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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-25

Filed: 18 December 2018

Gaston County, Nos. 16 CRS 58357, 58364–67

STATE OF NORTH CAROLINA

v.

CHRISTOPHER ALLEN MCABEE

Appeal by defendant from judgments entered 31 March 2017 by Judge Gregory R. Hayes and order entered 9 October 2017 by Judge Lisa Bell in Gaston County Superior Court. Heard in the Court of Appeals 21 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General A. Mercedes Restucha-Klem, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.

BRYANT, Judge.

Where defendant’s reported probation violations do not support a finding of absconding, we reverse the trial court’s judgments revoking defendant’s probation. Where the entry of an order on defendant’s jail credits was triggered by an incorrect revocation of defendant’s probation, we vacate the trial court’s 9 October 2017 order.

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Opinion of the Court

In Gaston County Superior Court on 29 August 2016, before the Honorable Jesse B. Caldwell III, Judge presiding, defendant Christopher Allen McAbee pled guilty to two counts of obtaining property by false pretense, four counts of felonious breaking and entering, four counts of larceny after breaking and entering, and two counts of attempted felony breaking or entering a building. Defendant's convictions were consolidated into six judgments with active sentences of 8 to 19 months to be served consecutively; the active terms were suspended and a split sentence imposed wherein defendant would serve twelve days active time with a credit of twelve days applied to each sentence. As part of the suspended sentence, defendant received 30 months supervised probation.

On 28 September 2016, Probation Officer Tina Bourne filed five probation violation reports against defendant. Defendant was arrested for absconding, and the matter was brought before the Honorable Robert T. Sumner, Judge presiding. Following a hearing on the matter, Judge Sumner concluded that defendant violated the conditions of his probation and modified the original probation order. Judge Sumner modified defendant's split sentences and for each judgment imposed an active sentence of 100 days (with credit for 62 days already spent in confinement).

Following defendant's release from jail on 9 January 2017, Probation Officer Bourne filed six violation reports against defendant on 25 January 2017. On 31 March 2017, the matter was brought before the Honorable Gregory R. Hayes, Judge

presiding, who concluded defendant had violated the terms of his probation and revoked defendant's probation on all six judgments. Defendant timely filed written notice of appeal to this Court from Judge Hayes' 31 March 2017 judgments.

Subsequently, the Department of Public Safety notified the Gaston County District Attorney's Office that defendant's "jail credits" (for time served) appeared to be incorrect. In response to a writ filed by the Department of Adult Correction (DAC), the matter was brought before the Honorable Lisa Bell, Judge presiding, on 29 September 2017. A hearing was held, and in an order entered 9 October 2017, Judge Bell modified the credit defendant was to receive as to each judgment. In two judgments entered for obtaining property by false pretense, defendant was credited with 187 days in pretrial confinement; for each of the four remaining judgments, defendant was credited with twelve days pretrial confinement per judgment. Defendant also appeals from Judge Bell's 9 October 2017 order.

Petition for Writ of Certiorari

We note that defendant has filed two separate appeals in the same matter. His first appeal challenges the judgments entered 31 March 2017 by Judge Hayes, which revoked defendant's probation. Defendant's second appeal challenges Judge Bell's order modifying the credits defendant was to receive for pretrial confinement, which was entered 9 October 2017. Defendant filed written notice of appeal with the Clerk's

Office within fourteen days following entry of Judge Bell's 9 October 2017 order. Defendant petitions this Court for a writ of certiorari in the event that his appeal from Judge Bell's order was untimely.

Pursuant to Rule 4 of our Rules of Appellate Procedure,

[a]ny party entitled by law to appeal from a judgment or order of a superior . . . court rendered in a criminal action may take appeal by: . . . (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after *entry* of the judgment or order

N.C. R. App. P. 4(a)(2) (2018) (emphasis added). "Subject to the provisions of Rule 54(b) [of our Rules of Civil Procedure], a judgment is *entered* when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5." N.C. Gen. Stat. § 1A-1, Rule 58 (2017) (emphasis added). We hold that defendant's written notice of appeal from Judge Bell's order entered 9 October 2017 was timely in accordance with Rule 4 of our Rules of Appellate Procedure. Accordingly, defendant's appeal is properly before this Court, and his petition for a writ of certiorari is hereby dismissed.

In his appeal of the 31 March 2017 judgments, defendant argues the trial court erred by revoking his probation on the basis of absconding. Defendant contends that the violation reports did not allege that defendant absconded and the evidence was

insufficient to establish that defendant absconded. Thus, it was error to activate his suspended sentences. We agree.

“[I]n a probation revocation, the standard is ‘that the evidence be such as to reasonably satisfy the [trial court] in the exercise of [its] sound discretion that the defendant has willfully violated a valid condition [upon which probation can be revoked].’” *State v. Harris*, 361 N.C. 400, 404, 646 S.E.2d 526, 529 (2007) (second and third alterations in original) (quoting *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967)). “Nonetheless, 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*, 246 N.C. App. 139, 142, 783 S.E.2d 21, 24 (2016) (citation omitted).

“[A] court may only revoke probation for a violation of a condition of probation under G.S. 15A-1343(b)(1) [(committing a criminal offense)] or G.S. 15A-1343(b)(3a) [(absconding)], except as provided in G.S. 15A-1344(d2).” N.C. Gen. Stat. § 15A-1344(a) (2017).

Prior to our Legislature’s enactment of the Justice Reinvestment Act of 2011 (“JRA”), the term “abscond” was not defined by statute. *State v. Williams*, 243 N.C. App. 198, 205, 776 S.E.2d 741, 746 (2015) (citations omitted). Instead, our case law used the term to refer to instances where a defendant failed to remain in the court’s jurisdiction or failed to report to a probation officer as directed. *See, e.g., State v. Hunnicutt*, 226 N.C. App. 348, 355, 740 S.E.2d 906, 911 (2013). Presently, “abscond” is defined by statute, and a defendant on supervised

probation only absconds when he “willfully avoid[s] supervision” or “willfully mak[es] [his] whereabouts unknown to [his] supervising probation officer[.]” N.C. Gen. Stat. § 15A-1343(b)(3a). This change was in line with the JRA’s purpose to be “part of a national criminal justice reform effort” which, among other changes, “made it more difficult to revoke offenders’ probation and send them to prison.” *State v. Johnson*, 246 N.C. App. 139, 145, 783 S.E.2d 21, 26 (2016). Under the statutory definition set out in § 15A-1343(b)(3a), we have held that a defendant absconds when he willfully makes his whereabouts unknown to his probation officer, and the probation officer is unable to contact the defendant. *See State v. Trent*, ___ N.C. App. ___, ___, 803 S.E.2d 224, 232 [(2017), *review denied*, 370 N.C. 576, 809 S.E.2d 599 (2018)].

State v. Melton, ___ N.C. App. ___, ___, 811 S.E.2d 678, 681 (2018).

In *Melton*, the probation officer testified that

[the] defendant absconded a week after [a] 26 October 2016 meeting because she failed to attend the 28 October and 2 November meetings, and did not contact [the probation officer] thereafter, even though the officer attempted to call and visit [the] defendant multiple times over the course of two days, and called and left messages with [the] defendant’s parents for [the] defendant to call her. However, on cross-examination, [the probation officer] could not support her testimony with records[.]

Id. at ___, 811 S.E.2d at 681.

[The] defendant testified that she did not willfully abscond because at the time of the alleged violation: her cell phone was missing, she was not at home when the officer visited, [the probation officer] left no messages at the home, her parents told her that [the probation officer] had not come by or called her, and she “had just [seen] [the officer] at the end of October[.]” so it did not otherwise occur to her to contact [the probation officer].

. . . .

[This Court held that] although there was competent evidence that [the officer] attempted to contact [the] defendant, there was insufficient evidence that [the] defendant willfully refused to make herself available for supervision

Id. at ___, 811 S.E.2d at 682.

In *Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (relied on in *Melton*),

[t]he State argue[d]:

[W]here the trial court is reasonably satisfied that a [d]efendant has willfully violated a valid condition of his probation without lawful excuse, it is within the court's discretion to revoke [d]efendant's probationary sentence and invoke the active sentence. *State v. Freeman*, 47 N.C. App. 171, 175, 266 S.E.2d 723, 725 (1980).

[And this Court noted] . . . , *this is no longer a correct statement of the law* for violations occurring on or after 1 December 2011. [*State v. Nolen*, 228 N.C. App. 203, 204, 743 S.E.2d 729, 730 (2013)]; *State v. Kornegay*, 228 N.C. App. 320, 321–24, 745 S.E.2d 880, 882–83 (2013). In the case before us, the trial court could only revoke [the] Defendant's probation if it found that [the] Defendant had absconded in violation of N.C. Gen. Stat. § 15A–1343(b)(3a).

Williams, 243 N.C. App. at 200, 776 S.E.2d at 743 (emphasis added).

We do not believe our General Assembly, in amending the probation statutes, intended for violations of N.C. Gen. Stat. §§ 15A–1343(b)(2) [(remain within the jurisdiction of the court)] and (3) [(report as directed to a probation

officer)] to result in revocation, unless the requirements of N.C. Gen. Stat. § 15A-1344(d2) [(“Confinement in Response to Violation”)] have been met.

Id. at 204, 776 S.E.2d at 745. In *Williams* the defendant was placed on supervised probation on 15 January 2014. When the probation officer visited defendant’s listed residence on 27 May, a bystander informed the officer that the defendant had been “back and forth” from that address but “never really lived at [the] address.” *Id.* at 198, 776 S.E.2d at 742 (alteration in original). The defendant failed to show up for a scheduled appointment on 16 June and did not respond to a message left the same day directing him to report to the probation office on 17 June. The probation officer spoke with the defendant via telephone on 24 June and directed him to report to her office on 1 July. The defendant failed to attend the 1 July meeting, but answered the officer’s phone call that evening. The probation officer directed the defendant to report to her office on 2 July. But again, the defendant failed to attend the meeting; he called to inform her he was in New Jersey. The probation officer reported that the defendant was not making himself available for supervision and obtained an order for arrest. During the defendant’s probation revocation hearing, the trial court found that the defendant had violated all seven conditions of his probation. *Id.* at 199, 776 S.E.2d at 742. On appeal, the defendant argued that the trial court erred in revoking his probation because he did not abscond. This Court agreed. *Id.*

We hold that the evidence in this case does not support finding a violation of N.C. Gen. Stat. § 15A–

1343(b)(3a) [(“Not abscond by willfully avoiding supervision”)]. The evidence was clearly sufficient to find violations of N.C. Gen. Stat. §§ 15A–1343(b)(2) and (3), and Defendant does not contest that portion of the judgment finding he violated those conditions. However, 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, which is not the situation in the case before us. The judgment entered upon revocation of probation is hereby reversed.

Id. at 205, 776 S.E.2d at 746.

Turning to the facts before us, in the 31 March 2017 judgments entered by Judge Hayes, the court stated that after hearing the evidence presented “the [c]ourt is reasonably satisfied in its discretion that . . . defendant violated each of the conditions of . . . defendant’s probation as set forth below.”

Of the conditions of probation imposed in that judgment, . . . 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, DEFENDANT HAS WILLFULLY AND KNOWINGLY MADE HIMSELF UNAVAILABLE FOR SUPERVISION, DEFENDANT HAS ABSCONDED.

DEFENDANT HAS FAILED TO PROVIDE SUPERVISING OFFICER WITH CORRECT ADDRESS IN WHICH HE CURRENTLY RESIDES.

- 3.[sic] “Report as directed by the Court, Commission or the

supervising officer to the officer at reasonable times and places . . .” in that DEFENDANT FAILED TO REPORT AS DIRECTED AND SCHEDULED TO PROBATION OFFICE ON 01/20/2017 AT 10 AM AND 01/23/17 AT 1:30 PM.

4. Condition of Probation “The defendant shall pay to the Clerk of Superior Court the “Total Amount Due” as directed by the Court of Probation officer” in that AS OF THE DATE OF THIS VIOLATION, DEFENDANT HAS MADE NO PAYMENTS ON CASE. CURRENT BALANCE IS \$492.50.
5. Condition of Probation “. . . Obtain prior approval from the officer for, and notify the officer of, any change in address . . .” in that DEFENDANT HAS MOVED WITHOUT PRIOR PERMISSION, APPROVAL, OR KNOWLEDGE OF SUPERVISING OFFICER. PROBATION DISCOVERED ADDRESS CHANGE DURING A HOME CONTACT ATTEMPT CONDUCTED ON 01/24/2017 WHEN DEFENDANT’S BROTHER REPORTED TO OFFICER THAT DEFENDNT DOES NOT LIVE AT THE RESIDENCE AND WHEN [sic] ON TO STATE THAT HE NEVER REALLY LIVED THERE, BUT ONLY VISITED A FEW TIMES.
6. Other Violation
DEFENDANT WAS COURT ORDERED TO PROVIDED A DNA SAMPLE ON JUDGMENT DATED 08/29/2016. DEFENDANT HAS FAILED TO DO SO.

We address only a portion of violation 1. As to each of the remaining violations, no allegation gives rise to a statutory ground upon which probation could be revoked.

In violation 1., the probation officer alleged that “DEFENDANT HAS WILLFULLY AND KNOWINGLY MADE HIMSELF UNAVAILABLE FOR SUPERVISION, DEFENDANT HAS ABSCONDED.” This sentence of this allegation invokes General Statutes, section 15A-1343(b)(3a) directing that a probationer “[n]ot abscond by willfully avoiding supervision or by willfully making the defendant’s whereabouts unknown to the supervising probation officer.” N.C. Gen. Stat. § 15A-1343(b)(3a).

During the 31 March 2017 probation violation hearing before Judge Hayes, the court heard testimony from Probation Officer Bourne and defendant. The hearing was to address defendant’s second absconding allegation, having previously been found in violation of the conditions of his probation on the basis of absconding by Judge Sumner. After serving an active term of 100 days pursuant to Judge Sumner’s special probation orders, defendant was released from jail on 9 January 2017. On 9 January, defendant contacted his probation officer, Officer Bourne, and stated that upon release from jail he would reside with his mother who lived on North Myrtle School Road. A probation officer visited the residence on 11, 17, 22, 23, and 24 January 2017, but none were able to speak with defendant. Officer Bourne testified that home visits such as these were unannounced. During the 17 January visit, Officer Bourne went to the residence and spoke with defendant’s brother, who said defendant was not at home. Following his release from jail, defendant spoke with

Officer Bourne via telephone on 18 and 23 January. On 18 January, Officer Bourne notified defendant that he was to report to her office on 20 January at 10:00 a.m.; defendant did not appear for the meeting. That same day, Officer Bourne left a note at the residence directing defendant to report to her office on 23 January at 1:30 p.m. Defendant called Officer Bourne on 23 January at 1:20 p.m. requesting that the meeting be rescheduled, he would not be able to meet her at 1:30 p.m. On 24 January, another probation officer visited the North Myrtle School Road residence and spoke with defendant's brother, who stated that defendant never really lived there; he just used the address. On 25 January, Officer Bourne spoke with defendant's mother who did not know where he was. That same day, defendant's probation officer filed a report alleging that defendant willfully and knowingly made himself unavailable for supervision, and therefore absconded. Defendant turned himself in to law enforcement officers on 27 January.

We find these facts substantially similar to those presented in *Melton* and *Williams*. We hold that the evidence does not support a conclusion that defendant absconded within the meaning of section 15A-1343(b)(3a). Accordingly, we reverse the trial court's 31 March 2017 judgments revoking defendant's probation.

In regard to defendant's second appeal, we hold that because the entry of the order setting forth defendant's jail credits was triggered by an incorrect revocation of

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defendant's probation, we vacate Judge Bell's 9 October 2017 order on defendant's jail credits.

REVERSED IN PART; VACATED IN PART.

Judges HUNTER, JR., and ARROWOOD concur.

Report per Rule 30(e).