IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-711

Filed: 6 March 2018

Rowan County, No. 15 CRS 53604

STATE OF NORTH CAROLINA

v.

CODY RYAN FOX

Appeal by defendant from judgment entered 9 November 2016 by Judge Anna M. Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 12 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryn H. Shields, for the State.

Barton & Doomy, PLLC, by Matthew J. Barton, for defendant-appellant.

BRYANT, Judge.

Where the underlying charges before the court were still outstanding, the trial court did not abuse its discretion by denying defendant's motion to set aside the order for arrest issued due to defendant's failure to appear in court during the calendar call. Where the trial court had sufficient unchallenged evidence to support its conclusion that defendant absconded from supervision in violation of the conditions of his

probation, the trial court did not abuse its discretion by revoking defendant's probation and activating his suspended sentences. Accordingly, we affirm the judgment of the trial court.

In 2015, defendant entered a plea of guilty to the charges of misdemeanor injury to real property and misdemeanor reckless driving. The trial court entered judgment in accordance with defendant's plea and sentenced defendant to two consecutive active terms of forty-five days. The trial court then suspended those sentences and placed defendant on supervised probation for a period of eighteen months. On 4 and 9 December 2015 and 5 January 2016, defendant's probation officer filed six violation reports relating to defendant's conduct while on probation. A hearing on the probation violations was held on 8 March 2016 in Rowan County District Court, the Honorable Beth S. Dixon, Judge presiding. The District Court found that defendant willfully violated the conditions of his probation as described in the violation reports and that each violation was "a sufficient basis upon which this [c]ourt should revoke probation and activate the suspended sentence." The court ordered that defendant's probation be revoked and that the suspended sentences be activated. Defendant appealed to Rowan County Superior Court. On 21 September 2016, two more probation violation reports were filed against defendant. The matter came on for hearing on 9 November 2016, the Honorable Ann Mills Wagoner, Judge presiding.

Appearing before the superior court, defendant initially moved to set aside an order for arrest issued earlier that day after defendant failed to appear for the court's calendar call. Defendant's bail bondsman appeared before the court and stated that he had timely brought defendant to court for defendant's past two appearances (since defendant had been out on bond), but this time, the bondsman suffered a flat tire while bringing defendant to court, which caused defendant to miss calendar call. In addition to his motion to set aside the order for arrest, defendant also moved the court to continue his case to another calendar. The court agreed to withdraw the order for arrest if defendant withdrew the motion to continue the case and the case was heard that day. Defendant agreed to proceed with the case that day.

During the probation revocation hearing, testimony was given by defendant's probation officer and defendant. Following the hearing, the trial court found that defendant "violated his probation for the reasons set forth in the [probation] violation report. Specifically absconding." The court ordered that defendant's suspended sentence be placed into effect. Defendant appeals.

On appeal, defendant argues the trial court erred by (I) denying his motion for a continuance and (II) finding that he absconded from probation.

I

Defendant argues the trial court abused its discretion in denying his motion to continue. More specifically, defendant contends that by failing to recall the order for arrest and instead using the order as leverage to pressure defendant to withdraw his motion for a continuance, the trial court abused its discretion. We disagree.

"A trial court's ruling on whether to grant or deny a motion for a continuance is ordinarily reviewed under an abuse of discretion standard." *State v. Blackwell*, 228 N.C. App. 439, 446, 747 S.E.2d 137, 143 (2013) (citing *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001)). "Under the abuse-of-discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *U.S. Tr. Co., N.A. v. Rich*, 211 N.C. App. 168, 171, 712 S.E.2d 233, 236 (2011) (citation omitted).

In his brief to this Court, defendant acknowledges that "[a]n order for arrest may be issued when: . . . (2) A defendant who has been arrested and released from custody pursuant to Article 26 of this Chapter, Bail, fails to appear as required." N.C. Gen. Stat. § 15A-305(b)(2) (2015). In *State v. Banner*, the trial court entered an order for arrest after the defendant failed to appear for court; however, at the time, the defendant was incarcerated and no writ had been issued to secure his appearance. 207 N.C. App. 729, 730, 701 S.E.2d 355, 356–57 (2010). The North Carolina Department of Correction asked that the order for arrest be withdrawn, but it was not withdrawn. Following the defendant's release from incarceration, he was stopped

by law enforcement officers who checked for the defendant's outstanding warrants. *Id.* at 730–31, 701 S.E.2d at 357. Due to the outstanding order for arrest, the defendant was arrested, searched incident to arrest, charged with possession of marijuana and cocaine, and ultimately indicted on simple possession of cocaine and obtaining habitual felon status. *Id.* The outstanding order for arrest was withdrawn two weeks after the defendant's arrest. On appeal, this Court considered whether the order for arrest was invalid. *Id.* at 733, 701 S.E.2d at 359. Specifically, the Court noted that after an order for arrest is issued,

> [t]he issuing official is permitted—but not required—to withdraw the order if he has "good cause" to do so. *See* N.C. Gen. Stat. § 15A–301(g)(2) (2009)[1] (setting forth several circumstances under which an order for arrest "may" be recalled). The disposition of all charges forming the basis for an order for arrest "shall effect the recall" of that order without any action by a judicial official. N.C. Gen. Stat. § 15A–301(g)(3).[2]

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[1] Pursuant to N.C. Gen. Stat. § 15A-301(g)(2),

> [a]ny criminal process other than a warrant or criminal summons *may* be recalled for good cause by any judicial official of the trial division in which it was issued. Good cause includes, without limitation, the fact that:
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> . . . .
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> d. It has been determined that grounds for the issuance of an order for arrest did not exist, no longer exist or have been satisfied.

N.C. Gen. Stat. § 15A-301(g)(2)d. (2017) (emphasis added).

[2] Pursuant to section 15A-301(g)(3),

Id. at 734, 701 S.E.2d at 359. The Court noted that when the order for arrest was issued, the underlying charges which gave rise to the order remained outstanding. Thus, "[e]ven if good cause to recall [the order for arrest] existed, recall was not *mandatory* under section 15A–301(g)(2)[.]" *Id.*

Here, defendant does not challenge the authority of the trial court to have issued the order for arrest or the propriety of doing so—defendant acknowledges that he failed to appear during the calendar call. But defendant contends that the information before the court as to why defendant failed to appear for the calendar call (defendant's transportation had a flat tire) indicated that defendant's failure was not willful. Pursuant to N.C. Gen. Stat. § 15A-301(g)(2)d. (where the grounds for the issuance of a criminal process no longer exist), a trial court has the authority to recall an order for arrest. Defendant argues that the court abused its discretion by failing to recall the order for arrest, instead using the outstanding order as leverage to entice defendant to address the underlying charges of probation violation. However, "[e]ven if good cause to recall [the order for arrest] existed, recall was not mandatory under section 15A–301(g)(2)[,]" *id.*, as the underlying charges—alleged probation

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> [t]he disposition of all charges on which a process is based shall effect the recall, without further action by the court, of that process and of all other outstanding process issued in connection with the charges, including all orders for arrest issued for the defendant's failure to appear to answer the charges.

Id. § 15A-301(g)(3).

violations—were still outstanding. Thus, the order for arrest was not required to be recalled until defendant's probation violation reports were addressed. Therefore, the trial court did not abuse its discretion by denying defendant's motion to continue and denying his request to withdraw the order for arrest. Accordingly, defendant's argument is overruled.

II

Next, for purposes of preservation, defendant argues before this Court that the trial court erred by revoking defendant's probation on grounds of absconding. However, defendant concedes in his brief that the facts in *State v. Trent*, ___ N.C. App. ___, 803 S.E.2d 224 (2017), are substantially similar to those of this case, and that the precedent established by *Trent* indicates that this Court would affirm the trial court's ruling to revoke defendant's probation and activate defendant's suspended sentence. We agree.

"Probation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime. A proceeding to revoke probation is not a criminal prosecution . . . ." *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967) (citation omitted). "The Supreme Court of the United States has observed that revocation of probation ' "deprives an individual . . . only of the conditional liberty" ' dependent on the conditions of probation." *State v. Murchison*, 367 N.C. 461, 463, 758 S.E.2d 356, 358 (2014) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 93 S.Ct.

1756, 1759, 36 L. Ed. 2d 656 (1973), *superseded by statute*, Parole Commission and Reorganization Act, Pub. L. No. 94–233, 90 Stat. 228 (1976)). "The alleged violation by the defendant of a valid condition upon which a sentence in a criminal case was suspended need not be proven beyond a reasonable doubt." *State v. Robinson*, 248 N.C. 282, 285, 103 S.E.2d 376, 379 (1958) (citations omitted). "The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion." *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (quoting *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960)).

In *Trent*, this Court affirmed the revocation of the defendant's probation on grounds of absconding. ___ N.C. App. ___, 803 S.E.2d 224. The facts presented during the revocation probation hearing indicate that the defendant met his probation officer and informed her that he and his wife were in the process of being evicted from their residence. *Id.* at ___, 803 S.E.2d at 226. The officer instructed that she be informed when his address changed. At their next meeting, the defendant provided the officer with his new address and made their next appointment for 9 May. On 24 April, the probation officer made an unannounced visit. The defendant was not at home, and his wife was "very upset." She told the officer that the defendant had left their residence the previous day with her car and bank card. The defendant's wife further stated that it was the defendant's normal pattern "to go out and be gone for days on

drugs." *Id.* The probation officer revisited the residence on 5 May. The defendant still had not returned, and his wife did not know his whereabouts. *Id.* On 9 May, the officer reported that the defendant had willfully violated probation. In pertinent part, the officer reported that the defendant absconded "by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer." *Id.* "THE DEFENDANT LEFT HIS RESIDENCE . . . ON OR ABOUT 04/23/2016, AFTER TAKING HIS WIFE'S CAR AND BANK CARD AND HAS FAILED TO RETURN TO THE RESIDENCE SINCE THAT TIME. HIS WHEREABOUTS ARE UNKNOWN." *Id.* The next day, the probation officer learned that the defendant had been arrested on 9 May. At a subsequent probation revocation hearing, the court ruled that the defendant had willfully absconded from supervision. The court revoked his probation and activated his suspended sentences. *Id.* at ___, 803 S.E.2d at 227.

On appeal, the defendant in *Trent* argued that the State failed to establish he was required to be at the residence at the time of the officer's unscheduled visit and thus, failed to establish that he willfully absconded. *Id.* at ___, 803 S.E.2d at 229. This Court reasoned that pursuant to North Carolina General Statutes, section 15A-1343, as a regular condition of probation, a defendant is required to

> [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.

N.C. Gen. Stat. § 15A-1343(b)(3) (2017). And, "[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." *Trent*, ___ N.C. App. at ___, 803 S.E.2d at 227 (citation omitted). This Court reasoned that the State established the defendant's whereabouts were unknown to the probation officer for the period beginning 26 April until 10 May. The defendant then failed to establish an inability to comply with the terms of his probation. *Id.* Accordingly, the trial court's order concluding that the defendant absconded from probation was affirmed. *Id.* at ___, 803 S.E.2d at 232.

Here, during the probation revocation hearing conducted in Rowan County Superior Court, defendant's probation officer testified that defendant moved from his approved residence on 18 December 2015, made himself unavailable for supervision, and made his whereabouts unknown. Defendant was located in a Charlotte hotel on 25 January 2016. Thereafter, defendant regularly met with his probation officer until 3 June 2016. Then, defendant failed to meet his probation officer on 3 June; 1, 11 through 22, and 26 July; and 3, 5, 19, and 22 August 2016. The probation officer could not reach defendant at his residence or by phone, and defendant's whereabouts were unknown. Defendant was later arrested on 2 September. At his probation

revocation hearing, defendant testified that when he was previously arrested on 25 January, he was on Christmas vacation with his family, though defendant acknowledged that he failed to inform his probation officer he would be out of town. Responding to evidence that he failed to meet with his probation officer from 3 June until being arrested on 2 September, defendant testified that he was living with his mother "for a little bit," and that his family was his only source of transportation. Following the presentation of evidence and arguments of counsel, the trial court concluded that defendant had violated the terms of his probation—specifically, absconding—and ordered that his suspended sentence be put into effect.

Based upon our review of the record, we hold that the trial court had sufficient, uncontradicted evidence to support the conclusion that defendant absconded from supervision in violation of the terms of his probation. *See Trent*, ___ N.C. App. at ___, 803 S.E.2d at 227 ("[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." (alteration in original)). Therefore, we hold the trial court did not abuse its discretion by revoking defendant's probation and activating his suspended sentences. *See Tennant*, 141 N.C. App. at 526, 540 S.E.2d at 808 ('The findings of the judge, if supported by competent evidence, and his judgment based thereon are not

reviewable on appeal, unless there is a manifest abuse of discretion."). Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).