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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1016

Filed: 3 April 2018

Robeson County, No. 14 CRS 55571, 17 CRS 305-06

STATE OF NORTH CAROLINA

v.

ANGELA LYNN SPAULDING

Appeal by defendant from judgments entered 3 April 2017 by Judge James G. Bell in Robeson County Superior Court. Heard in the Court of Appeals 6 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Gwenda L. Laws, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

TYSON, Judge.

Angela Lynn Spaulding (“Defendant”) appeals from judgments revoking her probation. We reverse and remand.

I. Background

Defendant pled guilty to three counts of uttering a counterfeit instrument in Scotland County on 19 May 2016. She was sentenced to two consecutive sentences of six to seventeen months imprisonment. These sentences were suspended, and

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Defendant was placed on supervised probation for twenty-four months, with a ten day active split-sentence as a special condition of probation with credit for time served. Defendant was also ordered to pay \$1,445.00 in restitution.

On 16 June 2016, Defendant pled guilty to one count of identity theft and three counts of obtaining property by false pretenses in Robeson County. She was sentenced to twenty-one to thirty-five months imprisonment. That sentence was suspended, and Defendant was placed on supervised probation for thirty-six months, with a thirty day active split-sentence with credit for time served. Defendant was also ordered to pay restitution to two victims, for \$468.50 and \$5,754.00.

Defendant was originally supervised in Robeson County, where she had resided since June 2016. Her probation officer visited her home “several times” between June and October 2016. In October 2016, Defendant was displaced from her home due to Hurricane Matthew, and moved into a Comfort Inn motel in Scotland County with Red Cross assistance. Defendant stayed at the Comfort Inn motel until 15 January 2017, when she returned to her home on Coward Drive in Robeson County.

In December 2016, Defendant was assigned a new probation officer, Toni Brannon. On 18 December 2016, Officer Brannon asked another probation officer to visit Defendant at the Comfort Inn motel in Scotland County and instruct Defendant to report to Officer Brannon on 21 December 2016. Defendant reported in person to

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Officer Brannon on 21 December 2016, and was instructed to report again on 10 January 2017. Defendant failed to report. Officer Brannon filed probation violation reports on 22 February 2017.

The violation reports allege Defendant had (1) absconded by willfully avoiding supervision or making her whereabouts unknown to the supervising probation officer, (2) failed to report to her probation officer as directed, (3) failed to pay her court and supervision fees, (4) failed to obtain approval from or notify her supervising officer of any change in her address, and (5) failed to obtain a substance abuse assessment. At the violation hearing on 3 April 2017, the trial court found Defendant had violated her probation and activated her suspended sentences.

Defendant's counsel appeared in open court on 6 April 2017 and gave oral notice of Defendant's appeal. On 22 September 2017, Defendant filed a petition for writ of certiorari seeking a belated appeal due to her non-compliance with Rule 4 of the Rules of Appellate Procedure.

II. Jurisdiction

Rule 4 provides a criminal defendant may appeal from a judgment of a superior court by giving oral notice at trial or by filing timely notice with the clerk of court. N.C. R. App. P. 4(a). In this matter, Defendant's counsel gave oral notice of appeal three days after her probation revocation hearing had concluded. Because Defendant's counsel failed to give timely oral notice of appeal at the hearing,

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Defendant's appeal is subject to dismissal. *State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 231 (citation omitted), *review denied*, 368 N.C. 429, 778 S.E.2d 95 (2015), and *cert. denied*, __ U.S. __, 195 L. Ed. 2d 824 (2016).

Pursuant to Rule 21(a)(1), this Court may grant a petition for writ of certiorari “in appropriate circumstances . . . when the right to prosecute an appeal has been lost by failure to take timely action.” N.C. R. App. 21(a)(1). When a defendant has lost the right to appeal through no fault of her own, this Court has granted the petition for writ of certiorari and considered the defendant's appeal on its merits. *Holanek*, 242 N.C. App. at 640, 776 S.E.2d at 232; *In re I.T.P-L.*, 194 N.C. App. 453, 460, 670 S.E.2d 282, 285 (2008); *State v. Hammonds*, 218 N.C. App. 158, 163, 720 S.E.2d 820, 823 (2012).

In this case, Defendant lost her appeal through no fault of her own. We allow Defendant's petition, issue the writ of certiorari, and address the merits of her appeal. *See Holanek*, 242 N.C. App. at 640, 776 S.E.2d at 232.

III. Issues

Defendant argues the trial court: (1) erred by finding “each violation is, in and of itself, a sufficient basis upon which the court should revoke probation and activate the suspended sentence” when only one of the violations allowed for revocation of probation and activation of the sentences, and (2) erred and abused its discretion in finding Defendant had willfully absconded from supervision.

IV. Analysis

A. Standard of Review

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. Johnson, __ N.C. App __, __, 783 S.E.2d 21, 23-24 (2016) (internal quotation marks omitted) (citing *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008)). The decision to revoke a defendant's probation is reviewed for an abuse of discretion. *Young*, 190 N.C. App. at 459, 660 S.E.2d at 576 ("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.").

B. Absconding

The regular conditions of probation are set out in N.C. Gen. Stat. § 15A-1343 (2017). A violation of any of these conditions may result in probation being extended or modified, but a court may only revoke probation when:

[T]he probationer: (1) commits a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two prior periods of CRV [confinement in response to violations] pursuant to N.C. Gen. Stat. § 15A-1344(d2).

Johnson, __ N.C. App. at __, 783 S.E.2d at 25 (citation omitted).

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As compared to a failure to report, a defendant absconds if he “willfully avoid[s] supervision or [] willfully make[s] [his] whereabouts unknown to the supervising probation officer[.]” N.C. Gen. Stat. § 15A-1343(b)(3a).

All three violation reports filed 22 February 2017 stated:

ON OR ABOUT 12/21/2016, THE DEFENDANT LEFT HER PLACE OF RESIDENCE AT 1699 US HWY 401 BYPASS, RM. 305, LAURINBURG, NC 28352 WITHOUT PRIOR APPROVAL OR KNOWLEDGE OF HER PROBATION OFFICER & FAILED TO MAKE HER WHEREABOUTS KNOWN, MAKING HERSELF UNAVAILABLE FOR SUPERVISION & THEREBY ABSCONDING SUPERVISION. AS OF THE DATE OF THIS REPORT, THE DEFENDANT'S WHEREABOUTS ARE UNKNOWN & ALL EFFORTS TO LOCATE THE DEFENDANT HAVE BEEN UNSUCCESSFUL.

The State argues the facts of this case are similar to the facts in *State v. Trent*, __ N.C. App. __, 803 S.E.2d 224 (2017) and *State v. Norris*, __ N.C. App. __, 796 S.E.2d 405, 2017 Westlaw 676958 (2017) (unpublished), and tend to show Defendant's actions equate to absconding. We disagree.

This Court distinguished the facts in *Trent* from those in *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015), where this Court held violations of N.C. Gen. Stat. § 15A-1343(b)(2) and (3) do not support a finding of a violation of absconding under (b)(3a), and from the facts in *Johnson*, __ N.C. App. __, 783 S.E.2d 21, where this Court held a defendant informing his probation officer he would not attend an office visit and then failing to report also does not support a violation of absconding under (b)(3a). Unlike the defendants in *Williams* or *Johnson*, the defendant in *Trent*

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was found to have absconded “for the simple, but significant fact that [his probation officer] was never aware of defendant’s whereabouts” after an unannounced visit to his new residence. *Trent*, __ N.C. App. at __, 803 S.E.2d at 230. At this unannounced visit, the probation officer encountered the defendant’s wife, who informed him that her husband had taken her car and her bank card without her permission. *Id.* at __, S.E.2d at 226. The defendant had still not returned when the probation officer visited eleven days later. Neither the probation officer nor the defendant’s wife knew his whereabouts. *Id.*

With respect to *State v. Norris*, the State failed to inform this Court that *Norris*’ is unpublished, in violation of N.C. R. App. P. 30(e)(3). An unpublished opinion is not controlling legal authority. N.C. R. App. P. 30(e)(3). Further in *Norris*, this Court also distinguished the facts in that case from *Williams*. *Norris*. at 676958 * 2. In *Norris*, the trial court made specific findings that the defendant had willfully absconded, and that this finding was supported by record evidence. *Id.* The defendant’s probation officer had been unable to contact her for at least twenty days, during which time she had missed at least three appointments, one of which the defendant had requested to be rescheduled. *Id.*

Here, the State argues that Officer Brannon was never aware of Defendant’s whereabouts from 10 January to 21 February 2017, a period of forty-three days, though the violation reports claim the absconding date was “on or about 12/21/2016,”

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the date she last physically reported to her probation officer. The evidence presented at the probation revocation hearing does not support the allegations in the violation reports, nor do Defendant's actions support a finding that she had absconded.

Defendant testified she fell and hurt her leg at a Walmart store on 10 January 2017, which led to her failure to report to Officer Brannon that day. Defendant testified she called Officer Brannon on 10 January and left a message and tried to reach Officer Brannon again about two days later.

Officer Brannon testified she never received any communication from Defendant on or after 10 January. Officer Brannon testified she attempted to contact Defendant, placing calls to the phone numbers Defendant had provided and to the Comfort Inn motel. Officer Brannon left messages with Defendant's father, other family members, and her boyfriend, James Hunt. She also went unannounced to Defendant's address on "Carrot Drive" in Robeson County, but no one answered the door.

Defendant testified her father had passed away in 2012. She also testified her relationship with Mr. Hunt was abusive, and she never received any messages concerning her probation officer from him. Defendant called the police on 18 or 19 February 2017, after an altercation with Mr. Hunt that left her with a black eye.

On 21 February 2017, Officer Brannon discovered Defendant was in jail. Officer Brannon printed the violation reports on 21 February 2017 and filed them on

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22 February 2017. She met with Defendant at the jail on 21 or 22 February to explain the violations. Defendant told Officer Brannon she was trying to get away from Mr. Hunt. During her visit, Officer Brannon observed Defendant had suffered a black eye.

At the time Officer Brannon filed the violation reports, she knew exactly where Defendant was located: she was in jail. The State presented no evidence at the hearing to support the allegation in the violation reports that Defendant had left her residence “on or about 12/21/2016.” On appeal, the State appears to argue the first instance of Defendant violating her probation was her failure to report on 10 January.

Regardless of the date, no evidence supports Defendant “willfully avoid[ed] supervision” or “willfully mad[e] [her] whereabouts unknown to [her] supervising probation officer.” N.C. Gen. Stat. 15A-1343(b)(3a). Defendant left the Comfort Inn motel in Scotland County, a Red Cross provided refuge from the effects of Hurricane Matthew, and returned to her home and address of record in Robeson County, not to a location unknown to her probation officer.

The facts here are unlike those in the case of *Trent*. __ N.C. App. at __, 803 S.E.2d at 230 (defendant allegedly took a painting job out of town without informing his supervising officer). Unlike the defendant in *Trent*, no evidence tends to show Defendant was aware Officer Brannon was attempting to contact her or that she had willfully refused to establish contact. *Id.* at __, 803 S.E.2d at 232 (“Even after learning

about [his probation officer's] unscheduled visits during his travels, defendant still did not contact her[.]”).

The State's evidence does not support a finding that Defendant had willfully absconded supervision, as compared with an explained failure to report due to injury in January and purported attempts to reach her probation officer. We reverse and remand. In light of our decision, we need not address Defendant's other issue on appeal.

V. Conclusion

Where a violation of an enumerated regular condition of probation occurs, that violation, without more, cannot be bootstrapped to a violation of absconding to support a revocation and activation of sentence. *Johnson*, __ N.C. App. at __, 783 S.E.2d at 26. In this matter, evidence was presented of Defendant failing to report, in violation of N.C. Gen. Stat. § 15A-1343(b)(2). Arguably, Defendant's failure to inform her supervising officer of her return to her home and address of record could be a violation of N.C. Gen. Stat. § 15A-1343(b)(2) as well. Absent evidence of Defendant's willful avoidance of supervision or leaving the jurisdiction, these violations presented here cannot result in the revocation of probation. *See Johnson*, __ N.C. App. at __, 783 S.E.2d at 26.

The State failed to present evidence to support a finding that Defendant had absconded supervision. The trial court's order revoking Defendant's probation is

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reversed. This matter is remanded for further proceedings not inconsistent with this ruling and opinion. *It is so ordered.*

REVERSED AND REMANDED.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).