

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-493

Filed: 20 December 2016

Orange County, No. 12 CRS52086, 12 CRS 52671

STATE OF NORTH CAROLINA

v.

PIERRE JE BRON MOORE, Defendant.

Appeal by Defendant from judgment entered 15 January 2016 by Judge R. Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 19 October 2016.

Attorney General Roy A. Cooper, III., by Assistant Attorney General Jessica V. Sutton, for the State.

Allegra Collins Law, by Allegra Collins, for Defendant-Appellant.

DILLON, Judge.

Defendant Pierre Je Bron Moore was convicted of a number of charges and placed on supervised probation. While on probation, he was served with two probation violation notices. After a hearing on the matter, Judge Baddour entered a judgment revoking Defendant's probation and activating his suspended sentence. On appeal, Defendant contends that Judge Baddour lacked jurisdiction to revoke his probation, contending that the State failed to give him adequate notice that it was

alleging a revocation-eligible violation. We disagree and thus affirm Judge Baddour's judgment.

I. Analysis

In North Carolina, a defendant's "probation may be reduced, terminated, continued, extended, modified, or revoked" N.C. Gen. Stat. § 15A-1344(a) (2016). However, with the passage of the Justice Reinvestment Act of 2011, it is "no longer true that [*any*] violation of a valid condition of probation is sufficient to revoke defendant's probation." *State v. Kornegay*, 228 N.C. App. 320, 323, 745 S.E.2d 880, 882 (2013) (emphasis added). Rather, the Act enumerates three ways a defendant's probation may be revoked: (1) the defendant commits a criminal offense; (2) the defendant absconds supervision; or (3) the defendant previously served two periods of confinement in response to a violation. N.C. Gen. Stat. § 15A-1344(a).

And where the State seeks to *revoke* someone's probation, it "must give the probationer notice of the [revocation] hearing and its purpose, including a statement of the violations alleged." N.C. Gen. Stat. § 15A-1345(e). That is, the violation report served on the probationer must put him "on notice that the State [is] alleging a revocation-eligible violation[.]" *State v. Lee*, 232 N.C. App. 256, 260, 753 S.E.2d 721, 723 (2014). Absent adequate notice that a revocation-eligible violation is being alleged, the trial court lacks jurisdiction to revoke a defendant's probation, unless the

defendant waives the right to notice. *Kornegay*, 228 N.C. App. at 322, 745 S.E.2d at 883.

In the present case, Judge Baddour revoked Defendant's probation based on his determination that Defendant had committed new criminal offenses, a revocation-eligible violation. On appeal, Defendant argues that he did not receive adequate notice that the State "intend[ed] to prove [at the hearing] that [he] violated a condition of probation that could result in the revocation of probation[.]" *Kornegay*, 228 N.C. App. at 322, 745 S.E.2d at 882.

The notices to Defendant alleged that he violated his probation as follows:

The Defendant has the following pending charges in
Orange County . . . 15 CR 51309 flee/elude arrest W/MV
6/8/15, . . . 14 CR 052225 possess drug paraphernalia
6/16/15, 14 CR 052224 resisting public officer 6/16/15 . . .

While the notices state that the pending charges constituted a violation of Defendant's probation, the notices fail to state expressly *which* condition of probation the State was contending had been violated. More specifically, the notices do not expressly indicate that the State was alleging that Defendant had violated the condition that he not commit a new criminal offense.

Our Court has never explicitly held that certain "magic" words must be used in a notice to confer jurisdiction on a court to revoke probation. However, on a number of occasions, our Court has been called upon to determine whether certain wording in a violation report constituted adequate notice.

For instance, in *State v. Lee*, we held that the notice was adequate where the violation report alleged that the probationer had certain enumerated criminal charges pending *and that* by he had, therefore, violated the condition that he not commit a new criminal offense. *Lee*, 232 N.C. App. at 260, 753 S.E.2d at 723-24. Indeed, it was unambiguous that the State was alleging a revocation-eligible violation. In *Kornegay*, however, we held that the notice was not adequate where the State alleged that the probationer possessed illegal drugs *but further alleged* that said possession constituted a violation of a different condition, namely that he not possess illegal drugs. *Kornegay*, 228 N.C. App. at 322, 745 S.E.2d at 882. Violating the condition that the probationer not possess illegal drugs, though, is not a revocation-eligible violation. Therefore, it certainly would not have been clear to the probationer in *Kornegay* from the notice that the State was alleging that he had committed the revocation-eligible violation of committing a new criminal offense.

We conclude that Defendant had adequate notice that the State was alleging a revocation-eligible violation of the condition, namely that he not commit a new criminal offense. Specifically, we conclude that where the notice fails to allege specifically which condition was violated but where the allegations in the notice could only point to a revocation-eligible violation, the notice is adequate to confer jurisdiction to revoke probation. Here, the only condition of Defendant's probation to

which his alleged pending charges could reasonably be referring to is the condition that he not commit a new criminal offense. There is no ambiguity.

Our result might be different had the report stated that Defendant had been charged with the crime of possessing illegal drugs, without referring to a specific condition of probation. In such case, Defendant would have had to guess whether the State was alleging that he committed a non-revocation-eligible violation of possessing illegal drugs *or* a revocation-eligible violation of committing a new criminal offense.

We note, though, that it is always the better practice for the State to *expressly* state which condition of probation it is alleging has been violated.

II. Conclusion

The General Assembly has stated that the State's notice must give the probationer notice of the purpose of the hearing and a statement of the violations alleged. N.C. Gen. Stat. § 15A-1345(e). We conclude that the State fulfilled its obligation in this case. Accordingly, we conclude that Judge Baddour properly exercised jurisdiction to revoke Defendant's probation, and we find no error.

NO ERROR.

Judge ELMORE concurs.

Judge HUNTER, JR., dissents by separate opinion.

HUNTER, JR., Robert N., Judge, Dissenting.

I respectfully dissent from the majority affirming the trial court and revoking Defendant's probation. Instead, I would vacate the trial court's judgment *ex mero motu* for lack of jurisdiction.

In probation revocations, the requirement of notice is imperative. Absent adequate notice, the trial court lacks subject matter jurisdiction. *State v. Kornegay*, 228 N.C. App. 320, 322, 745 S.E.2d 880, 882 (2013) (citing *State v. Tindall*, 227 N.C. App. 183, 187, 742 S.E.2d 272, 275 (2013)). To provide adequate notice, the "probation officer [must] specifically allege[] in the violation report that defendant . . . violated the condition that he not commit any criminal offense[.]" and Defendant must be "aware that the State [is] alleging a revocation-eligible violation and he [is] aware of the *exact violation* upon which the State relied." *State v. Lee*, 232 N.C. App. 256, 260, 753 S.E.2d 721, 723-24 (2014) (emphasis added).

The majority states, "Our Court has never explicitly held that certain 'magic' words must be used in a notice to confer jurisdiction on a court to revoke probation." However, the Court's definition of adequate notice in *Lee*, *Hancock*, and *Davis* and its identification of inadequate notice in *Tindall*, *Kornegay*, and *Jordan*, demonstrate the use of specific wording guides our Court's decision.

In *Lee*, *Hancock*, and *Davis*, this Court held the State provided adequate notice when the State used specific "commit no criminal offense" language. For example, in *Lee*, this Court held the State gave adequate notice when the "violation report

specifically alleged that defendant violated the condition of probation that he commit no criminal offense in that he had several new pending charges which were specifically identified” *Lee*, 232 N.C. App. at 259, 753 S.E.2d at 723 (emphasis added). The Court focused on the fact “[t]he probation officer specifically alleged in the violation report that defendant had violated the condition that he not commit any criminal offense.” *Id.* at 260, 753 S.E.2d at 723-24. Additionally, the Court noted Defendant in *Lee* was “aware that the State was alleging a revocation-eligible violation and he was aware of the *exact violation* upon which the State relied.” *Id.* at 260, 753 S.E.2d at 724 (emphasis added).

Further, this Court held in *Davis*:

Defendant was provided with sufficient notice that his probation could be revoked by means of a probation violation report clearly indicating that: (1) Defendant had willfully violated the condition of his probation that he commit no criminal offense Therefore, unlike *Tindall* and *Kornegay*, Defendant was provided with adequate notice of the State’s contention that he had committed a new criminal offense that was grounds for revocation

State v. Davis, No. COA 14-843, 2015 WL 892282, at *3 (unpublished) (N.C. Ct. App. March 3, 2015). Lastly, in *Hancock*, this Court held where specific “commit no criminal offense” is used, the “defendant need not be convicted of a criminal offense in order for the trial court to find that a defendant violated N.C. Gen. Stat. § 15A-1343(b)(1) by committing a criminal offense.” *State v. Hancock*, ___ N.C. App. ___, ___, 789 S.E.2d 522, 526 (2016).

Similarly, our Court has held where specific “commit no criminal offense” language is lacking, the State did not provide adequate notice. In *State v. Jordan*, the trial court revoked Defendant’s probation based on the violation “Other Violation: Defendant failed to report to superior court for pending probation violation on 12/3/2013.” No. COA 14-931, 2015 WL 1201392, at *3-*4 (unpublished) (N.C. Ct. App. March 17, 2015) (all caps in original). The State alleged this violation constituted a criminal offense and was sufficient to support revocation. *Id.* at *3. However, this Court concluded “the fact that failure to appear can constitute a crime does not, in itself, provide adequate notice absent *clear indication* that the State is pursuing that violation as a criminal offense pursuant to N.C. Gen. Stat. § 15A-1343(b)(1).” *Id.* at *4 (emphasis added). This Court held “[a]dequate notice requires that a defendant be notified concerning *which alleged violations* the State intends to pursue for the purposes of probation revocation.” *Id.* at *5 (emphasis added).

In *Tindall*, Defendant’s probation officer filed a violation report alleging Defendant willfully violated two conditions of probation: (1) “not use, possess or control any illegal drug” and (2) “[to] participate in further evaluation, counseling, treatment or education programs” *Tindall*, 227 N.C. App. at 186, 742 S.E.2d at 275. This Court concluded the State failed to provide adequate notice. *Id.* at 187, 742 S.E.2d at 275. This Court highlighted the fact the report did not specifically

allege Defendant committed a new criminal act. *Id.* at 186-87, 742 S.E.2d at 275.

Thus, this Court held the trial court lacked jurisdiction. *Id.* at 187, 742 S.E.2d at 275.

In *Kornegay*, the State filed two violation reports alleging Defendant violated three conditions of probation: (1) he “not be in possession of any drug paraphernalia” (2) he “[p]ossess no firearm . . . or other deadly weapon,” and (3) he “[n]ot use, possess or control any illegal drug or controlled substance” *Kornegay*, 228 N.C. App. at 321, 745 S.E.2d at 881 (brackets in original). Again, the reports did not specifically allege these behaviors violated the “commit no criminal offense” probation condition. *Id.* at 323, 745 S.E.2d at 883. This Court held the notice was inadequate and trial court lacked jurisdiction to revoke probation. *Id.* at 323-24, 745 S.E.2d at 883.

In this case, Defendant was convicted of various charges and placed on supervised probation and suspended sentencing. On 3 June 2015, Defendant’s Probation Officer, Willie Atwater, filed violation reports and stated Defendant “willfully violated” certain conditions of probation and committed “other violation[s].” On both violation reports under “Other Violation,” Probation Officer Atwater wrote the following:

The Defendant has the following pending charges in Orange County. 15CR 051315 No operator[]s license 6/8/15, 15CR 51309 Flee/elude arrest w/mv 6/8/15. 13CR 709525 No operator[]s license 6/15/15, 14CR 052225 Possess drug paraphernalia 6/16/15, 14CR 052224 Resisting public officer 6/16/15, 14CR706236 No motorcycle endorsement 6/29/15, 14CR 706235 Cover reg sticker/plate 6/29/15, and 14CR 706234 Reg card address

change violation.

(all caps in original)

The violation reports filed 3 June 2015 fail to provide adequate notice under our current case law. Merely alleging Defendant committed a new charge is not grounds for revocation. *Lee*, 232 N.C. App. at 260, 753 S.E.2d at 723. Further, the State failed to give notice of the *particular* revocation-eligible violation alleged by the State. *Id.* at 260-61, 753 S.E.2d at 723 (“because of the changes effected by the Justice Reinvestment Act, we have required that defendants be given notice of the *particular* revocation-eligible violation alleged by the State.”) (emphasis added) (citations omitted). The violation report did not specifically allege Defendant “committed a criminal offense” when it listed the new charges under the heading “Other Violation.” Further, the violation reports did not allege these new charges were revocation-eligible.

Because the probation violation reports fail to give Defendant adequate notice of the revocation-eligible conduct at issue, the trial court did not have subject matter jurisdiction to revoke Defendant’s probation. Accordingly, I would vacate the trial court’s judgment *ex mero motu*.