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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. CO16-1087

Filed: 6 June 2017

Lenoir County, No. 14 CRS 448

STATE OF NORTH CAROLINA

v.

ISRAEL ROGERS

Appeal by defendant from judgment entered 30 March 2016 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 8 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary Padget, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

ZACHARY, Judge.

Israel Rogers¹ (defendant) appeals from a judgment revoking his probation and activating his suspended sentence. Defendant argues, and the State agrees, that the trial court erred by revoking his probation based upon its finding that defendant had

¹ We are aware that Mr. Rogers' first name is spelled "Isreal" in some of the record documents. However, in documents bearing a signature, Mr. Rogers spells his name "Israel." Accordingly, we refer to defendant in this opinion as "Israel Rogers."

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previously served two 90 day periods of confinement in response to probation violations. We agree with the parties and vacate the trial court's order revoking his probation.

On 4 November 2010, defendant pleaded guilty in Pitt County Superior Court to two counts of felony larceny in Pitt County file numbers 09 CRS 56095 and 10 CRS 54928, before the Honorable W. Russell Duke, Jr. Judge Duke sentenced defendant to 10 to 12 months' imprisonment in 09 CRS 56095. The court imposed a suspended sentence of 10 to 12 months' imprisonment in 10 CRS 54928 and placed defendant on 60 months of supervised probation, beginning after his release from incarceration for the other larceny conviction.

Following defendant's release from incarceration on 4 August 2011, his probation was transferred to Lenoir County. On 5 March 2014, a Lenoir County Probation Officer filed a probation violation report alleging that defendant had violated the conditions of his probation. On 29 April 2015, the trial court entered an order finding that defendant violated the conditions of his probation and imposing a sentence of 90 days' confinement in response to the violation.

On 15 February 2016 and 23 February 2016, a Lenoir County Probation Officer filed probation violation reports alleging that defendant had violated the terms of his probation by committing a new criminal offense and by failing to charge the electronic monitoring unit he had been ordered to wear. On 30 March 2016, defendant appeared

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before the trial court for a probation violation hearing. At the hearing, defendant admitted to failing to charge his electronic monitoring unit. The trial court entered an order revoking defendant's probation based upon the court's findings that defendant had violated the terms of his probation and that he "twice previously has been confined in response to violation under G.S. 15A-1344(d2)." Defendant gave oral notice of appeal in open court.

On appeal, defendant contends that the trial court abused its discretion in revoking his probation because its findings in support of revoking probation were not supported by competent evidence. The State concedes this issue, and we agree with the State and defendant.

"Findings made in support of revoking probation must be supported by competent evidence, and will not be disturbed on appeal without a showing that the trial court committed a manifest abuse of discretion." *State v. Sherrod*, 191 N.C. App. 776, 777-78, 663 S.E.2d 470, 472 (2008) (internal quotation omitted). "When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion." *State v. Shannon*, 182 N.C. App. 350, 357, 642 S.E.2d 516, 522 (2007).

In this case, the trial court revoked defendant's probation pursuant to N.C. Gen. Stat. § 15A-1344(d2) (2015), which provides in pertinent part that:

When a defendant under supervision for a felony conviction has violated a condition of probation . . . the court may

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impose a period of confinement of 90 consecutive days to be served in the custody of the . . . Department of Public Safety. The court may not revoke probation unless the defendant has previously received a total of two periods of confinement under this subsection. . . .

In this case, both of the probation violation reports alleged that defendant had previously served one period of confinement in response to violations of probation. No evidence was offered at the probation violation hearing that might support a contrary finding. Indeed, defendant's prior period of confinement was not mentioned at the hearing. We conclude that the trial court erred by revoking defendant's probation and activating his suspended sentence. The court's judgment should be, and hereby is, vacated. Given our decision to vacate the trial court's judgment, we need not address defendant's other argument on appeal.

VACATED.

Judges BRYANT and DAVIS concur.

Report per Rule 30(e).