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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-242

Filed: 15 January 2019

Cumberland County, Nos. 13 CRS 62985, 13 CRS 63009, 13 CRS 63523, 13 CRS 63525, 13 CRS 63526, 13 CRS 64535

STATE OF NORTH CAROLINA

v.

JAMES DANIEL WEST, Defendant.

Appeal by Defendant from judgments entered 10 October 2017 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 2 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General William Walton, for the State.

Patrick S. Lineberry for Defendant-Appellant.

INMAN, Judge.

Defendant James Daniel West ("Defendant") appeals from judgments entered 10 October 2017 revoking his probation for absconding from supervision pursuant to subsection 15A-1343(b)(3a) of the North Carolina General Statutes. Defendant

contends that the trial court erred in concluding he had absconded within the meaning of that statute. After careful review, we affirm the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

On 10 September 2014, Defendant was sentenced to six consecutive prison terms of 10 to 21 months each following his guilty pleas in Cumberland County Superior Court to a bevy of felony larceny and conspiracy to commit larceny charges. The trial court suspended all of the prison sentences on the condition that Defendant comply with terms of supervised probation for 60 months.

In the summer of 2015, Defendant violated his probation by failing to inform his probation officer of an address change and being charged with shoplifting. The trial court modified Defendant's probation as a result, transferring his supervision to Hoke County and requiring him to report to that county's probation office within 48 hours of his release from jail. Defendant did not report as required, and violation reports were filed against him on 7 January 2016. On 30 November 2016, the trial court found Defendant had violated his probation as alleged in the reports and sentenced him to 90 days in jail. Once released, Defendant again failed to report for scheduled office visits with his probation officer, Chandra Baker ("Officer Baker"), on 17 and 19 April 2017. Officer Baker filed violation reports for those failures to report and Defendant agreed to serve another three days in the Cumberland County jail for the violations.

On 9 July 2017, Defendant and Officer Baker met for an appointment at Defendant's home and, prior to the conclusion of the appointment, Defendant was instructed to meet again at Officer Baker's office on 1 August 2017. Defendant failed to show for the appointment, however, so Officer Baker attempted to visit Defendant at his home on 10 August 2017. Officer Baker spoke with Defendant's girlfriend's mother, who said that Defendant was not home; Officer Baker asked her to tell Defendant to reach out to schedule another appointment. When Defendant failed to contact her, Officer Baker called Defendant's phone, left a voicemail, and sent a text message on 15 August 2017 telling him to report the following day. Defendant did not appear for his appointment, so Officer Baker again went to Defendant's home and spoke with Defendant's girlfriend's father, who once more stated Defendant was not home. Officer Baker asked the man to tell Defendant to call her as soon as he arrived back at the house. Defendant did not call Officer Baker.

Three days later, Officer Baker attempted to contact Defendant by phone. She eventually received a text message from Defendant stating that his car was in the shop and he would not be able to meet with her until 21 August 2017. She replied by text, instructing him to report on that date. Defendant did not report as directed, and Officer Baker attempted another home visit the following day. This time, Officer Baker was informed that Defendant, despite being unable to drive and meet Officer Baker over the past few days due to car troubles, had been arrested in Harnett

County for driving with a revoked license. Officer Baker told Defendant's girlfriend's mother to have Defendant call within 72 hours of his release from custody.

Defendant was released from jail on 23 August 2017 and called Officer Baker the following day. The two spoke and Defendant was told to meet at Officer Baker's office on the morning of 25 August 2017; Officer Baker also directed Defendant to stay at his home, as she would be by to visit him on the evening of their call. When Officer Baker arrived at the house at 8:30 p.m., Defendant was not present and his girlfriend's mother told Officer Baker that, despite his family's urgings to stay at the house, Defendant had left to purchase diapers for his child. Officer Baker later learned that Defendant had attempted to call her around 6:00 p.m. Officer Baker left a notice on the door directing Defendant to report for their previously-scheduled office contact at 10:00 a.m. on 25 August 2017 and confirmed with his girlfriend's mother that she would be able to drive Defendant to the appointment.

Yet again, Defendant did not appear for the appointment on 25 August 2017, reportedly because he was not at the house for his girlfriend's mother to drive him to Officer Baker's office.

Officer Baker made a further attempt to contact Defendant on 27 August 2017 by visiting his home. Defendant was not there when she arrived, and Officer Baker informed his family that he was required to report the following day. Defendant did not so report.

On 31 August 2017, Officer Baker filed a violation report alleging Defendant had, among other things, absconded supervision within the meaning of subsection 15A-1343(b)(3a). The trial court held a hearing on the probation violation report on 10 October 2017, and Officer Baker testified for the State consistent with the above. She also testified that, to her knowledge, Defendant did not have a job, was not in school, and was not receiving in-patient or out-patient medical care. Defendant declined to offer evidence. At the conclusion of the evidence, the trial court found that:

> [D]efendant did abscond, that he willfully . . . avoided supervision and willfully ma[de] his whereabouts unknown to the probation officer so the probation officer was not aware—known or could—of his whereabouts. The [D]efendant willfully left the home knowing that the probation officer was coming by for a home visit, that the [D]efendant had a ride to go to the probation office, and the [D]efendant's girlfriend's mother was willing to take him, and the [D]efendant left the residence and did not go to the probation office knowing he had a ride. So, based on that, the Court is revoking his probation, specifically finding that he did abscond supervision, willfully avoiding supervision.

That same day, the trial court entered written judgments in each case containing the same finding and revoking Defendant's probation, thus activating the six consecutive prison terms. Defendant entered oral notice of appeal in open court.

II. ANALYSIS

Defendant argues that the trial court erred in revoking his probation, reasoning that: (1) he was not provided sufficient notice as set forth in *State v. Tindall*, 227 N.C. App. 183, 742 S.E.2d 272 (2013); and (2) Defendant's actions violated only subsection 15A-1343(b)(3) which, standing alone, does not give rise to a revocation of probation. *See* N.C. Gen. Stat. § 15A-1344(a) (2017) (setting forth grounds for revocation of probation). We address each argument in turn.

A. Notice

Defendant's notice argument, which is premised on *Tindall*, is misplaced, as that decision was overruled by our Supreme Court in *State v. Moore*, 370 N.C. 338, 807 S.E.2d 550 (2017), "to the extent that [it] . . . created a new notice requirement not found in the text of subsection 15A-1345(e)." 370 N.C. at 343, 807 S.E.2d at 554.

Section 15A-1345(e) provides that "[t]he State must give the probationer notice of the hearing [on his probation violations] and its purpose, including a statement of the violations alleged." N.C. Gen. Stat. § 15A-1345(e) (2017). In interpreting that language, *Moore* held:

> A statement of a defendant's alleged actions that constitute the alleged violation will give the defendant the chance to prepare a defense because he will know what he is accused of doing. He will also be able to determine the possible effects on his probation that those allegations could have, and he will be able to gather any evidence available to rebut the allegations.

Id. at 342, 807 S.E.2d at 553. Thus, a violation report satisfies the statute's notice requirements when it alleges "only a statement of the actions that violated the conditions, not of the conditions that those actions violated." *Id.* at 341, 807 S.E.2d at 553. The notice of violation in this case exceeds that requirement, specifically alleging: (1) a violation of subsection 15A-1343(b)(3a); (2) that Defendant had absconded by refusing to make himself available for supervision after multiple failed attempts to meet with him; and (3) the specific date he absconded. As a result, we reject Defendant's argument based on *Tindall* and hold the probation violation report provided Defendant with sufficient notice under subsection 15A-1345(e). *Moore*, 370 N.C. at 341-42, 807 S.E.2d at 553-54.

B. Absconding

Defendant next argues that the trial court erred in finding that he absconded within the meaning of subsection 15A-1343(b)(3a). Where the trial court's determination that a violation giving rise to revocation occurred is premised on statutory interpretation, such as the application of subsection 15A-1343(b)(3a), we apply *de novo* review. *State v. Johnson*, 246 N.C. App. 139, 142, 783 S.E.2d 21, 24 (2016).

Our probation revocation statutes provide that "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[.]' " *State v. Melton*,

___ N.C. App. ___, ___, 811 S.E.2d 678, 681 (2018) (quoting N.C. Gen. Stat. § 15A-1343(b)(3a)) (alterations in original). When the conduct alleged falls entirely within a category of conduct for which revocation is not available, however, the defendant cannot be said to have absconded. For example:

> [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) when these *exact actions* violate the explicit language of a wholly separate regular condition of probation which does not allow for revocation and activation of a suspended sentence.

Johnson, 246 N.C. App. at 146, 783 S.E.2d at 26 (citing N.C. Gen. Stat. § 15A-1343(b)(3) and *State v. Williams*, 243 N.C. App. 198, 204, 776 S.E.2d 741, 745 (2015)) (emphasis in original).

Defendant contends that, as in *Williams* and *State v. Krider*, ___ N.C. App. ___, 810 S.E.2d 828, *modified and aff'd*, ___ N.C. ___, 818 S.E.2d 102 (2018), his conduct did not fall within the meaning of "abscond" as used in subsection 15A-1343(b)(3a). Both cases are readily distinguishable.

In *Williams*, the defendant failed to show up for four appointments over a 16 day period because he was travelling in New Jersey, though he did manage a single telephone conversation. 243 N.C. App. at 199, 776 S.E.2d at 742. In revoking the defendant's probation, the trial court failed to make any specific finding that defendant had absconded, and instead simply concluded that the defendant was " 'in

willful violation of the terms and conditions of probation.' " *Id.* at 203, 776 S.E.2d at 744. Left with nothing else to rely on for the trial court's absconding determination, this Court looked to the violation report and observed that the allegation the defendant had absconded was "simply a re-alleging of the . . . alleged violations related to N.C. Gen. Stat. §§ 15A-1343(b)(2) and (3)[,]" *id.* at 204, 776 S.E.2d at 745, with neither subsection providing for revocation. Indeed, the violation report failed to assert willful conduct on the part of the defendant in its allegation that the defendant had absconded, *id.* at 204, 776 S.E.2d at 745, an essential element that separates absconding under subsection 15A-1343(b)(3a) from failing to report in violation of subsection 15A-1343(b)(2). The report also "did not include reference to N.C. Gen. Stat. § 15A-1343(b)(3a)[.]" *Id.* at 205, 776 S.E.2d at 745. From these procedural facts and the underlying evidence showing only that the defendant failed to attend four appointments due to travel to New Jersey, we held "that the evidence in this case does not support finding a violation of N.C. Gen. Stat. § 15A-1343(b)(3a)." *Id.* at 205, 776 S.E.2d at 746.

This Court reached the same holding in *Krider* where the probation officer made one home visit, learned the defendant did not live at that house from an unidentified woman, and then never attempted to contact the defendant again before filing a violation report for absconding. ___ N.C. App. at ___, 810 S.E.2d at 831. Because "there was no evidence that defendant was even aware of [the probation

officer's] unannounced visit until after his arrest[for violating the terms of his probation,] . . . there was no evidence of willfulness." *Id.* at ___, 810 S.E.2d at 832 (citations omitted). Further, the defendant in *Krider* introduced evidence "that he attempted to contact [the probation officer] '[p]lenty of times[.]' " *Id.* at ___, 810 S.E.2d at 832 (second alteration in original).

Here, the evidence shows that Officer Baker attempted to make contact with Defendant more than ten times over a 50-day period. Officer Baker attempted both home and office visits, scheduled and unscheduled, at varying times on different days, all to no avail. On the two occasions she was able to contact him via phone, Defendant: (1) said he was unable to meet in the immediate term due to car troubles but somehow managed to be arrested in another county for driving with a revoked license before the date he told Officer Baker his car would be available; and (2) was instructed to remain at his house until Officer Baker arrived, but directly disregarded that instruction despite Officer Baker's directive and the urgings of Defendant's family. When Officer Baker took extra care to ensure that Defendant could attend his next office visit by arranging a ride for him with his girlfriend's mother, Defendant made himself unavailable by failing to be present at the house when it was time for his ride to leave for the appointment. Despite the probation officer's many efforts and the lack of any apparent excuse on his part, Defendant never met with Officer Baker. Finally, the violation reports filed by Officer Baker expressly alleged willful conduct

distinct from Defendant's mere failure to report, and the trial court expressly found, both orally and in writing, that Defendant had absconded within the meaning of subsection 15A-1343(b)(3a). In short, and unlike in *Williams* and *Krider*, the evidence in this case was sufficient to show that Defendant's actions amounted to "willfully avoiding supervision." N.C. Gen. Stat. § 15A-1343(b)(3a). We therefore reject Defendant's second argument.

III. CONCLUSION

For the foregoing reasons, we hold that the trial court did not err in revoking Defendant's probation under subsection 15A-1344(a) for absconding as set forth in subsection 15A-1343(b)(3a).

AFFIRMED.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).