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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-550

Filed: 7 January 2020

McDowell County, No. 16 CRS 727

STATE OF NORTH CAROLINA

v.

JEREMY KEITH WHITMIRE

Appeal by defendant from judgment entered 4 December 2018 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 4 December 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Heather Haney, for the State.*

*Jeffrey William Gillette for defendant.*

ARROWOOD, Judge.

Jeremy Whitmire (“defendant”) appeals from judgment revoking his probation and activating his suspended sentence. Defendant contends the trial court abused its discretion in revoking his probation. Defendant concedes his appeal is not properly before this Court because he failed to comply with N.C.R. App. P. 4, and has

thus filed a petition for *writ of certiorari* requesting our review. For the following reasons, we grant defendant's petition but affirm the judgment of the trial court.

I. Background

On 13 October 2017 defendant pleaded guilty to assault inflicting serious bodily injury and was sentenced to a minimum of 16 months to a maximum of 29 months in prison. The trial court suspended the sentence and placed defendant on supervised probation for 24 months.

On 23 October 2018 defendant's probation officer, Officer Lucas King, filed a probation violation report. In the report, Officer King alleged defendant willfully violated the terms of his probation by absconding supervision. Specifically, defendant had missed multiple scheduled office visits, failed to report to and communicate with his supervising officer, and failed to be at an approved residence or make his whereabouts known. Officer King further alleged in the report that defendant had tested positive for marijuana on 21 June 2018, was terminated from a Cognitive Behavioral Intervention ("CBI") program on 1 October 2018 due to numerous absences, and was in arrears on his probation supervision fees and court costs and fines. An arrest warrant was subsequently issued for defendant. Defendant called Officer King to turn himself in the next day, after he learned of the warrant.

The matter came on for hearing on 4 December 2018. At the hearing, Officer King testified defendant missed scheduled appointments with him on 19 June 2018

and 13 September 2018. Following defendant's failure to appear at the 13 September meeting, Officer King went to defendant's approved residence. Defendant's brother answered the door and informed Officer King that defendant was at work and had been staying at his girlfriend's house. Officer King did not ask for defendant's girlfriend's address. Instead, he left door tags at defendant's approved residence instructing defendant to report to his office. Officer King testified that he returned to that address five or six times, leaving door tags instructing defendant to report to his office on 24 September 2018, 12 October 2018, 15 October 2018, 17 October 2018, 19 October 2018, and 22 October 2018. However, defendant remained absent from the residence and failed to report to him.

Officer King further testified he also attempted to reach defendant by telephone, leaving voicemails and text messages for defendant at the cell phone number defendant had provided. During the period of 1 September 2018 to 23 October 2018, defendant did not return any of Officer King's phone calls and texted him only once. On cross-examination, Officer King admitted he was unable to remember exactly when or how many times he had called defendant. He also did not know if defendant received any of his voicemails or was aware of the door tags he left at defendant's approved residence.

The trial court found that defendant violated the terms of his probation as alleged in the probation violation report. Concluding that defendant willfully

absconded from supervision, the trial court revoked defendant's probation and activated his suspended sentence. On 14 December 2018, counsel for defendant filed a handwritten note which he had signed on behalf of defendant stating, "I would like to appeal my case to the court of appeals."

## II. Discussion

On appeal, defendant argues the trial court abused its discretion by revoking his probation because there was insufficient evidence to support a finding that he absconded from supervision under N.C. Gen. Stat. § 15A-1343(b)(3a).

As an initial matter, we address this Court's jurisdiction to consider the merits of defendant's appeal. Though defendant filed a written letter expressing his desire to appeal, he neglected to comply with the requirements of N.C.R. App. P. 4, which governs proper procedure for appealing a superior court judgment to this Court. Specifically, Rule 4(b) mandates that where an appeal is taken by filing a written notice, that notice must name the party taking the appeal, designate the judgment from which appeal is taken and the court to which appeal is taken, and be signed by counsel. N.C.R. App. P. 4(b) (2019). Defendant's letter, which simply stated, "I would like to appeal my case to the court of appeals," fails to satisfy Rule 4. There was also no indication the McDowell County District Attorney's Office was served with the notice of appeal in accordance with Rule 26(d). N.C.R. App. P. 26(d) (2019).

STATE V. WHITMIRE

*Opinion of the Court*

Because defendant failed to file a proper notice of appeal in compliance with Rule 4, this Court is deprived of jurisdiction and must dismiss defendant's appeal. *State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011). However, defendant has also filed a petition for *writ of certiorari* requesting appellate review. In our discretion, we grant defendant's petition for *writ of certiorari* for the purpose of reviewing the judgment from the trial court. N.C.R. App. P. 21(a)(1)(2019) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]").

We now address the merits of this appeal. N.C. Gen. Stat. § 15A-1343(b)(3a) mandates that, as part of the regular conditions of probation, a defendant must "[n]ot abscond by willfully avoiding supervision or by willfully making [his or her] whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." N.C. Gen. Stat. § 15A-1343(b)(3a) (2017).

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). “Abuse of discretion occurs when [the trial court’s] ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (quoting *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009)) (quotation marks omitted). However, “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. 132, 134, 782 S.E.2d 549, 551-52 (2016) (citation and quotation marks omitted).

A trial court may only revoke probation and activate a suspended sentence where the defendant: (1) commits a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds “by willfully avoiding supervision or by willfully making the defendant’s whereabouts unknown to the supervising probation officer,” in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates a condition of probation after serving two prior periods of confinement in response to violations under N.C. Gen. Stat. § 15A-1344(d2). N.C. Gen. Stat. § 15A-1344(a) (2017). The remedy for all other violations of conditions of probation is modification of the terms and conditions of probation or imposition of a ninety-day period of confinement. *Id.*

In the present case, the violation report indicated that defendant had not previously served any periods of confinement under N.C. Gen. Stat. § 15A-1344(d2),

or committed a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1). The report did, however, allege defendant had absconded from supervision. Accordingly, the trial court could only revoke defendant's probation for a violation of N.C. Gen. Stat. § 15A-1343(b)(3a). We therefore review for whether there was sufficient evidence to support the trial court's finding that defendant absconded in violation of N.C. Gen. Stat. § 15A-1343(b)(3a).

The Justice Reinvestment Act of 2011 ("JRA") was enacted as "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, 143, 783 S.E.2d 21, 24 (2016) (citation and quotation marks omitted). In keeping with that purpose, the JRA has defined "abscond" to mean "willfully avoiding supervision or . . . willfully making the defendant's whereabouts unknown to the supervising probation officer." N.C. Gen. Stat. § 15A-1343(b)(3a). Accordingly, this Court's jurisprudence, recognizing the purpose of the JRA, has placed a heightened burden on the State to establish not only that a probation officer was unable to locate or contact a defendant placed on supervised probation, but that such inability was due to the willful efforts of the defendant. *See, e.g., State v. Melton*, \_\_ N.C. App. \_\_, 811 S.E.2d 678 (2018); *State v. Krider*, \_\_ N.C. App. \_\_, 810 S.E.2d 828 (2018).

STATE V. WHITMIRE

*Opinion of the Court*

In *Melton*, we held the defendant did not abscond within the meaning of N.C. Gen. Stat. § 15A-1343(b)(3a) even though she was not present at her approved residence and failed to report to her probation officer, because there was evidence the defendant was unaware of the officer's attempts to contact her. \_\_ N.C. App. at \_\_, 811 S.E.2d at 682. There, the probation officer testified she called defendant and left messages with defendant's parents to pass along to defendant, but could not recall precisely when she made attempts to contact defendant and did not have a written record of the contacts with her at the hearing. *Id.* at \_\_, 811 S.E.2d at 682. The defendant testified her cell phone was missing, her parents told her the officer had not visited or called, and she did not think to contact the officer because they had met at the end of the previous month. *Id.* at \_\_, 811 S.E.2d at 682. Under these facts, we held "the State failed to present competent evidence that defendant's failure to contact [her probation officer] from 2 November to 4 November 2016 was willful." *Id.* at \_\_, 811 S.E.2d at 682.

In *Krider*, we again found the defendant had not absconded. Noting that the State presented no evidence the defendant was even aware of his probation officer's unannounced visit until after his arrest, we held there was no evidence the defendant was *willfully* avoiding supervision. \_\_ N.C. App. at \_\_, 810 S.E.2d at 832. In reaching our holding, we also considered the defendant's uncontradicted testimony that he had attempted to contact his probation officer multiple times, to no avail. *Id.* at \_\_, 810



S.E.2d at 832. *See also State v. Williams*, 243 N.C. App. 198, 199, 776 S.E.2d 741, 742 (2015) (holding the defendant did not abscond where he failed to show up for scheduled office visits but kept in regular phone contact with his probation officer). Thus, the line of cases in which we have found the defendant did not abscond involved circumstances in which there was insufficient evidence the defendant was aware of the probation officer's attempts to contact them, or the defendant failed to report to office visits but nevertheless maintained contact via phone or otherwise attempted to contact the probation officer.

In contrast, the cases in which we held the defendant did abscond involved defendants who were aware of their probation officers' attempts to contact them, and nonetheless failed to contact the officers. For instance, in *State v. Trent* the defendant was not present at his approved residence when his probation officer made an unscheduled visit, and the defendant's wife said she did not know where he was. \_\_\_ N.C. App. \_\_\_, \_\_\_, 803 S.E.2d 224, 226 (2017). Following a second unscheduled visit less than two weeks later, the probation officer filed a violation report upon finding the defendant was again absent. *Id.* at \_\_\_, 803 S.E.2d at 231. We held that the defendant absconded because he admitted that even when he became aware of his probation officer's attempts to contact him, he still did not contact the officer to inform him of his whereabouts. *Id.* at \_\_\_, 803 S.E.2d at 232. We reached a similar conclusion in *State v. Johnson*, holding that the defendant was an absconder where, upon

realizing he was wanted for violating certain terms of his probation, he did not turn himself in. 246 N.C. App. at 138, 782 S.E.2d at 554. In addition, the defendant had failed to keep in contact with his probation officer and notify him of his whereabouts. *Id.* at 137-38, 782 S.E.2d at 553.

Though defendant contends his case has many similarities to *Melton* and *Krider*, his case is distinguishable for several reasons and is more akin to the line of cases in which we found the defendant did abscond. Here, defendant left his approved residence, missed numerous office visits with his probation officer, and failed to keep his probation officer informed of his whereabouts. Although there is no direct evidence defendant was aware of Officer King's efforts to contact him, the cases in which we held the defendant did not abscond did not turn on this fact alone. In *Melton*, we found it notable that the defendant did not receive her probation officer's calls because her phone was missing. \_\_ N.C. App. at \_\_, 811 S.E.2d at 682. In addition, her parents told her the officer had not called or visited. *Id.* at \_\_, 811 S.E.2d at 682. Thus, there was evidence she was unaware of the officer's attempts to contact her. Furthermore, unlike defendant in this case, the defendant in *Melton* did not think to contact her probation officer during the alleged period of abscondment because they had met only one week prior. *Id.* at \_\_, 811 S.E.2d at 682.

In contrast, there is circumstantial evidence in this case from which the trial court could reasonably find that defendant was aware his probation officer was

looking for him. Officer King made several calls and texts to the phone number from which defendant texted the officer at least once, and from which he called the officer as soon as the warrant was issued. The fact that defendant called Officer King from the same number Officer King called and left voicemails on indicates that he was likely aware Officer King had attempted to contact him. Yet, defendant did not return any of Officer King's calls. Moreover, unlike the defendant in *Krider*, defendant did not attempt to visit or have any other contact with his probation officer. We therefore are not persuaded that defendant did not willfully abscond from supervision. Accordingly, we hold the trial court did not abuse its discretion in revoking defendant's probation and activating his suspended sentence.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court.

AFFIRMED.

Judges STROUD and BROOK concur.

Report per Rule 30(e).