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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1015

Filed: 15 October 2019

Alamance County, No. 16 CRS 51749

STATE OF NORTH CAROLINA

v.

MICHAEL ROBERT HYMAN

Appeal by defendant from judgment entered 22 March 2018 by Judge Andrew Taube Heath in Alamance County Superior Court. Heard in the Court of Appeals 27 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

ZACHARY, Judge.

Defendant Michael Robert Hyman appeals from a judgment revoking his probation and activating his suspended sentence. Defendant argues that the trial court erred by revoking his probation after its expiration without making the statutorily required finding of good cause. In light of the Supreme Court's recent

holding in *State v. Morgan*, No. 150A18, ___ N.C. ___, ___ S.E.2d ___ (filed Aug. 16, 2019), we agree.

Background

On 25 August 2016, Defendant pleaded guilty to two counts of attempted common law robbery committed on 9 April 2016. Per the plea arrangement:

The Defendant will plead guilty to the charges listed on the transcript. The Defendant shall be sentenced as a Class H prior record level IV and receive two consecutive judgments. In the first judgment the Defendant shall receive an active sentence in the mitigated range of 7 months minimum to 18 months maximum. This active sentence shall run concurrent with any sentence the Defendant is presently serving. In the second judgment the Defendant shall receive a suspended sentence in the presumptive range of 11 to 23 months. The terms of the suspended sentence shall be in the court[']s discretion.

The trial court entered judgment against Defendant in accordance with the plea arrangement, with twelve months of supervised probation to commence upon Defendant's release from incarceration. According to Defendant's supervising probation officer, Defendant reported for probation sometime around 12 March 2017.

On 26 April 2017, Defendant's probation officer completed a violation report alleging that Defendant had incurred new criminal charges for misdemeanor simple assault and felony larceny from the person. The report was file-stamped with the

Alamance County Clerk of Superior Court on 31 April 2017.¹ On 29 August 2017, Defendant's probation officer completed a second violation report alleging that on or about 7 August 2017, Defendant violated N.C. Gen. Stat. § 15A-1343(b)(1) by committing misdemeanor larceny. That report was filed with the clerk of superior court on 5 September 2017.

This matter came on for hearing before the Honorable Andrew Taube Heath on 22 March 2018 in Alamance County Superior Court. At the beginning of the hearing, the State announced its plan to proceed solely with the second allegation of the violation report filed on 31 April 2017, alleging that Defendant had committed felony larceny from the person.² Testimony at the hearing revealed that on 5 April 2017, Defendant approached two homeless men, Roger Profit and Terry Wall, who were asleep on a church porch. Defendant convinced Profit to pull out his wallet, then grabbed the wallet and ran away. Profit and Wall chased Defendant, but they could not catch him. On 26 April 2017, Defendant's probation officer issued an "Authority to Arrest" order for Defendant. Two days later, Defendant was arrested.

¹ We note that there are only thirty days in the month of April. It is not apparent from the record on appeal or the parties' briefs that the erroneous file stamp was acknowledged. Jurisdiction in a criminal case must be established beyond a reasonable doubt, *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 835 (1993), and the *absence* of a file stamp on a probation violation report is a jurisdictional flaw requiring the appellate court to arrest judgment and vacate the conviction, *State v. Moore*, 148 N.C. App. 568, 570-71, 559 S.E.2d 565, 566-67 (2002). However, the *erroneous* date on the clerk's file stamp is more akin to a clerical error and is not, based on the facts of this case, a jurisdictional flaw. See *State v. Kerrin*, 209 N.C. App. 72, 80, 703 S.E.2d 816, 821 (2011) (defining "clerical error" as "an error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination").

² The State later dismissed the first allegation listed on the report.

After finding that Defendant willfully violated the terms of his probation, the trial court revoked Defendant's probation and activated his suspended sentence. Defendant gave notice of appeal in open court.

Discussion

Defendant argues on appeal that the trial court erred in revoking his probation after it had expired without making a finding of good cause as required by N.C. Gen. Stat. § 15A-1344(f)(3). For the reasons explained below, we agree.

A. Standard of Review: Mootness

“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].” *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (internal quotation marks omitted). On appeal, we review the trial court's decision to revoke Defendant's probation under an abuse of discretion standard. *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014).

The fact that Defendant has served the sentence activated upon the revocation of his probation does not alter our analysis or the applicable standard of review. As this Court has previously acknowledged, a prior finding of willful violation of the conditions of probation may serve as an aggravating factor in a defendant's future sentencing. *See State v. Black*, 197 N.C. App. 373, 375-77, 677 S.E.2d 199, 201-02

(2009); N.C. Gen. Stat. § 15A-1340.16(d)(12a) (2017). In that Defendant could suffer potential adverse collateral consequences in the future, this appeal is not moot and we may reach the merits of his appeal.

B. Authority and Jurisdiction to Revoke Probation

A trial court may only revoke a defendant's probation "for a violation of a condition of probation under G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a), except as provided in G.S. 15A-1344(d2)." N.C. Gen. Stat. § 15A-1344(a). First, section 1343(b)(1) requires as a condition of probation that a probationer "[c]ommit no criminal offense in any jurisdiction." *Id.* § 15A-1343(b)(1). A trial court may also revoke supervised probation if the probationer "abscond[s] by willfully avoiding supervision or by willfully making [his] whereabouts unknown to the supervising probation officer." *Id.* § 15A-1343(b)(3a). Finally, section 15A-1344(d2) provides that when a probationer "under supervision for a felony conviction has violated a condition of probation *other than* G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a)," the trial court may impose up to ninety days of active confinement. *Id.* § 15A-1344(d2) (emphasis added). This is commonly referred to as a "quick dip." After imposing two periods of confinement under this provision, the trial court may then revoke the defendant's probation. *Id.*

Unless waived by the probationer, a trial court must "hold a hearing to determine whether to revoke . . . probation and must make findings to support the

decision and a summary record of the proceedings.” *Id.* § 15A-1345(e). The State must provide the probationer with “notice of the hearing and its purpose, including a statement of the violations alleged” at least twenty-four hours before the hearing, unless waived by the probationer. *Id.* Evidence must be disclosed to the probationer, and the probationer has the right to counsel, as well as the right to appear, to speak on his behalf, to present evidence, and to cross-examine witnesses. *Id.*

“[O]ther than as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant’s probation after the expiration of the probationary term.” *State v. Moore*, 240 N.C. App. 461, 463, 771 S.E.2d 766, 767 (2015). If a trial court revokes a defendant’s probation before the expiration of the probationary period, then section 15A-1344(f) does not apply. *State v. Knox*, 239 N.C. App. 430, 433, 768 S.E.2d 381, 383 (2015). “The burden of perfecting the trial court’s jurisdiction for a probation revocation hearing after [a] defendant’s period of probation has expired lies squarely with the State.” *State v. Harwood*, 243 N.C. App. 425, 428, 777 S.E.2d 116, 118 (2015).

The trial court’s 25 August 2016 judgment provided that Defendant’s twelve-month probationary period would begin “when the defendant [was] released from incarceration.” Neither party presented evidence at the violation hearing of the date on which Defendant’s prison term ended, nor is there any evidence of that fact in the record. However, Defendant’s probation officer testified that Defendant reported for

probation “around March 12th of 2017.” The trial court held Defendant’s probation hearing on 22 March 2018. Assuming that Defendant reported for supervision on the date of his release from prison, the 22 March 2018 revocation hearing occurred more than twelve months after his probationary period expired. Therefore, the trial court revoked Defendant’s probation after his probationary period had expired, and was required to comply with N.C. Gen. Stat. § 15A-1344(f).

C. Finding of Good Cause Shown and Stated

Defendant argues that the trial court failed to make any finding “for good cause shown and stated that the probation should be extended, modified, or revoked,” as required by N.C. Gen. Stat. § 15A-1344(f)(3). We agree.

N.C. Gen. Stat. § 15A-1344(f) provides, in pertinent part:

The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

- (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
- (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
- (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

Id. § 15A-1344(f)(1)-(3).

In the instant case, it is undisputed that the trial court satisfied the first two subsections. As a result, the question presented is whether the trial court satisfied the third subsection: a finding of “good cause shown and stated.”

Our Supreme Court recently addressed this very issue. In *State v. Morgan*, the Supreme Court overruled this Court’s prior holding “that an express finding of good cause shown and stated is not required by” the statute. *Morgan*, slip op. at 13. Writing for a unanimous Court, Justice Davis made clear that “such a finding *is statutorily required*” under N.C. Gen. Stat. § 15A-1344(f)(3). *Id.* slip op. at 1 (emphasis added). The Court explained that failing to make such a finding runs counter to the plain language of the statute, as well as to case law applying earlier iterations of the statute. *Id.* slip op. at 11 (citing *State v. Bryant*, 361 N.C. 100, 104-05, 637 S.E.2d 532, 536 (2006)).³ Justice Davis ultimately concluded that “when the General Assembly has inserted the phrase ‘the court finds’ in a statute setting out the exclusive circumstances under which a defendant’s probation may be revoked, the specific finding described in the statute must actually be made . . . and . . . cannot simply be inferred from the record.” *Id.* slip op. at 11-12.

In the present case, after hearing testimony, the trial court stated in open court that:

³ The *Bryant* Court analyzed the statute as it read in 2005.

Based on the evidence that's been presented, statements from both sides, I find and conclude that there is sufficient evidence to reasonably satisfy the Court that the alleged violation did occur. Those findings and conclusions are based on the testimony of Mr. Wall, Mr. Profit. I find their testimony to be credible in terms of the major events of the evening in question.

I find that . . . [D]efendant violated the condition of commit no criminal offense. The [D]efendant violated the condition willfully and without justification or excuse prior to the expiration of probationary period.

That this violation is in and of itself a sufficient basis to justify revocation of probation and activation of the suspended sentence.

Therefore, probation is revoked and the sentence is activated.

Absent from the trial court's findings, however, is the "good cause shown and stated" for the revocation, despite the hearing's lack of timeliness. Defendant was sentenced to one year of probation, and his probation officer testified that Defendant first reported to him "somewhere around" 12 March 2017. As previously stated, "a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term." *Moore*, 240 N.C. App. at 463, 771 S.E.2d at 767. Hence, Defendant's revocation hearing should have been conducted prior to 12 March 2018. In *State v. Bryant*, the Court noted that "[t]he record is devoid of any persuasive evidence as to why there was more than a two-month delay in conducting [the] defendant's probation revocation hearing." *Bryant*, 361 N.C. at 104, 637 S.E.2d at

535; *see also Morgan*, slip op. at 14 (discussing the importance of evidence of good cause in the *Bryant* Court’s analysis). While not as extreme as the two-month period in *Bryant*, the record before us indicates that the hearing was held on 22 March 2018, approximately ten days *after* Defendant’s probation had ended. Absent any showing of good cause for the revocation of Defendant’s probation, in spite of the untimely hearing, we hold that the trial court failed to comply with the statutory requirements of N.C. Gen. Stat. § 15A-1344(f)(3).

Conclusion

The trial court did not make the proper findings of fact to support revocation of Defendant’s probation and activation of his suspended sentence. As in *Morgan*, we are unable to determine whether the evidence was sufficient to support a “finding of ‘good cause shown and stated’ under subsection (f)(3).” *Morgan*, slip op. at 14. We therefore “remand to the trial court for a finding of whether good cause exists to revoke [D]efendant’s probation despite the expiration of his probationary period and—assuming good cause exists—to make a finding in conformity with [N.C. Gen. Stat.] § 15A-1344(f)(3).” *Id.*

REVERSED AND REMANDED.

Judges STROUD and INMAN concur.

Report per Rule 30(e).