

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-272

Filed: 20 February 2018

Iredell County, No. 14 CRS 55742

STATE OF NORTH CAROLINA

v.

JERMEL TORON KRIDER

Appeal by defendant from judgment entered 3 October 2016 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 6 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Allison Angell, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

CALABRIA, Judge.

Jermel Toron Krider (“defendant”) appeals from the trial court’s judgment revoking his probation and activating his suspended sentence. After careful review, we conclude that the State presented insufficient evidence to support a finding of willful absconding pursuant to N.C. Gen. Stat. § 15A-1343(b)(3a) (2017). As a result, the trial court lacked jurisdiction to revoke defendant’s probation after his probationary term expired. Accordingly, we vacate the trial court’s judgment revoking defendant’s probation.

I. Background

On 2 April 2015, defendant pleaded guilty to possession of cocaine in Iredell County District Court. The district court, having jurisdiction to accept his guilty plea to a Class I felony, sentenced defendant to 6-17 months in the custody of the North Carolina Division of Adult Correction, suspended his sentence, and placed defendant on 12 months of supervised probation. As a term of his probation, defendant was ordered to obtain substance abuse treatment, in addition to complying with all of the regular conditions of probation pursuant to N.C. Gen. Stat. § 15A-1343(b).

On 14 December 2015, defendant's probation officer ("Officer Thomas") visited his reported address. However, defendant was not present, and an unidentified woman advised Officer Thomas that "he didn't live there." As a result, on 21 December 2015, Officer Thomas filed a report alleging that defendant had willfully violated his probation by: (1) absconding on 14 December 2015; (2) testing positive for marijuana on 18 August 2015; (3) failing to report to his probation officer on 4 November 2015; (4)-(5) being in arrears as to his case and supervision fees; and (6) failing to obtain court-ordered substance abuse treatment. An arrest warrant was issued based on the absconding allegation. On 4 February 2016, defendant was arrested for violating his probation. Officer Thomas continued to supervise defendant until his probation expired on 2 April 2016.

On 3 October 2016, a probation violation hearing was held in Iredell County Superior Court. Defendant denied the alleged violations, contending that he “substantially complied with [the] terms of his probation.” However, Officer Thomas recommended revocation, “[b]ecause he absconded probation and his whereabouts were unknown for two months.” Following testimony from both parties, the trial court found that defendant willfully violated the conditions alleged, revoked his probation, and activated his suspended sentence. Defendant appeals.

II. Analysis

On appeal, defendant contends that the trial court erred by revoking his probation based on its finding that he willfully absconded from supervision. We agree.

A hearing to revoke a defendant’s probationary sentence only 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 or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. The judge’s finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citations and quotation marks omitted). However, “when a trial court’s determination relies on statutory interpretation, our review is *de novo* because those matters of statutory

interpretation necessarily present questions of law.” *State v. Johnson*, __ N.C. App. __, __, 783 S.E.2d 21, 24 (2016) (citation and quotation marks omitted).

Once a defendant’s probationary term expires, the trial court must comply with N.C. Gen. Stat. § 15A-1344(f) in order to “extend, modify, or revoke” the defendant’s probation. The statute provides, in pertinent part:

The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

- (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
- (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
- (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

N.C. Gen. Stat. § 15A-1344(f)(1)-(3). This statute is jurisdictional. *See State v. Moore*, 240 N.C. App. 461, 463, 771 S.E.2d 766, 767 (2015) (explaining that “other than as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant’s probation after the expiration of the probationary term”); *State v. High*, 230 N.C. App. 330, 337, 750 S.E.2d 9, 14 (2013) (holding that the trial court lacked jurisdiction over the defendant because the State’s violation reports did not bear a time stamp evincing that they were filed within the probationary period).

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Furthermore, for violations occurring on or after 1 December 2011, the trial court may only revoke a defendant's probation where the defendant (1) commits a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds "by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer," in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition after previously serving two periods of confinement in response to violations ("CRV") pursuant to N.C. Gen. Stat. § 15A-1344(d2). N.C. Gen. Stat. § 15A-1344(a). For all other violations, the trial court may either modify the conditions of the defendant's probation or impose a 90-day period of CRV. *Id.*

In the instant case, defendant's probation expired on 2 April 2016. The violation hearing was held more than six months later, on 3 October 2016. However, on 21 December 2015, the State filed a written report alleging six violations of defendant's probation. Therefore, the State timely "indicat[ed] its intent to conduct a hearing on one or more violations" of defendant's probation, as required by N.C. Gen. Stat. § 15A-1344(f)(1). The violation report indicated that defendant had not previously served any periods of CRV as allowed by N.C. Gen. Stat. § 15A-1344(d2), and the State did not allege that defendant committed a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1). Accordingly, pursuant to N.C. Gen.

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Stat. § 15A-1344(a), the trial court was only authorized to revoke defendant's probation for a violation of N.C. Gen. Stat. § 15A-1343(b)(3a).

The State alleged the following with regard to absconding:

1. Regular Condition of Probation: "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, THE DEFENDANT ABSCONDED SUPERVISION ON 12/14/15 BY MAKING HIS WHEREABOUTS UNKNOWN TO THIS OFFICER. ON OR ABOUT 12/14/15, THE OFFICER WAS ADVISED THAT THE OFFENDER DID NO LONGER RESIDE AT THE RESIDENCE GIVEN. THE DEFENDANT HAS . . . AVOIDED SUPERVISION AND MADE HIMSELF UNAVAILABLE FOR SUPERVISION; THEREFORE ABSCONDING SUPERVISION.

The State's allegations and supporting evidence are very similar to that which we rejected in *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015). In *Williams*, the State filed a report alleging that the defendant had violated seven conditions of his probation, including:

1. Regular Condition of Probation: "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, THE DEFENDANT IS NOT REPORTING AS INSTRUCTED OR PROVIDING THE PROBATION OFFICER WITH A VALID ADDRESS AT THIS TIME. THE DEFENDANT IS ALSO LEAVING THE STATE WITHOUT PERMISSION. DUE TO THE DEFENDANT KNOWINGLY AVOIDING THE PROBATION OFFICER AND NOT MAKING HIS TRUE WHEREABOUTS KNOWN THE DEFENDANT HAS ABSCONDED SUPERVISION.

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243 N.C. App. at 200-01, 776 S.E.2d at 743. In support of this allegation, the probation officer testified that when she visited the defendant's residence, a woman informed her that the defendant had "never really lived at the address." *Id.* at 198, 776 S.E.2d at 742. In addition, the officer testified that the defendant had failed to attend multiple scheduled appointments; was traveling "back and forth from North Carolina to New Jersey" without permission; and "wasn't making himself available for supervision," although the officer acknowledged that she had phone contact with the defendant during his unauthorized trips to New Jersey. *Id.* at 198-99, 776 S.E.2d at 742.

On appeal, we held that the evidence was insufficient to support a finding of willful absconding under N.C. Gen. Stat. § 15A-1343(b)(3a) and reversed the revocation of the defendant's probation. *Id.* at 205, 776 S.E.2d at 746. While "[t]he evidence was clearly sufficient to find violations of N.C. Gen. Stat. §§ 15A-1343(b)(2) and (3), . . . N.C. Gen. Stat. § 15A-1344(a) does not authorize revocation based upon violations of those conditions," unless the requirements of N.C. Gen. Stat. § 15A-1344(d2) have been met. *Id.*; *see also* N.C. Gen. Stat. §§ 15A-1343(b)(2)-(3) (requiring, as regular conditions of probation, that a defendant must "[r]emain within the jurisdiction of the court unless granted written permission to leave" and "[r]eport as directed . . . to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable times, answer all reasonable inquiries by

the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment”).

Officer Thomas experienced a situation that was similar to the officer in *Williams*. Officer Thomas testified that when he visited defendant’s reported address on 14 December 2015, an “elderly black female” informed him that defendant “didn’t live there.” *Cf. Williams*, 243 N.C. App. at 198, 776 S.E.2d at 742. The State failed to present evidence regarding the identity of the person who greeted Officer Thomas, or her relationship to defendant. However, Officer Thomas testified that after speaking with her, he never attempted to contact defendant again, “[b]ecause when we w[ere] told . . . that he didn’t live at the residence, no reason for us to go back out there.” Nevertheless, Officer Thomas also testified that when defendant contacted him following his absconding arrest, he met defendant “at the residence.” Officer Thomas subsequently had “regular contact” with defendant until his case expired on 2 April 2016. During that time, defendant completed substance abuse treatment, held seasonal employment, and made payments toward his arrears.

“Under this Court’s precedents, [defendant’s] actions, while clearly a violation of N.C. Gen. Stat. § 15A-1343(b)(3), . . . do not rise to ‘absconding supervision’ in violation of N.C. Gen. Stat. § 15A-1343(b)(3a).” *Johnson*, __ N.C. App. at __, 783 S.E.2d at 25. We are unable to meaningfully distinguish this case from *Williams*, and we are bound by our Court’s decision. *In re Appeal from Civil Penalty*, 324 N.C. 373,

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384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

The dissent contends that the instant case is analogous to *State v. Trent*, __ N.C. App. __, 803 S.E.2d 224, *temp. stay allowed*, __ N.C. __, 802 S.E.2d 725 (2017). As in this case, the *Trent* defendant was not at home when his supervising officer made an unscheduled visit on 24 April 2016. __ N.C. App. at __, 803 S.E.2d at 226. However, the defendant’s “very upset” wife told the officer that the defendant had taken her car and bank card without permission when he left the residence the previous day. *Id.* According to the defendant’s wife, “it was [his] ‘normal pattern . . . to go out and be gone for days on drugs.’ ” *Id.* “These allegations prompted [the officer’s] second unscheduled visit less than two weeks later[,]” on 5 May 2016. *Id.* at __, 803 S.E.2d at 231. Since the defendant still had not returned and his wife “did not know where he was[,]” the officer filed violation reports for absconding. *Id.*

At the violation hearing, the defendant testified that contrary to his wife’s allegations, he was actually in Raleigh on an eight-day painting job during the officer’s visits to his residence. *Id.* at __, 803 S.E.2d at 230. Nevertheless, the defendant admitted that “[e]ven after learning about [the officer’s] unscheduled visits during his travels, [he] still did not contact her to correct any allegedly inaccurate information that [his wife] may have communicated.” *Id.* at __, 803 S.E.2d at 232.

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Instead, the defendant “went to stay at his mother’s house ‘for a couple days’ until he was arrested in Greensboro on 9 May 2016.” *Id.*

The instant case is distinguishable from *Trent*, where the probation officer gleaned information about the defendant’s whereabouts from *his wife*. Here, Officer Thomas testified only that he spoke with an “elderly black female” at defendant’s reported address. The State failed to establish the woman’s identity, or whether she even lived at the residence. Furthermore, unlike in *Trent*, Officer Thomas did not revisit defendant’s residence or otherwise attempt to verify the unidentified woman’s allegations. *Contra id.* at ___, 803 S.E.2d at 231.

The dissent contends that “[a]s in *Trent*, through the exercise of logic and reason, the trial court could have considered [d]efendant was not in contact with his probation officer for two months” in finding that he absconded from supervision. (*Murphy, J., dissenting*, at 4). However, unlike *Trent*, there was no evidence that defendant was even aware of Officer Thomas’s unannounced visit until after his arrest. *Contra id.* at ___, 803 S.E.2d at 232. A trial court may only revoke probation where the defendant “abscond[s] by *willfully* avoiding supervision or by *willfully* making the defendant’s whereabouts unknown to the supervising officer[.]” N.C. Gen. Stat. § 15A-1343(b)(3a) (emphasis added). Here, there was no evidence of willfulness.

Moreover, at the violation hearing, defendant testified that he attempted to contact Officer Thomas “[p]lenty of times”:

[DEFENDANT:] I called, called in the morning, I’m coming – notified to come. I called. He never in his office. Ring, ring. He never answer. I leave voice mail, call. He never answer or call me back.

[DEFENSE COUNSEL:] Okay.

A. I come by a few times and never – he never there. A few times I came but never signed my name on the line that was on my behalf, but rest of the times I come and call, he never there. I ain’t never heard from him.

Although the State argues on appeal that defendant’s testimony was “not credible,” at the hearing, the State failed to cross-examine defendant or to impeach his testimony by recalling Officer Thomas to the witness stand. *Cf. Trent*, __ N.C. App. at __, 803 S.E.2d at 231 (“Despite defendant’s accusation that [his wife] misinformed [his probation officer] in his absence, during cross-examination by the State, defendant admitted that he failed to contact [the officer] even after he returned from Raleigh[.]”).

We agree with the dissent that the State is never required to cross-examine a defendant, and that “the demeanor of the witness on the stand is always in evidence.” (*Dissent* at 4). Nevertheless, despite the “informal or summary” nature of probation hearings, the State bears the burden of presenting sufficient evidence “to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has

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willfully violated a valid condition of probation.” *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014). In the instant case, the State failed to carry its burden. *Williams*, not *Trent*, is controlling here. As in *Williams*, we conclude that the evidence in this case does not support a violation of N.C. Gen. Stat. § 15A-1343(b)(3a). 243 N.C. App. at 205, 776 S.E.2d at 746; accord *State v. Brown*, __ N.C. App. __, 791 S.E.2d 662 (2016) (unpublished).

Here, however, the trial court’s decision was not only an abuse of discretion but also an error that deprived the court of jurisdiction to revoke defendant’s probation. The violation hearing was conducted after defendant’s case expired, and “other than as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant’s probation after the expiration of the probationary term.” *Moore*, 240 N.C. App. at 463, 771 S.E.2d at 767. Before defendant’s probation expired, the State filed a written report alleging violations of six conditions of defendant’s probation. N.C. Gen. Stat. § 15A-1344(f)(1). However, of the six violations alleged, the trial court was only authorized to revoke defendant’s probation for absconding. N.C. Gen. Stat. § 15A-1344(a). Since the State’s evidence was insufficient to support that allegation, we conclude that the trial court lacked jurisdiction to revoke defendant’s probation after his case expired.

“Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or

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otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction.” *State v. Gorman*, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) (citation and quotation marks omitted). “If the court was without authority, its judgment . . . is void and of no effect.” *Id.* Therefore, we vacate the trial court’s judgment revoking defendant’s probation.

VACATED.

Judge ZACHARY concurs.

Judge MURPHY dissents in a separate opinion.

MURPHY, Judge, dissenting.

I respectfully dissent from the Majority’s determination that the trial court lacked jurisdiction to revoke Defendant’s probation and the mandate to vacate the judgment revoking Defendant’s probation.

Abuse of Discretion

As an initial matter, the trial court did not abuse its discretion by revoking Defendant’s probation.

A hearing to revoke a defendant’s probationary sentence only 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 or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation and quotation marks omitted). “[O]nce the State has presented competent evidence establishing a defendant’s failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms.” *State v. Trent*, ___ N.C. App. ___, ___, 803 S.E.2d 224, 227 (2017) (citation and quotation marks omitted).

We review the trial court’s decision to revoke a defendant’s probation for abuse of discretion. *State v. Miller*, 205 N.C. App. 291, 293, 695 S.E.2d 149, 150 (2010) (citation omitted). “Abuse of discretion occurs when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a

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reasoned decision.” *Trent*, ___ N.C. App. at ___, 803 S.E.2d at 227 (citation and quotation marks omitted).

Here, Defendant argues the State’s evidence was insufficient to support the conclusion that he violated N.C.G.S. § 15A-1343(b)(3a) (2015). Under this statute, as a regular condition of probation, a defendant must “[n]ot abscond by willfully avoiding supervision or by willfully making the defendant’s whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation.” N.C.G.S. § 15A-1343 (b)(3a). As the Majority explains, citing to *State v. Williams*, 243 N.C. App. 198, 205, 776 S.E.2d 741, 745 (2015) and *State v. Johnson*, ___ N.C. App. ___, ___, 783 S.E.2d 21, 26 (2016), our case law has made it clear that violations of §§ 15A-1343(b)(2) and (3) are insufficient to establish the revocable violation of absconding under § 15A-1343(b)(3a). N.C.G.S. § 15A-1343(b)(3) requires, as a regular condition of probation, that a defendant:

[r]eport as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.

In *Williams*, we held the evidence presented at the probation hearing was insufficient to support a finding of willful absconding where, without more, the evidence showed a defendant failed to show up to meetings and had been outside the state without permission, although he had been communicating with the probation

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officer via phone. *Williams*, 243 N.C. App. at 198-99, 776 S.E.2d at 742. In *Johnson*, emphasizing the defendant's whereabouts were never "unknown" because defendant was on electronic monitoring, we held that a defendant who informed his probation officer he would not attend an office visit, and then subsequently failed to report to that meeting does not, without more, violate (b)(3a) when those same actions violate (b)(3). *Johnson*, ___ N.C. App. at ___, 783 S.E.2d at 26-27.

Here, in concluding it is bound by *Williams* and *Johnson* to determine that the evidence in the instant case only evidences a violation of (b)(3), and does not constitute a violation of (b)(3a), the Majority overlooks key facts that distinguish this case. Unlike *Williams* and *Johnson*, the evidence showed that Defendant's "whereabouts were unknown for two months[,]” and during that time Defendant did not communicate with the probation officer. Therefore, this case is more like *State v. Trent*, ___ N.C. App. ___, 803 S.E.2d 224 (2017), where we distinguished *Williams* and *Johnson*, determining a trial court did not abuse its discretion by finding a defendant violated (b)(3a) because the probation officer “did not have the benefit of tracking defendant's movements” as in *Johnson* and had “absolutely no means of contacting defendant” unlike in *Williams*. *Trent*, ___ N.C. App. at ___, 803 S.E.2d at 231 (internal citations omitted); *see also State v. Hurley*, ___ N.C. App. ___, 805 S.E.2d 563, slip op. at 6-7 (October 17, 2017) (unpublished) (explaining how *Trent* distinguished *Williams* and *Johnson*). While Defendant provided self-serving

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testimony at the revocation hearing, the trial court was in the proper position to weigh and reject any or all of Defendant's self-serving testimony. The Majority takes into account the State's failure to cross-examine or attempt impeachment of Defendant, however, the demeanor of the witness on the stand is always in evidence. *State v. Mullis*, 233 N.C. 542, 544, 64 S.E.2d 656, 657 (1951). There is no requirement that the State attempt to cross-examine or impeach the Defendant and disregard of the Defendant's testimony does not demonstrate an abuse of discretion. Therefore, the record does not support a conclusion that the trial court abused its discretion in ruling that Defendant had absconded on probation. As in *Trent*, through the exercise of logic and reason, the trial court could have considered Defendant was not in contact with his probation officer for two months, his whereabouts were unknown, and he was not subject to the supervision of the State. Our decision is not controlled by *Williams* and *Johnson* and it was within the trial court's discretion to find that Defendant violated N.C.G.S. § 15A-1343(b)(3a).

Jurisdiction

While the Majority's holding rests on *Williams* and *Johnson*, it also raises an additional jurisdictional issue, stating that the trial court lacked jurisdiction to revoke Defendant's probation because the violation hearing was conducted after the Defendant's case expired. We review de novo whether a trial court had subject matter

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jurisdiction to revoke a defendant's probation. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted).

Pursuant to N.C.G.S. § 15A-1344(f) (2015), a trial court may extend, modify, or revoke a defendant's probation after the expiration of the probationary term only if several conditions are met, including findings by the trial court that prior to the expiration of the probation period a probation violation had occurred and a written probation violation report had been filed. Also the trial court must find good cause for the extension, modification, or revocation.

State v. Moore, 240 N.C. App. 461, 463, 771 S.E.2d 766, 767 (2015)(alterations omitted) (citing N.C.G.S. § 15A-1344(f)). As the Majority notes, Defendant's hearing took place after the expiration of his probationary term. However, the written violation reports were filed prior to the expiration of the probation period, and the trial court found that a probation violation occurred prior to the expiration of the probationary period. Moreover, the trial court found good cause for the revocation. Thus, the fact that the hearing took place after the expiration of the probationary period did not deprive the trial court of jurisdiction.

Mandate

Finally, assuming *arguendo* that the State failed to present sufficient evidence of Defendant's absconding probation, the proper mandate is not to Vacate the judgment of the trial court, but to Reverse and Remand as we did in *Williams*. *Williams*, 243 N.C. App. at 206, 776 S.E.2d at 746. Here, the trial court found

Defendant violated the terms and conditions of his probation as alleged in “[p]aragraph(s) 1-6 of the Violation Report . . . dated [21 December 2015]”. At a minimum, it is proper to allow the trial judge the opportunity to enter an appropriate judgment based on the remaining violations.

Conclusion

Under these facts, we are not bound by *Williams* and *Johnson*, and the timing of the hearing does not present a jurisdictional bar. The trial court did not abuse its discretion in finding that Defendant violated N.C.G.S. § 15A-1343(b)(3a) or in revoking his probation. I respectfully dissent.