

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-517

Filed: 7 January 2020

Wake County, No. 17CRS002362

STATE OF NORTH CAROLINA

v.

ANDREW McCORD, Defendant.

Appeal by Defendant from judgment entered 25 October 2018 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 4 December 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery,
for the State.*

Kimberly P. Hoppin for the Defendant.

BROOK, Judge.

Andrew McCord (“Defendant”) appeals from judgment revoking probation and activating his sentence of five to fifteen months upon the finding of the Honorable Rebecca W. Holt that he was in willful violation of his probation. We hold that the lower court did not abuse its discretion and affirm, but we remand for the sole purpose of correcting clerical errors in the judgment.

I. Background

Defendant pleaded guilty in Johnston County Superior Court to felony possession of a schedule II controlled substance on 17 September 2015 before the Honorable Jackie Lee. The lower court continued judgment until 1 October 2015. Defendant was sentenced to a minimum of five and a maximum of fifteen months in prison, and the lower court suspended the sentence, placing Defendant on supervised probation for a period of 24 months. The lower court ordered Defendant to pay \$285 in court costs to the Clerk of Superior Court pursuant to a schedule determined by the probation officer. As a general condition of probation under N.C. Gen. Stat. § 15A-1343(b), Defendant was required not to commit any criminal offense in any jurisdiction. Defendant's case was transferred to Wake County on 5 December 2016, and as a condition of probation, Defendant was ordered to enroll in and complete an in-patient treatment program at Healing Transitions¹ in Wake County.

Defendant was charged on 19 March 2017 with driving while impaired ("DWI") in Wake County. The State alleged that Defendant violated the terms of his probation by incurring the new DWI charge, by being in arrears \$205 in court indebtedness, and by leaving Healing Transitions without being successfully discharged. Defendant denied the violations, and a hearing was held before Judge Holt on 25 October 2018.

¹ Various witnesses and court records refer to the treatment facility as both Healing Transitions and The Healing Place.

STATE V. MCCORD

Opinion of the Court

The probation officer assigned to monitor Defendant on probation, Officer Nicholas Smilek, testified that Defendant informed him he had been in treatment at Healing Transitions but left the facility and moved to a different residential treatment facility. Officer Smilek testified that Defendant informed him that he left because he was not able to work while he was in treatment at Healing Transitions, and he needed to be able to work to provide for his family.

The State presented further evidence tending to show that on 19 March 2017, Seth Paul Allen was driving on Interstate 40 in Raleigh and saw a car on the side of the road, “slightly into the right lane, parked sort of sideways, backed up against the guardrail[.]” He noticed that the engine bay was on fire, and that someone was in the car in the driver’s seat, so he went over to speak with the driver, later identified as Defendant. He testified Defendant “seemed kind of out of it. [His] [s]peech was slurred. He had a big old bruise on the right side of his head that was bleeding.” Mr. Allen testified that he reached into the car, turned the car off, removed the keys, and told Defendant to get out of the car, although Defendant “was not super cooperative at first.” He testified that Defendant “told me to give him his keys back and he was going to drive home.” Mr. Allen refused, and Defendant told him again to give him the keys. Mr. Allen dropped the keys on the ground and told Defendant not to get back into the car. Mr. Allen testified, “it was at that point that he left and I went to

my car to get the fire extinguisher and attempted to put out the fire with no success. And then I was already on the phone with emergency services at that point.”

Officer Todd Gremillion with the Raleigh Police Department testified that he responded to a dispatch call reporting a car accident on Interstate 40 in Wake County. By the time Officer Gremillion arrived at the scene of the accident, Defendant had left the car on foot. Officer Gremillion spoke with Mr. Allen who told him that he did not see the accident happen, but he noticed the car was stopped facing the wrong direction on the side of the road and was on fire, so he stopped to help Defendant, who was sitting in the driver’s side of the car and trying to drive it. Other officers eventually found Defendant walking down the side of Interstate 40 and brought him back to the scene.

Defendant had sustained injuries in the accident, and emergency medical personnel began assisting him and took him to the hospital for treatment. Officer Gremillion testified that Defendant “seemed to be somewhat incoherent[.]” When Officer Gremillion arrived at the hospital, Defendant was unconscious. Officer Gremillion sought a search warrant to seize Defendant’s blood “to check for impairment.” Defendant’s blood was drawn pursuant to the search warrant and tested for blood alcohol concentration (“BAC”). The State also presented the testimony of Dr. Richard Wagoner, Jr., a forensic toxicologist. Dr. Wagoner, Jr.’s,

STATE V. MCCORD

Opinion of the Court

testing revealed that Defendant's BAC was 0.16 grams of alcohol per 100 milliliters of whole blood.

At the close of the State's evidence, Defendant moved to dismiss the alleged violations for insufficient evidence. The lower court granted the motion with regard to the arrearages because the State did not present sufficient evidence that Defendant's failure to pay was willful. The court denied the motion with regard to the alleged violations of committing a new criminal offense and leaving Healing Transitions.

Defendant's wife, Stephanie McCord, testified for Defendant. Mrs. McCord testified that she and Defendant went out to dinner on the night of 18 March 2017, and that Defendant "had a couple drinks" at the restaurant. She testified that she in fact was driving the car, and that the car "came out from underneath me and it slid and hit the median . . . the car got out of control." She testified that she and Defendant "got in an argument because I wrecked the car and I didn't want to hear it anymore, so I walked off[,] leaving her husband in the wrecked and burning car. She testified a friend picked her up down the road about 15 minutes later, and she eventually learned Defendant had been taken to the hospital and went to meet him there.

The lower court found Defendant to be in willful violation of the conditions of his probation, finding he committed a new criminal offense and willfully left Healing

Transitions. Based on the court's finding, the State moved to revoke Defendant's probation. The court ruled as follows:

THE COURT: All right. Andrew McCord, having come before the court in 17 CRS 2362, the court having found that the defendant is in willful violation of his probation as alleged in paragraphs 1 and 3 related to the committing a new offense being the DWI as well as—I am sorry, 2 and 3—as well as failing to abide by the modification order to complete Healing Transitions. The court, as I have indicated, does find that he is in willful violation, does revoke his probation and orders his sentence activated.

Defendant noticed appeal on 6 November 2018.

II. Analysis

Defendant argues that the lower court erred in determining: (1) that Defendant willfully violated the condition of probation that he not commit a new criminal offense because there was insufficient evidence that Defendant committed the offense of DWI; (2) that the lower court erred in finding that Defendant willfully violated the condition of his probation that he enroll in and complete in-patient treatment at Healing Transitions; (3) that the lower court erred in marking on the judgment the box indicating that each violation “is, in and of itself, a sufficient basis” to revoke probation; (4) that the lower court erred in marking the box on the judgment indicating that Defendant waived a violation hearing and admitted the alleged violations; and (5) that the lower court erred by listing all three alleged violations on the judgment form where the court found that Defendant violated only two of the three.

These alleged errors require us to assess first whether there was a valid basis to revoke Defendant's probation. We then address clerical errors in the judgment. Ultimately, we affirm the lower court's revocation of Defendant's probation because there was sufficient evidence to satisfy the lower court that Defendant committed the offense of DWI, and we remand for correction of clerical errors in the judgment.

A. Standard of Review

We review an order revoking probation for an abuse of discretion. *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960). "Abuse of discretion results where the 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. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). The question whether a criminal defendant has violated the conditions of probation is a question of fact for the judge. *State v. Hewett*, 270 N.C. 348, 352, 154 S.E.2d 476, 479 (1967). Such a violation need not be proved beyond a reasonable doubt, *id.* at 353, 154 S.E.2d at 482, and the judge need only be reasonably satisfied that "[t]here is competent evidence . . . that probationer has violated a valid condition upon which his sentences were suspended[.]" *id.* at 356, 154 S.E.2d at 482. If a judge makes erroneous findings, they "may be disregarded as harmless if the trial court's decision to revoke probation is supported by at least one properly-found [sic] violation." *State v. Hancock*, 248 N.C. App. 744, 747, 789 S.E.2d 522, 524 (2016).

We review errors in a judgment to determine whether they are legal or merely clerical in nature. *State v. Linemann*, 135 N.C. App. 734, 737-8, 522 S.E.2d 781, 784 (1999). Where we determine a lower court has made a clerical error, this Court remands in accord with the lower court's "power and duty to make its records speak the truth." *Id.* at 738, 522 S.E.2d at 784. The correction on remand "does not constitute a new conviction or judgment." *Id.*

B. Grounds to Revoke Probation

To find that a probationer has committed a new criminal offense, a judge may not rely on "the mere fact that he was charged[.]" *Hancock*, 258 N.C. App. at 749, 789 S.E.2d at 526. A judge may rely on "[a] conviction by jury trial or guilty plea" to determine that a defendant committed a new criminal offense. *Id.* (citation omitted). The State may also prove the violation by submitting "evidence from which the trial court can independently find that the defendant committed a new offense." *Id.* at 749-50, 789 S.E.2d at 526. "[T]he credibility of the witnesses and the evaluation and weight of their testimony are for the judge." *Hewett*, 270 N.C. at 356, 154 S.E.2d at 482.

Defendant contends that there was insufficient evidence to find that he committed the new criminal offense of DWI because, while Defendant's BAC was 0.16 grams per 100 milliliters, Defendant contends that "[t]he timeline established by the evidence was inadequate to determine that [Defendant]'s blood alcohol

[concentration] of .16 was the result of alcohol consumed before or during the operation of the vehicle.” We disagree.

North Carolina General Statutes § 20-138.1 provides in pertinent part:

(a) A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

(1) While under the influence of an impairing substance; or

(2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person’s alcohol concentration[.]

N.C. Gen. Stat. § 20-138.1 (2017). The evidence presented at the probation revocation hearing showed that Mr. Allen discovered Defendant in the driver’s seat of a crashed car that was on fire, attempting to drive it, with the keys in the ignition and the car still running. It showed that when Mr. Allen turned the car off and removed the keys from the ignition, Defendant told Mr. Allen to “give him his keys back and he was going to drive home.” Police officers discovered Defendant wandering the highway near the accident. Defendant was taken to the hospital for his injuries, and his blood was drawn pursuant to a search warrant at the hospital, revealing a BAC of 0.16.

This evidence is sufficient to support an independent finding by the judge that Defendant had committed the offense of DWI. *See State v. Monroe*, 83 N.C. App. 143, 145-46, 349 S.E.2d 315, 317 (1986). Here, the judge evaluated the evidence and

weighed the credibility of the witnesses, as she was obliged to do. *See Hewett*, 270 N.C. at 356, 154 S.E.2d at 482. She was permitted to assess the credibility of and disregard the testimony of Defendant's wife, Mrs. McCord, that she in fact was the driver of the vehicle. She was likewise permitted to believe the testimony of Mr. Allen, that Defendant was attempting to drive the vehicle. The State presented ample evidence that Defendant had committed the offense of DWI. Therefore, the court was permitted to revoke Defendant's probation based on its finding that Defendant committed a new criminal offense.²

C. Errors in Judgment

Defendant alleges several errors in the written judgment. The written judgment reflects that Defendant waived a violation hearing and admitted the violations. It also reflects that the court found Defendant violated the conditions laid out in paragraphs one through three of the violation report. The judgment also indicates, by an "X" in a box, that "Each violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence."

Assessing how to resolve errors in a written judgment depends on a determination of whether the errors are clerical or legal in nature. *State v. Lawing*, 12 N.C. App. 21, 23, 182 S.E.2d 10, 11 (1971). A clerical error is defined as follows:

² Because we hold that the lower court had valid grounds to revoke Defendant's probation, we do not address whether there was sufficient evidence to find Defendant violated the condition of his probation that he enroll in and complete treatment at Healing Transitions.

“[a]n error resulting from a minor mistake or inadvertence and not from judicial reasoning or determination; esp., a drafter’s or typist’s technical error that can be rectified without serious doubt about the correct reading.” ERROR, Black’s Law Dictionary (11th ed. 2019).

We review each purported error in turn.

i. Admission of Violation

In a criminal case, when a judgment does not reflect what was announced in open court, such an error is clerical. *Lawing*, 12 N.C. App. at 23, 182 S.E.2d at 11. Here, the transcript makes plain that Defendant did not waive a violation hearing. He denied the violations at the beginning of the hearing, and a hearing was held on his violations. This error is clerical. It is therefore appropriate to remand for correction of the clerical error found on the judgment. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (remanding for trial court to correct error in judgment where record made plain that trial court “simply misread the sentencing form and checked the wrong box”).

ii. Reference to Violation Report

Similarly, the transcript makes plain that the court dismissed the allegation that Defendant was in willful violation of the condition of probation that he pay probation fees and costs. It also makes plain that the court found Defendant violated the conditions of his probation that he not commit a new criminal offense and that he

had left Healing Transitions. The lower court stated that she

found that the defendant is in willful violation of his probation as alleged in paragraphs 1 [being in arrears \$205] and 3 [leaving Healing Transitions] related to the committing a new offense being the DWI as well as—I’m sorry, 2 [committing DWI] and 3 [leaving Healing Transitions]—as well as failing to abide by the modification order to complete Healing Transitions.

The indication on the judgment that Defendant committed the violations alleged in paragraphs “1-3” is a clerical error. On remand, the court should correct the error to reflect the conditions the court found Defendant to have violated. *See id.*

iii. Each Violation as Sufficient to Revoke

Defendant argues that the trial court erred in marking the corresponding box to the statement “Each violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence” because only the commission of a new criminal offense is sufficient to form the basis of a probation revocation and the activation of a suspended sentence. N.C. Gen. Stat. §§ 15A-1344(a), 15A-1343(b)(1) (2017). The violation of any other condition cannot be a sufficient basis, in and of itself, to revoke a defendant’s probation. §§ 15A-1344(a), 15A-1343(b)(1), (3a) (2017). Like the errors above, this error is a clerical error that requires correction on remand.

The judgment in its current form states that “each” of the violations listed in “Paragraph(s) 1-3 of the Violation Report . . . is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence.” The

checkmark in the corresponding box here refers to alleged violations put forward in “Paragraph(s) 1-3[.]” But, as noted above, the reference to a violation in Paragraph 1 was a clerical error. Because the court unequivocally stated on the record that it did not find Defendant willfully violated the condition of his probation that he pay certain fees and costs, this checkmark is also a clerical error.

III. Conclusion

The evidence was sufficient to find Defendant committed the new criminal offense of DWI, and that finding was sufficient to find that he violated a condition of his probation and therefore sufficient to revoke Defendant’s probation. The inaccurate statements and checkmarks on the judgment form, that is, the reference to paragraphs one through three of the violation report, the indication that Defendant waived a violation hearing, and the indication that each of the three violations was sufficient to revoke Defendant’s probation, are clerical errors that must be corrected on remand.

AFFIRMED; REMANDED FOR CORRECTION OF JUDGMENT.

Judges STROUD and ARROWOOD concur.

Report per Rule 30(e).