An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-848

Filed: 20 March 2018

Catawba County, Nos. 16 CRS 50643, 2243

STATE OF NORTH CAROLINA

v.

KENNETH CHARLES KNIGHT

Appeal by Defendant from judgment entered 17 April 2017 by Judge Todd Pomeroy in Catawba County Superior Court. Heard in the Court of Appeals 12 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Rana M. Badwan, for the State.

Winifred H. Dillon for Defendant-Appellant.

INMAN, Judge.

Kenneth Charles Knight ("Defendant") appeals from a judgment entered upon revocation of his probation. Because the evidence supports the trial court's finding that Defendant willfully violated the conditions of his probation by absconding supervision under N.C. Gen. Stat. § 15A-1343(b)(3a) (2015), we affirm.

Factual and Procedural History

On 7 November 2016, Defendant pleaded guilty to two counts of obtaining property by false pretenses. The trial court consolidated the offenses for judgment, suspended a sentence of eight to nineteen months of imprisonment, and placed Defendant on supervised probation for thirty months.

A report filed by Defendant's supervising probation officer on 15 December 2016 alleged that Defendant had violated a domestic violence protective order ("DVPO") on or about 14 December 2016, thereby violating the condition of probation that he commit no criminal offense. *See* N.C. Gen. Stat. §§ 15A-1343(b)(1), 50B-4.1 (2015). The trial court found Defendant in willful violation of his probation and ordered him to continue on supervision.

In a violation report filed 30 March 2017, Defendant was charged with (1) failing to report to his probation officer as directed on 22 March 2017, in violation of N.C. Gen. Stat. § 15A-1343(b)(3); (2) failing to obtain a required substance abuse assessment, in violation of N.C. Gen. Stat. § 15A-1343(b4)(4); and (3) absconding supervision "by willfully avoiding supervision or by willfully making [his] whereabouts unknown to the supervising probation officer[,]" in violation of N.C. Gen. Stat. § 15A-1343(b)(3a). Violation of the absconding condition in N.C. Gen. Stat. § 15A-1343(b)(3a) is one of the three statutory grounds for revoking a defendant's

probation. *See* N.C. Gen. Stat. § 15A-1344(a) (2015); *see also State v. Nolen*, 228 N.C. App. 203, 205, 743 S.E.2d 729, 730 (2013).[1]

Defendant waived his right to counsel at the revocation hearing held 17 April 2017. After receiving testimony from the probation officer and Defendant, the trial court found Defendant in willful violation of his probation as alleged in the report filed on 30 March 2017. The court revoked Defendant's probation based on his willful violation of N.C. Gen. Stat. § 15A-1343(b)(3a) and activated his suspended sentence. Defendant gave oral notice of appeal at the conclusion of the hearing.

Analysis

Defendant contends the trial court erred in revoking his probation, because the evidence did not support a determination that he willfully absconded supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a). We apply the following standard of review to his claim:

> [T]he alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt. Instead, all that is required in a hearing of this character is 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. Accordingly, the decision of the trial court is reviewed for abuse of discretion.

[1]Revocation is also authorized if a probationer: (1) commits a criminal offense, in violation of the regular condition of probation in N.C. Gen. Stat. § 15A-1343(b)(1); or (2) violates any condition of probation after serving two periods of confinement under N.C. Gen. Stat. § 15A-1344(d2). *See Nolen*, 228 N.C. App. at 205, 743 S.E.2d at 730.

State v. Murchison, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (citations, internal quotation marks, and alterations omitted).

Defendant argues the conduct described in the 30 March 2017 violation report and established by the evidence does not constitute absconding within the meaning of N.C. Gen. Stat. § 15A-1343(b)(3a). In pertinent part, the violation report alleged the following:

> [T]he defendant has willfully violated:
>
> 1. Regular Condition of Probation: General Statute 15A-1343(b)(3a) "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, on or about March 20th 2017 the defendant left his place of residence at 822 7th Avenue Pl SW Hickory NC 28602 without prior approval or knowledge of his probation officer and failed to make his whereabouts known, making himself unavailable for supervision and ther[e]by absconding supervision. As [of] the date of this report, the defendant[']s whereabouts are unknown and all efforts to locate the defendant have been unsuccessful.

(All caps omitted).

Defendant claims these factual allegations show merely his violation of N.C. Gen. Stat. § 15A-1343(b)(3), under which a probationer must "[r]eport as directed . . . to the [probation] officer" and "obtain prior approval from the officer for, and notify

the officer of, any change in address . . . ."[2] Citing our decisions in *State v. Johnson*, __ N.C. App. __, 783 S.E.2d 21 (2016) and *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015), he insists "the trial court cannot rely on facts which only support a violation of N.C. Gen. Stat. § 15A-1343(b)(3) to find that a defendant absconded" in violation of N.C. Gen. Stat. § 15A-1343(b)(3a). *Johnson*, __ N.C. App. at __, 783 S.E.2d at 26 (holding that "a defendant informing his probation officer he would not attend an office visit the following day and then subsequently failing to report for the visit, does not, *without more*, violate N.C. Gen. Stat. § 15A-1343(b)(3a)" (emphasis added)); *Williams*, 243 N.C. App. at 205, 776 S.E.2d at 745 (concluding that mere use of the term "abscond[ing] supervision" in a violation report "cannot convert violations of N.C. Gen. Stat. §§ 15A-1343(b)(2) and (3) into a violation of N.C. Gen. Stat. § 15A-1343(b)(3a)" (internal quotation marks and brackets omitted)). Defendant further asserts that the question of whether certain acts represent "absconding" under N.C. Gen. Stat. § 15A-1343(b)(3a) requires the court to engage in statutory construction and is thus a conclusion of law subject to *de novo* review. *See Johnson*, __ N.C. App. at __, 783 S.E.2d at 24; *see also Sen Li v. Zhou*, __ N.C. App. __, __, 797 S.E.2d 520, 523 (2017) ("An error of law is by definition an abuse of discretion.").

---

[2] Our Supreme Court recently held that a violation report need not identify the condition of probation allegedly violated but must include "a statement of the actions that a defendant has allegedly taken that constitute a violation of a condition of probation." *State v. Moore*, No. 22A17, __ N.C. __, __, 807 S.E.2d 550, 555, 2017 WL 6063559, at *5 (2017) (construing the statement of the violations alleged in N.C. Gen. Stat. § 15A-1345(e) (2015) and overruling *State v. Tindall*, 227 N.C. App. 183, 742 S.E.2d 272 (2013) and progeny).

Defendant's claim is without merit. The violation report filed on 30 March 2017 did not merely allege Defendant's failure to attend his scheduled office appointment on 22 March 2017, as in *Johnson*. Rather, as in *State v. Trent*, __ N.C. App. __, 803 S.E.2d 224, *temp. stay allowed*, __ N.C. __, 802 S.E.2d 725 (2017), Defendant was accused of leaving his last known address without his probation officer's knowledge and subsequently "fail[ing] to make his whereabouts known, *making himself unavailable for supervision* and ther[e]by absconding supervision." (emphasis added). *See Trent*, __ N.C. App. at __, 803 S.E.2d at 230-31.

Moreover, unlike *Johnson* and *Williams*, the State adduced evidence that Defendant not only failed to report as scheduled but left his probation officer with no means to either locate or contact him. *See Johnson*, __ N.C. App. at __, 783 S.E.2d at 23 (holding that failure to attend a scheduled appointment did not amount to absconding where the probation officer "admitted the electronic monitoring device [the] [d]efendant wore transmitted all of [the] [d]efendant's locations and movements to the officer"); *Williams*, 243 N.C. App. at 198-99, 776 S.E.2d at 742 (holding the evidence failed to show absconding where the probation officer was notified that the "[d]efendant had been going back and forth from North Carolina to New Jersey" and the defendant remained in contact with the officer by phone). The officer testified that, at the time she filed the violation report on 30 March 2017, she had been unable to locate or contact Defendant for more than three weeks. She attempted to visit

Defendant on two occasions at his reported address at Oxford House in Hickory. On the first occasion, she was told Defendant was at an interview; on the second, she was told Defendant had been evicted. As Defendant did not have a cell phone, his probation officer was unable to call him. At the time of the revocation hearing on 17 April 2017, the probation officer had yet to hear from Defendant or ascertain his location. *See Trent*, __ N.C. App. at __, 803 S.E.2d at 230 ("The instant case is distinguishable from *Johnson* and *Williams* for the simple, but significant, fact that [the officer] was never aware of [the] defendant's whereabouts . . . ."). Under *Trent*, these facts meet the statutory standard for absconding. *Id.* at __, 803 S.E.2d at 230-31.

Defendant next contends the State failed to prove that he acted willfully in violating N.C. Gen. Stat. § 15A-1343(b)(3a). "[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. Terry*, 149 N.C. App. 434, 437-38, 562 S.E.2d 537, 540 (2002) (citation omitted). A defendant "is entitled to have his evidence considered and evaluated by the trial court[.]" *State v. Jones*, 78 N.C. App. 507, 509, 337 S.E.2d 195, 197 (1985) (citation omitted). However, "[i]n determining whether the evidence warrants the revocation of probation or a suspended sentence, the credibility of the witnesses and the evaluation and weight of

their testimony are for the judge." *State v. Hewett*, 270 N.C. 348, 356, 154 S.E.2d 476, 482 (1967).

Testifying at the hearing, Defendant admitted having missed his scheduled office visit on 22 March 2017 but explained he "could not remember" the appointment date, having lost the slip of paper on which it was written. Defendant further acknowledged, "I did move. I don't have a cell phone. And I know that [my probation officer] has to be able to call me or whatever, but I'm sorry." Defendant asked the court not to revoke his probation, because he had "found a really good job and [was] actually working a really good job." He offered to give the probation officer his new address at the hearing.

The probation officer testified that Defendant had previously phoned the probation office "just after being placed on probation" in November 2016. Defendant also called her on 6 March 2017 "after he was released from Watauga County [jail] and he was provided reporting instructions." Defendant did not contact her between 6 March 2017 and 30 March 2017 or at any time prior to the revocation hearing on 17 April 2017.

Again, Defendant's claim is without merit. The judgment entered in this cause expressly states that the trial court considered "the evidence presented by the parties" and found Defendant to have committed each of the violations alleged in the 30 March 2017 report "willfully and without valid excuse[.]" *See Jones*, 78 N.C. App.

at 510, 337 S.E.2d at 197. The court was not obliged to credit Defendant's averments that he forgot his appointment date and had no ability thereafter to contact his probation officer or report to the probation office. Defendant's exception is overruled.

Conclusions

For the foregoing reasons, we affirm the trial court's judgment.

AFFIRMED.

Judges BRYANT and HUNTER concur.

Report per Rule 30(e).