned, allegations that Merino committed a new offense and admitted to marijuana use.

chance," but Merino "was stringing me along." Hernandez stated that Merino would call her pleading for another opportunity and promising he would report the next time.

Hernandez also testified that, despite being referred several times, Merino never attended the Felony Victim Impact Panel Program, Anger Management Program, or Theft Rehabilitation Program. Since being placed on probation four years earlier, Merino only paid a total of $25 toward the fees, costs, restitution, and fine ordered in one case and nothing in the other case. Finally, Hernandez testified that Merino had only completed 4.75 hours out of the 160 hours of community service ordered.

Merino testified on his own behalf. Although he pleaded "not true" to all the allegations, Merino acknowledged that at least some of the failure-to-report allegations were true and that he had not made any payments. He explained to the trial court that he failed to report because he was "on drugs." Merino then said that he would "like to go get help," and the following exchange occurred:

> [COURT]: You want to go to SAFPF?
>
> [MERINO]: What is that?
>
> [COURT]: That's lockdown drug treatment.
>
> [MERINO]: For how long because I don't want to be—I don't want to lose my mom and dad, sir, that's my biggest fear. If I lose my mom and dad while I'm in there, or prison, I mean, I'm gonna go crazy. I mean, if you all are here for help, then I'll like—
>
> [COURT]: No, it's a while, Mr. Merino, I'm not going to lie to you, it's a while.
>
> [MERINO]: Like years?
>
> [COURT]: Not years—
>
> [MERINO]: Okay, well, then I'll take it.
>
> [COURT]: —but like a year.

[MERINO]: I'll take it.

At another point in the proceeding, Merino explained to the court that he deserved another opportunity because he "didn't know the importance of [probation]." The court responded, "I think you did know. This is the third time you've been here."[3] Merino persisted, "No, I didn't know."

The trial court found all the allegations "true," revoked Merino's community supervision in both cases, adjudicated him guilty, and sentenced him to fifteen years' imprisonment on the robbery convictions and ten years on the retaliation conviction. After the Texas Court of Criminal Appeals granted Merino an out-of-time appeal based on his appellate counsel's failure to file a notice of appeal, Merino timely filed a "Motion for New Trial and for Reconsideration," citing Texas Rule of Appellate Procedure 21.4 and Texas Code of Criminal Procedure article 40.001. In the motion, Merino submitted that his conduct in prison for the past eleven months constituted "newly discovered evidence" that should be considered by the trial court in assessing whether to restore his community supervision.

The trial court conducted a hearing, and Merino testified that since his imprisonment, he had completed a cognitive intervention program, explored various educational programs, and complied with the institution's rules and regulations. Merino stated that he was now prepared to take community supervision seriously and comply with all conditions imposed on him. Merino's father and stepbrother also testified that they were willing and able to support his efforts to comply. Merino's attorney asked the trial court to grant the motion and "restore [Merino] to community supervision."

[3] As the State later reminded the trial court, this was Merino's fourth motion to revoke, not his third.

The State argued, on the other hand, that any rehabilitation on Merino's part, while laudable, was merely proof that a penological interest was being met, not evidence of how Merino would behave if he were free to make his own choices. The best evidence of that, the State pointed out, was Merino's conduct during the four years he was on supervision.

At the completion of the hearing, the trial court announced that it needed to review the file and took the motion under advisement. The court subsequently denied the motion, and this appeal ensued.

II. STANDARD OF REVIEW

We review a trial court's decision revoking community supervision for an abuse of discretion. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006); *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). In a revocation proceeding, it is the State's burden to prove by a preponderance of the evidence that a probationer violated the terms of his community supervision. *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). The trial judge is the sole judge of the credibility of the witnesses and the weight given to their testimony, and we review the evidence in the light most favorable to the trial court's ruling. *Cardona*, 665 S.W.2d at 493; *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. [Panel Op.] 1981). The trial court abuses its discretion when it revokes community supervision after the State has failed to meet its burden of proof. *Cardona*, 665 S.W.2d at 493–94. Proof by a preponderance of the evidence of any one of the alleged violations of the conditions of community supervision will support revocation on appeal. *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980); *Sanchez v. State*, 603 S.W.2d 869, 871 (Tex. Crim. App. [Panel Op.] 1980).

III. ANALYSIS

A. Request for SAFPF

By his first issue, Merino contends that the trial court abused its discretion by revoking his community supervision instead of placing him in SAFPF for drug treatment, as Merino requested. Once a violation is established, trial courts enjoy broad discretion in deciding whether to continue, extend, modify, or revoke community supervision. TEX. CODE CRIM. PROC. ANN. art. 42A.751(d); *Ex parte Tarver*, 725 S.W.2d 195, 200 (Tex. Crim. App. 1986); *Smith v. State*, 587 S.W.3d 413, 419 (Tex. App.—San Antonio 2019, no pet.). This includes whether to place a probationer in SAFPF as an additional condition of continued community supervision. TEX. CODE CRIM. PROC. ANN. art. 42A.752(a)(4). Likewise, "the discretion of the trial court to choose the alternative of revocation is at least substantially absolute." *Flournoy v. State*, 589 S.W.2d 705, 708 (Tex. Crim. App. [Panel Op.] 1979). Accordingly, courts of appeals, including our own, have consistently deferred to a trial court's discretion to revoke community supervision over the probationer's request for placement in SAFPF. *Hawkins v. State*, 112 S.W.3d 340, 343–44 (Tex. App.—Corpus Christi–Edinburg 2003, no pet.); *see also Hodge v. State*, Nos. 02-10-00050-CR, 02-10-00051-CR, 2011 WL 2756540, at *2 (Tex. App.—Fort Worth July 14, 2011, pet. ref'd) (mem. op., not designated for publication); *Mathis v. State*, No. 04-09-00075-CR, 2009 WL 3320270, at *2 (Tex. App.—San Antonio Oct. 14, 2009, no pet.) (mem. op., not designated for publication); *Marriott v. State*, No. 07-02-00203-CR, 2003 WL 22004084, at *1–3 (Tex. App.—Amarillo Aug. 25, 2003, pet. ref'd) (mem. op., not designated for publication).

In this case, Merino was given four successive opportunities to abide by the terms of his community supervision before the trial court finally revoked his probation, first when he was initially placed on community supervision, and then each time the trial court elected to continue his supervision despite Merino's repeated violations, including numerous instances of failing to report. After his latest opportunity to comply, and within weeks of successfully completing ISF for the second time, Merino stopped reporting again. A probationer cannot be supervised if he continually refuses to report. Based on these persistent violations alone, it would have been reasonable for the trial court to conclude that Merino no longer remained a good candidate for supervision. *See State v. Waters*, 560 S.W.3d 651, 659 (Tex. Crim. App. 2018) (explaining that "in a revocation proceeding, the central question is whether the probationer has violated the terms of [his] community supervision and whether [he] remains a good candidate for supervision"); *Flournoy*, 589 S.W.2d at 709 (concluding the trial court's decision to revoke supervision based solely on failure-to-report violations "is just such a matter of discretion that this Court will not disturb").

Moreover, it was the trial court's sole province to determine whether Merino's request for placement in SAFPF was credible. *See Cardona*, 665 S.W.2d at 493. When the trial court explained that SAFPF was "lockdown drug treatment," Merino equivocated by asking about the length of the program. Merino did not agree to "take it" until the trial court confirmed that the duration of the program was significantly shorter than the potential sentences Merino faced if his probation was revoked. *See* TEX. PENAL CODE ANN. §§ 12.33(a), 12.34(a). It would have been reasonable for the trial court to conclude that Merino's primary objective in requesting SAFPF was not rehabilitation. *See Sharp v.*

State, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) (explaining that the trier of fact may choose to believe or disbelieve any portion of a witness's testimony).

In sum, revocation proceedings are "highly discretionary." *Waters*, 560 S.W.3d at 661. Any one of Merino's numerous violations over the years would have supported his revocation. *See Moore*, 605 S.W.2d at 926. Therefore, it was well within the trial court's discretion to finally revoke Merino's supervision after his latest violations, regardless of Merino's request for placement in SAFPF. *See Hawkins*, 112 S.W.3d at 343–44; *see also Hodge*, 2011 WL 2756540, at *2; *Mathis*, 2009 WL 3320270, at *2; *Marriott*, 2003 WL 22004084, at *1–3. We overrule Merino's first issue.

B. Motion for New Trial/Reconsideration

By his second issue, Merino submits that the trial court abused its discretion by denying his request to restore him to community supervision based on newly discovered evidence. According to Merino, the completion of a cognitive intervention program and his good behavior in prison constitutes "newly discovered evidence."

"A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial." TEX. CODE CRIM. PROC. ANN. art. 40.001. Motions for new trials based on newly discovered evidence are generally disfavored and should be carefully examined. *Drew v. State*, 743 S.W.2d 207, 225 (Tex. Crim. App. 1987); *Dedesma v. State*, 806 S.W.2d 928, 934 (Tex. App.—Corpus Christi–Edinburg 1991, pet. ref'd). We review a trial court's decision to deny such a motion for an abuse of discretion. *Davila v. State*, 147 S.W.3d 572, 577 (Tex. App.—Corpus Christi–Edinburg 2004, pet ref'd) (citing *Keeter v. State*, 74 S.W.3d 31, 37 (Tex. Crim. App. 2002)). To establish an abuse of discretion, the record must show: (1) the newly discovered evidence

was unknown or unavailable to the defendant at the time of trial; (2) the defendant's failure to discover or obtain the new evidence was not due to the defendant's lack of due diligence; (3) the new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching; and (4) the new evidence is probably true and will probably bring about a different result in a new trial. *Stubbs v. State*, 533 S.W.3d 557, 570 (Tex. App.—Corpus Christi–Edinburg 2017, pet ref'd) (citing *Carsner v. State*, 444 S.W.3d 1, 2–3 (Tex. Crim. App. 2014)). Failure to satisfy any one of these four elements is fatal to a motion for a new trial. *Id.*

The gravamen of Merino's argument for relief was that after spending a year in prison, Merino was now a better candidate for probation than he was on the day that the trial court revoked his probation. As proof, Merino testified about his accomplishments in prison. However, Merino has failed to provide us with any authority that a defendant's own post revocation conduct constitutes "newly discovered evidence" of the defendant's suitability for community supervision, and we have found none. Nevertheless, assuming without deciding that Merino met the first three elements of a motion for a new trial, we conclude that he necessarily failed to meet the fourth element.

"We note that since a revocation of probation is a proceeding tried before the court and not before a jury, the trial court is not required even to consider a motion for new trial." *Glaze v. State*, 675 S.W.2d 768, 769 (Tex. Crim. App. 1984). Moreover, as the trier of fact, the trial court determines the credibility of witnesses and the probable truth of the newly discovered evidence. *State v. Thomas*, 428 S.W.3d 99, 104 (Tex. Crim. App. 2014). In this case, Merino cannot demonstrate that a new trial will probably bring about a different result because the trial court has *already* considered and rejected Merino's

"newly discovered evidence" as a basis for restoring him to community supervision. *See Stubbs*, 533 S.W.3d at 570. For Merino to prevail, then, he must demonstrate that the trial court's decision on the merits was an abuse of discretion.

As we explained above, once a violation is established, trial courts enjoy near absolute discretion when deciding between revoking and continuing supervision. TEX. CODE CRIM. PROC. ANN. art. 42A.751(d); *Ex parte Tarver*, 725 S.W.2d at 200; *Flournoy*, 589 S.W.2d at 708. Accordingly, we defer to the trial court's decision to uphold Merino's revocation after weighing his "newly discovered evidence." We overrule Merino's second issue.

IV. CONCLUSION

The judgments are affirmed.

GREGORY T. PERKES
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
11th day of June, 2020.