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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-22

Filed: 6 August 2019

Davidson County, No. 13 CRS 57137

STATE OF NORTH CAROLINA

v.

SHANNON ALCON

Appeal by Defendant from Judgments entered 22 May 2018 by Judge Anna M. Wagoner in Davidson County Superior Court. Heard in the Court of Appeals 8 May 2019.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Kathryn H. Shields, for the State.*

*Meghan Adelle Jones for defendant-appellant.*

HAMPSON, Judge.

**Factual and Procedural Background**

Shannon Alcon (Defendant) appeals from the trial court's two separate "Judgment and Commitment upon Revocation of Probation" (Revocation Judgments) finding Defendant committed a new criminal offense in violation of her probation,

revoking her probation, and activating her suspended sentences. The Record before us tends to show the following:

On 10 February 2014, Defendant was indicted for Trafficking in Opium or Heroin by Transport, Trafficking in Opium or Heroin by Possession, Possession of a Controlled Substance with Intent to Sell or Deliver, and Maintaining a Vehicle to Keep a Controlled Substance. Pursuant to a plea agreement, Defendant pleaded guilty to Attempted Trafficking in Opium or Heroin by Possession and Possession of a Controlled Substance with Intent to Sell or Deliver. On 7 April 2016, the trial court sentenced Defendant for the Attempted-Trafficking conviction to a suspended term of 13 to 15 months' imprisonment and placed her on supervised probation for 24 months. For the Possession-of-a-Controlled-Substance-with-Intent-to-Sell-or-Deliver conviction, the trial court sentenced Defendant to a suspended term of 4 to 14 months' imprisonment and placed her on supervised probation for 24 months.

On 19 January 2018, Defendant's probation officer filed a Violation Report (First Violation Report) alleging Defendant had willfully violated:

1. Condition of Probation "The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" as directed by the Court or probation officer" in that OFFENDER HAS PAID \$362.80 ON PARTIAL PAYMENT SHE IS IN ARREARS \$737.20 AND BALANCE DUE IS \$1512.20
2. Condition of Probation "The defendant shall pay to the Clerk of Superior Court the monthly supervision fee as set by law" in that OFFENDER HAS PAID \$57.20 ON SUPERVISION FEES AND IS IN ARREARS \$782.80

3. General Statute 15A-1343(b)(1) “Commit no criminal offense in any jurisdiction” in that OFFENDER WAS CHARGED WITH SHOPLIFTING CONCEALMENT OF GOODS IN CASE 17 CR 055290 ON 08-29-2017 AND WAS CONVICTED ON 11-06-2017 THIS IS A VIOLATION OF [HER] CURRENT PROBATION.

On 26 January 2018, Defendant’s probation officer filed another Violation Report (Second Violation Report) alleging Defendant had willfully violated:

1. Condition of Probation “The defendant shall pay to the Clerk of Superior Court the “Total Amount Due” as directed by the Court or probation officer” in that OFFENDER HAS MADE NO PAYMENTS AND IS IN ARREARS \$572.50 ON PARTIAL PAYMENTS AND BALANC[E] DUE IS \$572.50

2. General Statute 15A-1343(b)(1) “Commit no criminal offense in any jurisdiction” in that OFFENDER WAS CHARGED WITH SHOPLIFTING CONCEALMENT OF GOODS IN CASE 17 CR 055290 ON 08-29-2017 AND WAS CONVICTED ON 11-06-2017 THIS IS A VIOLATION OF HER CURRENT PROBATION.

On 22 May 2018, the trial court held a probation-violation hearing. At this hearing, Defendant admitted to the existence of these violations; however, neither the State nor Defendant presented any evidence as to the felony or misdemeanor classification of Defendant’s Shoplifting-Concealment-of-Goods conviction for sentencing purposes. At the conclusion of the hearing, the trial court found that Defendant had violated the conditions of her probation, revoked her probation based on the Shoplifting-Concealment-of-Goods conviction, and activated Defendant’s suspended sentences.

Thereafter, Defendant entered a written Notice of Appeal outside the 14-day deadline.<sup>1</sup> On 18 January 2019, Defendant filed a Petition for Writ of Certiorari with this Court in order to preserve her right of appellate review, conceding that her Notice of Appeal was defective in that it was not timely filed. *See* N.C.R. App. P. 4(a)(2). In our discretion under N.C.R. App. P. 21(a)(1), we allow Defendant's Petition to review the trial court's Revocation Judgments.

### **Issue**

The sole issue on appeal is whether the trial court erred in revoking Defendant's probation where the Record does not show Defendant's new shoplifting conviction, which served as the basis for revocation, was for anything other than a Class 3 misdemeanor.

### **Analysis**

#### **I. Standard of Review**

A proceeding to revoke probation [is] often regarded as informal or summary, and the court is not bound by strict rules of evidence. An alleged violation by a defendant of a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion.

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<sup>1</sup> The file stamp on Defendant's Notice of Appeal is difficult to read, and both parties agree the Notice of Appeal's file stamp appears to say either 10, 16, or 18 June 2018. In any event, all three dates are outside of the 14-day period for filing written notice of appeal.

*State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (alteration in original) (citations and quotation marks omitted).

## II. Probation Revocation

Under Section 15A-1344(a) of our General Statutes, a trial court may not “revoke a defendant’s probation for a probation violation, unless that violation is committing a new crime or absconding, or unless the violation follows two prior periods of confinement in response to violations.” *State v. Williams*, 243 N.C. App. 198, 200, 776 S.E.2d 741, 743 (2015) (citation omitted). This Statute further provides “probation may not be revoked solely for conviction of a Class 3 misdemeanor.” N.C. Gen. Stat. § 15A-1344(d) (2017).

In this case, the trial court specifically revoked Defendant’s probation based on her Shoplifting-Concealment-of-Goods conviction. Although the Probation-Violation Reports do not indicate what statute Defendant’s conviction falls under, Defendant contends, and the State does not dispute, that Section 14-72.1(a) governs her Shoplifting-Concealment-of-Goods conviction. *See* N.C. Gen. Stat. § 14-72.1(a) (2017). Under this Statute, a first conviction under Subsection (a) is punishable as a Class 3 misdemeanor, and subsequent convictions under Subsection (a) are punishable as Class 1 or 2 misdemeanors. *See id.* § 14-72.1(e). If a defendant uses a lead-lined or aluminum-lined bag or similar device, a violation of Subsection (a) is punishable as a Class H felony. *See id.* § 14-72.1(d1).

Here, although Defendant conceded her new shoplifting conviction, nothing in the Record indicates the classification of this conviction, and it appears the trial court revoked Defendant's probation based solely on this conviction. Moreover, at the probation-revocation hearing, the State presented no evidence indicating that Defendant's Shoplifting-Concealment-of-Goods conviction was her second or subsequent conviction under Section 14-72.1(a). In fact, Defendant's prior-record-level worksheet, which was submitted with Defendant's original plea agreement, shows Defendant had no previous convictions at the time of her 7 April 2016 convictions. Further, the State presented no evidence showing Defendant used a lead-lined or aluminum-lined bag or similar device, which would have been punishable as a Class H felony. *See id.*

The State acknowledges the Record is silent as to the classification of Defendant's latest conviction but contends—based on the fact that the Record is silent—that Defendant cannot show prejudicial error. However, the State bears the initial burden of proving a probation violation that justifies revocation. *See State v. Seagraves*, 266 N.C. 112, 113, 145 S.E.2d 327, 329 (1965) (“[T]he burden of proof is upon the State to show that the defendant has violated one of the conditions of his probation.”). Because the State failed to present any evidence that Defendant's Shoplifting-Concealment-of-Goods conviction was a Class 2 misdemeanor or higher, no competent evidence supports the trial court's Revocation Judgments, as a

conviction of a Class 3 misdemeanor is not a proper basis for probation revocation under our Statutes. Therefore, the State failed to meet its burden, and the trial court was without statutory authority to revoke Defendant's probation. Thus, we conclude the trial court abused its discretion in revoking Defendant's probation without evidence of the classification of the offense. *Cf. Tennant*, 141 N.C. App. at 526, 540 S.E.2d at 808 ("The findings of the judge, *if supported by competent evidence*, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion." (emphasis added) (citation and quotation marks omitted)).

**Conclusion**

Accordingly, for the foregoing reasons, we reverse the trial court's Revocation Judgments revoking Defendant's probation. However, we remand for entry of appropriate judgments for Defendant's remaining, admitted probation violations consistent with N.C. Gen. Stat. § 15A-1344.

REVERSED AND REMANDED.

Judges STROUD and YOUNG concur.

Report per Rule 30(e).