

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-548

Filed: 15 December 2015

Granville County, No. 12 CRS 051949

STATE OF NORTH CAROLINA

v.

PHILLIP RAYMOND MARKUNAS

Appeal by Defendant from judgment entered 8 December 2014 by Judge J. Carlton Cole in Superior Court, Granville County. Heard in the Court of Appeals 3 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Allison A. Angell, for the State.

Mark Hayes for Defendant-Appellant.

McGEE, Chief Judge.

Phillip Raymond Markunas (“Defendant”) was convicted on 2 December 2013 of taking indecent liberties with a child. The trial court suspended Defendant’s sentence of nineteen to twenty-three months’ imprisonment and placed him on supervised probation for thirty-six months.

A probation violation report was filed on 10 September 2014, alleging Defendant violated a condition of his probation. The sole ground alleged in the

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violation report was that Defendant had violated the condition that he possess no firearm or other deadly weapon. N.C. Gen. Stat. § 15A-1343(b)(5) (2013). Specifically, the violation report alleged that a search of Defendant's residence had revealed "a handgun, two shot guns, AK-47, and numerous large knives[.]"

An addendum to the violation report ("the addendum") was filed on 29 October 2014. The addendum alleged that Defendant: (1) had failed to report to his probation officer for a scheduled office visit; (2) had been arrested for violating his probation, but upon bonding out of jail, failed to notify his probation officer of his release; and (3) had been charged with the criminal offense of possession of a firearm by a felon.

The trial court held a probation violation hearing in Granville County Superior Court on 8 December 2014. At the beginning of the hearing, the State announced it would abandon allegation three that was listed in the addendum, that Defendant had committed another criminal offense. Defendant denied the remaining allegations. The trial court found that Defendant had violated the terms of his probation without lawful excuse. The trial court revoked Defendant's probation and activated his suspended sentence. Defendant appeals.

Defendant argues the trial court erred by revoking his probation and activating his suspended sentence. We agree.

In 2011, the General Assembly passed the Justice Reinvestment Act ("JRA"), which limits a trial court's discretion to revoke a defendant's probation. For probation

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violations occurring on or after 1 December 2011, a trial court may only revoke probation where a defendant: (1) commits a new crime in violation of N.C. Gen. Stat. § 15A–1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A–1343(b)(3a); or (3) violates any condition of probation after serving two prior periods of confinement in response to violation (“CRV”) under N.C. Gen. Stat. § 15A–1344(d2). N.C. Gen. Stat. § 15A–1344(a) (2013). Additionally, the provision relating to revocation for absconding applies only to offenses committed on or after 1 December 2011. *State v. Hunnicutt*, __ N.C. App. __, __, 740 S.E.2d 906, 911 (2013) (citing 2011 N.C. Sess. Laws 412, sec. 2.5).

Defendant’s underlying offense was committed in 2009; therefore, Defendant was not yet subject to the new absconding condition added by the JRA. *Id.* Additionally, Defendant has served no prior period of CRV. Consequently, the trial court could only revoke Defendant’s probation if he committed a new crime in violation of N.C. Gen. Stat. § 15A–1343(b)(1).

Here, the judgment entered by the trial court indicated Defendant had committed a new crime or absconded. In the third alleged violation listed in the addendum, the State had alleged that Defendant committed a new crime. The State, however, abandoned this allegation at the 8 December 2014 hearing, stating: “Third is a charge that still remains pending, Your Honor. We will abandon paragraph three.” Therefore, no allegation that Defendant violated N.C. Gen. Stat. § 15A-

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1343(b)(1) was before the trial court, and the trial court lacked jurisdiction to revoke Defendant's probation based on that allegation. *See State v. Williams*, __ N.C. App. __, __, 754 S.E.2d 826, 829 (2013) *disc. review denied*, 367 N.C. 298, 753 S.E.2d 670 (2014); *State v. Kornegay*, __ N.C. App. __, __, 745 S.E.2d 880, 883 (2013); *see also State v. Jordan*, __ N.C. App. __, 772 S.E.2d 13 (2015) (unpublished opinion). The judgment also indicated that the trial court revoked Defendant's probation based on its finding that Defendant violated his probation as alleged in the first paragraph of the 10 September 2014 violation report. That paragraph alleged Defendant violated his probation by possessing firearms and knives, but did not allege that the State was pursuing that violation as a criminal offense pursuant to N.C. Gen. Stat. § 15A-1343(b)(1). Consequently, this allegation provided insufficient notice that the State intended to pursue this ground as a basis for revoking Defendant's probation. *Id.* Accordingly, we vacate the trial court's order revoking Defendant's probation and activating his sentence. *Id.* The trial court may conduct a new probation violation hearing consistent with this opinion.

VACATED AND REMANDED.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).