

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-1002

Filed: 17 July 2018

Haywood County, Nos. 16 CRS 846–48

STATE OF NORTH CAROLINA

v.

DOMINICK ROMEO DELEGGE

Appeal by defendant from judgments entered 24 April 2017 by Judge J. Thomas Davis in Haywood County Superior Court. Heard in the Court of Appeals 7 March 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Teresa L. Townsend, for the State.

Sharon L. Smith for defendant.

ELMORE, Judge.

Defendant Dominick Romeo Delegge appeals from judgments in which the trial court found him in willful violation of his probation, revoked his probation, and activated three consecutive sentences of 11 to 23 months' incarceration each. On appeal, defendant contends the trial court erred by denying his motions to continue his probation violation hearing and to dismiss the violation charges, and that the trial

court abused its discretion by finding defendant in willful violation of his probation. For the reasons stated herein, we affirm.

Background

On 2 August 2012, upon defendant’s guilty plea in Buncombe County Superior Court to (1) possession of a firearm by a felon, (2) breaking or entering, (3) felony larceny, and (4) obtaining property by false pretenses, Judge Robert C. Ervin imposed one active sentence of 19 to 32 months’ incarceration and three suspended sentences of 11 to 23 months’ incarceration each. Judge Ervin ordered that, should the latter three sentences be activated, they would run consecutively with defendant’s active sentence as well as with each other. Judge Ervin then ordered that the execution of those three sentences be suspended for 36 months.

In issuing the first suspended sentence, Judge Ervin stated that “[defendant] is to have supervised probation for that [36-month] period of time, with the probation to begin upon his release from the Department of Correction and is subject to the following conditions[.]”¹ Judge Ervin then announced the monetary conditions of defendant’s probation—“to be paid on a schedule provided by the probation officer”—and ordered that defendant complete 96 hours of community service during the first 180 days of his probationary period.

¹ Although the transcript from defendant’s 2012 sentencing hearing does not appear to be included as part of the record on appeal in the instant case, it is part of the record in another appeal docketed in this Court. *See State v. Delege*, No. 17-980 (appeal dismissed by order entered Feb. 21, 2018).

In issuing the second suspended sentence, Judge Ervin likewise stated that defendant's supervised probation was "to begin upon his release from the Department of Correction. He's to pay the costs and comply with each and every one of the terms and conditions of probation in the [first suspended sentence]." Finally, in issuing the third suspended sentence, Judge Ervin stated that defendant was "to be placed on supervised probation to begin upon his release from the Department of Correction. He's subject to the regular terms and conditions of probation and pay the costs. He's to comply with each and every one of the terms and conditions of the probation in the [first suspended sentence]. Good luck to you."

These excerpts from the 2012 sentencing hearing show that Judge Ervin unequivocally intended and ordered for defendant's 36-month probationary period to run consecutively with his active sentence, but the form judgments failed to indicate the same. Specifically, the clerk failed to check the boxes on the judgments to reflect Judge Ervin's explicit order that probation begin following defendant's release from incarceration. However, nothing in the record suggests that anyone involved in this matter noticed the clerical error or gave it any effect whatsoever.

Meanwhile, defendant served his active sentence from 2 August 2012 until 25 April 2014. Following his release from incarceration, defendant was transferred to Florida, and orders were entered in Buncombe County Superior Court remitting his probation supervision and community service fees "while being supervised by

Florida.” Defendant’s first restitution payment was due on 25 May 2014—thirty days after his release from incarceration—and defendant made his first and only payment toward restitution on 22 May 2014. Defendant was then incarcerated in Florida on unrelated matters from 21 August 2014 until 28 July 2016.

In August 2016, defendant returned to North Carolina, where he was almost immediately fitted with a location-monitoring ankle bracelet pursuant to the results of a probation assessment that classified him as “high risk.” Defendant signed paperwork acknowledging his high-risk classification as well as the conditions of electronic monitoring on 30 August 2016. Nevertheless, on 11 September 2016, defendant removed his ankle bracelet and went to California; he was extradited from California to Haywood County in November 2016.

On 23 September 2016, defendant’s probation officer filed a report in Haywood County Superior Court alleging probation violations related to the three suspended sentences imposed by Judge Ervin in 2012. Among other things, the report alleged that defendant had committed the new criminal offenses of breaking or entering and larceny on 9 September 2016. On 12 December 2016, the State voluntarily dismissed the violation charges after receiving certified copies of the judgments from Buncombe County and becoming aware of the clerical error contained therein. Following a review of the transcript from defendant’s sentencing hearing, a clerk in Buncombe

County notified the Department of Public Safety of the clerical error via email dated 11 January 2017.

On 21 March 2017, Judge Mark E. Powell held a hearing in Buncombe County Superior Court on the State’s motion to correct the three judgments *nunc pro tunc* 2 August 2012. Defendant was present and represented by counsel at the hearing. After reviewing the transcript from defendant’s 2012 sentencing hearing and receiving the arguments of counsel, Judge Powell granted the State’s motion to correct the judgments. Judge Powell entered a simultaneous order providing that the correction “shall not preclude any defense that the defendant may have to any allegation that [he] was on probation in 2016.”

On 20 April 2017—approximately one month after correction of the judgments and five days before defendant’s 36-month probationary period was set to expire—defendant’s probation officer again filed a report in Haywood County Superior Court alleging probation violations related to the three suspended sentences imposed by Judge Ervin in 2012. The report alleged that defendant had failed to pay fees and costs as ordered, and that he had committed the new criminal offenses of breaking or entering and larceny in September 2016. On Thursday, 20 April 2017, defendant was served with notice of probation violation and hearing scheduled for the following Monday.

STATE V. DELEGGE

Opinion of the Court

At his Monday, 24 April 2017 hearing in Haywood County Superior Court, defendant first moved Judge J. Thomas Davis for a continuance based on his constitutional rights to due process. Specifically, defense counsel informed Judge Davis that he had received a blurry photograph from the State on Friday, 21 April 2017. The photograph purported to show the vehicle defendant was driving on the date of the alleged criminal offenses, which involved the stealing of a television. Defense counsel explained that after receiving the photograph, he had spoken with an expert in home entertainment centers who “asked [defense counsel] some questions that that picture may well reveal answers to.” Judge Davis denied defendant’s motion to continue the violation hearing for time to conduct what defense counsel referred to as an “expert digital analysis” of the photograph.

Defendant then moved Judge Davis to dismiss the violation charges based on lack of subject matter jurisdiction, contending that the clerical error in the judgments entered on 2 August 2012 and corrected on 21 March 2017 meant that defendant’s 36-month probationary period had automatically expired on 2 August 2015. After much consideration and discussion with counsel, Judge Davis denied defendant’s motion to dismiss and proceeded to receive testimony relevant to the violation charges from four State witnesses and two defense witnesses.

At the conclusion of the hearing, Judge Davis announced that he was reasonably satisfied defendant had willfully violated his probation by committing the

new criminal offenses of breaking or entering and larceny after breaking or entering on 9 September 2016, and by failing to pay fees and costs, complete community service, and obtain a substance abuse assessment. Judge Davis then revoked defendant's probation and activated his three consecutive sentences of 11 to 23 months' incarceration each. Defendant appeals.

Discussion

On appeal, defendant contends the trial court erred (I) by denying his motion to continue the violation hearing so that he could analyze the State's blurry photograph of his vehicle and (II) by denying his motion to dismiss the violation charges on jurisdictional grounds. Defendant also argues the trial court abused its discretion (III) by finding him in willful violation of his probation based on the commission of new criminal offenses.

I. Motion to Continue

Defendant first contends the trial court's denial of his motion to continue the violation hearing deprived him of his constitutional rights to due process. According to defendant, because he had no time to secure an expert digital analysis "or to otherwise challenge whether the photographs were authentic," the denial of the continuance "violated [his] constitutional due process rights to present a complete defense."

We review a trial court's resolution of a motion to continue for abuse of discretion. When a motion to continue raises

a constitutional issue, however, the trial court's ruling thereon involves a question of law that is fully reviewable on appeal by examination of the particular circumstances presented in the record. Even when the motion raises a constitutional issue, denial of the motion is grounds for a new trial only upon a showing that the denial was erroneous and also that defendant was prejudiced as a result of the error.

State v. Morgan, 359 N.C. 131, 143, 604 S.E.2d 886, 894 (2004) (citations, quotation marks, and brackets omitted).

“Continuances should not be granted unless the reasons for the delay are fully established.” *State v. Beck*, 346 N.C. 750, 756, 487 S.E.2d 751, 755 (1997) (citation omitted). “While a defendant must be afforded a reasonable opportunity to prepare a defense, neither the United States Constitution nor the North Carolina Constitution guarantees a particular length of time for the preparation.” *Morgan*, 359 N.C. at 144, 604 S.E.2d at 894. Rather, “[a]n inquiry into alleged constitutional error by a trial court in denying a motion to continue requires scrutiny of the record and consideration of the circumstances of the individual case.” *State v. Barlowe*, 157 N.C. App. 249, 253, 578 S.E.2d 660, 663 (2003) (citation omitted).

Some of the factors considered by North Carolina courts in determining whether a trial court erred in denying a motion to continue have included (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant's case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the

continuance.

Id. at 254, 578 S.E.2d at 663 (citations omitted).

Defendant relies primarily on *State v. Barlowe* to support his argument that the trial court erred in denying his motion to continue. In *Barlowe*, the defendant had been convicted of first degree murder by a jury and thereafter requested a new trial, arguing the denial of her motion to continue precluded her from securing a blood spatter expert witness. *Id.* As this Court noted, “the blood spatter evidence was critical to the State’s case against defendant because it was the only physical evidence potentially placing her at the scene at the time of the murder.” *Id.* at 257, 578 S.E.2d at 665. “Considering all of the factors which our courts have said are relevant to a determination of whether the denial of a motion to continue implicates constitutional guarantees,” this Court held in *Barlowe* that the denial was error and violated the defendant’s constitutional rights. *Id.*

The instant case is readily distinguishable from *Barlowe*. Here, the evidence at issue is a blurry photograph of a vehicle which defendant had driven to the victims’ residence on a previous occasion and which was allegedly caught on camera around the time of the crime. However, “while the blood spatter evidence in *Barlowe* was key to proving the defendant’s participation in the murder, in the case at bar, additional compelling evidence . . . linked defendant to the [crime].” *Morgan*, 359 N.C. at 145, 604 S.E.2d at 895. For example, at defendant’s violation hearing, a probation officer

testified that defendant had been fitted with an ankle bracelet in August 2016 and would have been wearing the device on 9 September 2016 (*i.e.*, the date of the crime). The device provided GPS data to the probation officer, who further testified that defendant was in the general area of the victims' residence at the time of the crime. One of the victims also testified that while moving approximately one month after the crime, she found defendant's food stamp card behind the dresser from which the television had been stolen.

In his brief, defendant asserts that he requested the continuance for more time to verify the authenticity of the photograph and to analyze its probative value. Given the additional compelling evidence linking him to the crime, defendant has failed to demonstrate that he suffered prejudice as a result of the trial court's denial of his motion to continue for this purpose. This assignment of error is therefore overruled.

II. Motion to Dismiss

In his most extensive argument on appeal, defendant next contends the trial court lacked subject matter jurisdiction to revoke his probation. Defendant insists that his probationary period automatically expired on 2 August 2015 and asserts that the violation reports at issue here were filed after that expiration date in violation of N.C. Gen. Stat. § 15A-1344(f). Thus, according to defendant, "jurisdiction was lost by the lapse of time and the court had no power to enter a revocation judgment." *State v. Hall*, 160 N.C. App. 593, 594, 586 S.E.2d 561, 561 (2003) (citation omitted).

Defendant's assertion that the trial court lacked jurisdiction in the violation hearing because his probationary period had expired prior to the State's filing of a violation report raises issues of both statutory interpretation and jurisdiction.

An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*. This Court also reviews challenges to the jurisdiction of the trial court under a *de novo* standard. Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Wainwright, 240 N.C. App. 77, 79–80, 770 S.E.2d 99, 102 (2015) (citations and quotation marks omitted). Our *de novo* review begins with the statutes.

N.C. Gen. Stat. § 15A-1346(b) governs the commencement of probation where the trial court is imposing multiple sentences. It provides, in relevant part, that “[i]f a period of probation is being imposed at the same time a period of imprisonment is being imposed . . . the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently.” N.C. Gen. Stat. § 15A-1346(b) (2015). “N.C. Gen. Stat. § 15A-1344(f) ([2015]) provides that, in order for a trial court to revoke a defendant's probation after the expiration of the period of probation, the State must have filed a written violation report *before* the expiration of the period of probation, among other conditions.” *State v. Harwood*, 243 N.C. App. 425, 428, 777 S.E.2d 116, 119 (2015).

Defendant relies on *State v. Harwood* to support his argument that the trial court lacked subject matter jurisdiction to revoke his probation. In *Harwood*, the judge presiding over the defendant's May 2009 sentencing hearing imposed two active sentences and five suspended sentences. *Id.* at 426–27, 777 S.E.2d at 117–18. The judge ordered that the defendant serve all seven sentences consecutively, but that the execution of the latter five sentences be suspended on the condition that the defendant serve 48 months of supervised probation. *Id.* at 427, 777 S.E.2d at 118. In issuing the five suspended sentences, the judge failed to specify whether the defendant's probationary period would run concurrently or consecutively with his two active sentences. The clerk, in turn, failed to check the boxes on the form judgments to indicate when the defendant's probationary period would begin.

The defendant in *Harwood* served his active sentences from May 2009 until June 2010. In January 2014, the defendant's probation officer filed violation reports related to the five suspended sentences imposed in 2009, and at a March 2014 hearing, the defendant admitted to willfully violating the terms of his probation by committing new criminal offenses. The trial court then revoked the defendant's probation, activated all five suspended sentences, and ordered that the defendant serve them consecutively. *Id.*

On appeal, the defendant argued that pursuant to the default rule set forth in N.C. Gen. Stat. § 15A-1346(b), his 48-month probationary period had run from May

2009 until May 2013; thus, under N.C. Gen. Stat. § 15A-1344(f), the 2014 trial court lacked subject matter jurisdiction to revoke his probation after it had expired. *Id.* at 428, 777 S.E.2d at 119. This Court agreed, rejecting the State’s contention that the clerk’s failure to check the boxes to indicate that the probationary period would begin upon the defendant’s release from incarceration was a clerical mistake. Additionally, because the judge presiding over the 2009 sentencing hearing utterly failed to specify whether the defendant’s probationary period would run concurrently or consecutively with his active sentences, we held that the alleged mistake “would be a substantive error, rather than a clerical one.” *Id.* at 430, 777 S.E.2d at 120.

The instant case is distinguishable from *Harwood*. Here, the transcript from defendant’s 2012 sentencing hearing indicates Judge Ervin unequivocally ordered that defendant’s probationary period run consecutively with his active sentence. Moreover, the clerical error in the judgments had been corrected by Judge Powell before the matter reached Judge Davis, who revoked defendant’s probation and activated the three suspended sentences based on those judgments. Defendant was present and represented by counsel at both the hearing on the State’s motion to correct the judgments as well as the probation violation hearing. And defendant’s probation officer filed written violation reports on 23 September 2016 and 20 April 2017—prior to the 25 April 2017 expiration of defendant’s probationary period.

It is universally recognized that a court of record has the inherent power and duty to make its records speak the

truth. It has the power to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record, and no lapse of time will debar the court of the power to discharge this duty.

State v. Old, 271 N.C. 341, 343, 156 S.E.2d 756, 757–58 (1967) (citations omitted).

When the trial court “amends its records to accurately reflect the proceedings, the amended record stands as if it had . . . been made at the proper time. In other words, the amended order is a *nunc pro tunc* entry.” *State v. Dixon*, 139 N.C. App. 332, 338, 533 S.E.2d 297, 302 (2000).

Because the violation reports at issue here were filed prior to the expiration of defendant’s probationary period, we reject defendant’s argument that the trial court lacked subject matter jurisdiction to revoke his probation.

III. Willful Violation of Probation

In his final argument on appeal, defendant contends the trial court abused its discretion by finding him in willful violation of his probation. Defendant argues that the State’s evidence failed to show that defendant was in the victims’ home on the date of the alleged criminal offenses or that defendant had sufficient time to commit the offenses. Defendant further contends that the State’s evidence was contradictory in that the testimony of the State’s main witnesses (*i.e.*, the two victims) contradicted what they told police on the date of the offenses.

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).

After receiving testimony from four State witnesses and two defense witnesses, the trial court here concluded it was reasonably satisfied defendant had

willfully violated his probation in those respects consisting of committing the criminal offense of breaking and entering as well as larceny after breaking and entering; also, too, his failure to pay his fees and costs as set and required by his probation; and also in regard to failing to do community service as well as obtaining his substance abuse assessment and treatment as ordered.

In support of its conclusion, the trial court's findings of fact included (1) an identification of the victims, who were acquainted with defendant, and the location of the alleged criminal offenses; (2) that one victim last saw the stolen property prior to leaving her home around 12:00 p.m. on the date of the offenses; (3) the same victim left a message with defendant informing him that she was leaving the home to pick up the second victim, her roommate, from work; (4) the second victim was delayed at work; (5) upon returning home, the victims were missing a television, Xbox gaming system, Kinect device, and various controllers and games; and (6) during the time in

which the offenses took place, defendant was on the premises and driving his mother's black Honda CRV.

Because the trial court's findings were based on competent evidence in the form of testimony from six witnesses, and because those findings in turn support the trial court's conclusion that defendant willfully violated his probation, we reject defendant's argument that the trial court abused its discretion.

Conclusion

Given the additional compelling evidence linking him to the crime, defendant has failed to demonstrate that he suffered prejudice as a result of the trial court's denial of his motion to continue based on the State's blurry photograph. Additionally, because the violation reports were filed prior to the 25 April 2017 expiration of defendant's probationary period, we reject defendant's argument that the trial court lacked subject matter jurisdiction to revoke his probation. Lastly, the trial court did not abuse its discretion when it received testimony from six witnesses and concluded that it was reasonably satisfied defendant had willfully violated his probation. Accordingly, the judgments of the trial court are hereby:

AFFIRMED.

Judges INMAN and BERGER concur.

Report per Rule 30(e).