

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA16-1227

Filed: 5 July 2017

Catawba County, No. 14CRS55436

STATE OF NORTH CAROLINA,

v.

JORGE GUERRERO, JR., Defendant.

Appeal by defendant from a judgment entered 19 May 2016 by Judge Daniel A. Kuehnert in Catawba County Superior Court. Heard in the Court of Appeals 19 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly S. Murrell, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

BERGER, Judge.

Jorge Guerrero, Jr. (“Defendant”) appeals from judgment entered upon revocation of his probation. Defendant contends the trial court erred by revoking his probation based solely on a pending criminal charge because there was no guilty plea, conviction, or independent evidence found. We disagree.

Factual and Procedural Background

On March 29, 2016, Defendant was placed on supervised probation following his guilty plea to possession of methamphetamine, possession of marijuana, and possession of a Schedule III controlled substance. Less than two weeks later, on April 8, 2016, a violation report was filed by Defendant's probation officer alleging Defendant tested positive for methamphetamine and marijuana, failed to notify his supervising officer of an address change, and failed to provide proof of employment. A second violation report was filed on May 5, 2016, alleging Defendant failed to report as directed to his probation officer and committed a new criminal offense.

On May 19, 2016, a hearing was held in Catawba County Superior Court. Defendant, through counsel, admitted to the violations contained in the violation reports. Specifically, defense counsel informed the trial court:

Your Honor, we are admitting in a way. Some of his allegations are pending new charges. We've talked to the probation officer. We are admitting to the extent that we believe there is enough to get revoked, but are not admitting in any way to jeopardize the pending criminal charges, if that makes sense, Your Honor.

...

We're not admitting to any wrong doing, but admitting to the -- that there are allegations that exist that could allow Your Honor to revoke our probation.

STATE V. GUERRERO

Opinion of the Court

Defendant's probation officer relayed information to the trial court consistent with the violation reports, including information that Defendant had committed offenses for assault on a female and misdemeanor larceny while he was on probation.

On the record in open court, the trial court found that Defendant violated the terms and conditions of his supervised probation by committing a criminal offense, and revoked his probation. The trial court made written findings which incorporated the violation reports by reference, indicated Defendant admitted the violations in the violation reports and waived hearing, and found that Defendant's probation could be revoked for the "willful violation of the condition(s) that [he] not commit any criminal offense." The trial court, however, failed to note in the judgment that Defendant had violated his probation by committing a new criminal offense. Defendant appeals, contending the trial court abused its discretion by revoking his probation.

On January 3, 2017, Defendant filed a Motion to Amend the Record on Appeal requesting this Court to include Defendant's handwritten pro se notices of appeal in the record. This Court granted the motion to amend contingent upon Defendant filing an addendum to the record inclusive of Defendant's handwritten letters. Defendant filed the addendum on January 20, 2017.

On January 4, 2017, Defendant filed a petition for writ of certiorari seeking review due to the deficiencies in his written notices of appeal. The State argues, and Defendant concedes, that Defendant failed to specifically identify the judgment from

STATE V. GUERRERO

Opinion of the Court

which he appeals; serve a copy of his written notice of appeal on opposing counsel prior to filing; and designate that his appeal was to the Court of Appeals. *See* N.C.R. App. P. 4(a)-(b). Although Defendant failed to comply with Rule 4 of the North Carolina Rules of Appellate Procedure, this Court has the discretionary authority “to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action.” N.C.R. App. P. 21(a)(1). Therefore, we grant Defendant’s petition for writ of certiorari and address the merits of this case.

Standard of Review

“A proceeding to revoke probation is not a criminal prosecution . . . [.] [t]hus the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt.” *State v. Hancock*, ___ N.C. App. ___, ___, 789 S.E.2d 522, 524 (2016) (citation and brackets omitted). A trial court’s ruling on a hearing to revoke probation simply requires that “the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation.” *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967) (citations omitted). On appeal, the decision of the trial court is reviewed for abuse of discretion. *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014).

The findings of a trial court are not reviewable on appeal, if supported by competent evidence, “unless there is a manifest abuse of discretion.” *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (citation omitted). “A trial court abuses its discretion if its decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Hancock*, ___ N.C. App. at ___, 789 S.E.2d at 524 (citation and quotation marks omitted).

Analysis

Pursuant to North Carolina General Statute § 15A-1344(a) (2016), a trial court may not “revoke a defendant’s probation for a probation violation, unless that violation is committing a new crime or absconding, or unless the violation follows two prior periods of confinement in response to violations.” *State v. Williams*, ___ N.C. App. ___, ___, 776 S.E.2d 741, 743 (2015) (citation omitted). Defendant has never served any prior confinement periods, and there is no allegation that Defendant violated the absconding provision. Under these circumstances, Defendant’s probation was only subject to revocation if the trial court found that Defendant committed a new criminal offense.

[A] defendant's probation is subject to revocation if he violates the normal condition of probation that he commit no criminal offense in any jurisdiction. A conviction by jury trial or guilty plea is one way for the State to prove that a defendant committed a new criminal offense. The State may also introduce evidence from which the trial court can independently find that the defendant committed a new offense.

State v. Lee, 232 N.C. App. 256, 259, 753 S.E.2d 721, 723 (2014) (citations, brackets, and quotation marks omitted).

Defendant argues that the trial court relied solely on a pending criminal charge and that the State failed to introduce evidence to support an independent finding by the trial court. We disagree.

The sworn violation reports and statements of Defendant's probation officer set forth five conditions violated by Defendant, including committing a new criminal offense. The probation officer noted that during a five-day period in which Defendant could not be located, Defendant was arrested and charged with assault on a female and misdemeanor larceny.

Through counsel, Defendant admitted that sufficient evidence existed to revoke his probation. *See State v. Sellers*, 185 N.C. App. 726, 727, 649 S.E.2d 656, 656-67 (2007) (holding an admission through counsel was sufficient to meet due process requirements and affirm a revocation of probation). Defendant recognized that the only possible legal basis for revocation in this case was to find that he committed a crime. When asked at the hearing whether Defendant admitted or denied violating probation, Defendant's attorney stated, "We are admitting to the extent that we believe there is enough to get revoked, but are not admitting in any way to jeopardize the pending criminal charges, if that makes sense, Your Honor."

STATE V. GUERRERO

Opinion of the Court

Defendant admitted there was sufficient evidence to revoke his probation, while at the same time not admitting criminal culpability.

The trial court's factual findings, inclusive of the probation violation reports and Defendant's admission, are reflected in the written judgment entered after revocation of probation. The written judgment, however, fails to include as a violation of probation that Defendant committed a new criminal offense, and erroneously contains a finding that each violation is a sufficient basis for revocation of probation. Clerical errors do not preclude the revocation of Defendant's probation. *See State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702 (2009) (A clerical error results from a "minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." (citation, brackets, and quotation marks omitted)); *State v. Jones*, 225 N.C. App. 181, 185-86, 736 S.E.2d 634, 638 (2013) (holding the clerical errors where the court failed to check the correct box and omitted reference to a paragraph number of the violation report in its judgment, would not preclude the revocation of probation and emphasized that the trial court specifically stated its findings at the hearing). In the case *sub judice*, the written judgment and oral statements at the hearing established the findings of the trial court, which support Defendant's probation revocation.

Conclusion

STATE V. GUERRERO

Opinion of the Court

The trial court was fully authorized to make an independent finding and conclude that Defendant violated a condition of his probation by committing a criminal offense. Considering the violation reports, Defendant's admissions, and statements provided by Defendant's probation officer, the trial court did not manifestly abuse its discretion by revoking Defendant's probation. However, we remand this matter to the trial court for correction of the clerical errors contained in the judgment.

AFFIRMED IN PART; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Judges ELMORE and INMAN concur.

Report per Rule 30(e).