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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-846

Filed: 16 June 2020

Buncombe County, Nos. 14 CRS081108-10, 090034

STATE OF NORTH CAROLINA

v.

JAQUAN STEPHON GETER

Appeal by defendant from judgments entered on or about 4 April 2019 by Judge R. Gregory Horne in Superior Court, Buncombe County. Heard in the Court of Appeals 21 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Liliana R. Lopez, for the State.

Jason Christopher Yoder for defendant-appellant.

STROUD, Judge.

Defendant appeals the revocation of his probation. Because several violations of probation were alleged but revocation of probation is not authorized for some of the violations, we must reverse and remand for entry of a new order identifying the violations upon which probation was revoked. In addition, the probation violation hearing occurred after the expiration of defendant's probation, but the trial court

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failed to make a determination of good cause for revocation. We therefore reverse and remand for entry of a new order.

I. Background

In August of 2016, the trial court entered judgments against defendant on his guilty plea to possession of a stolen motor vehicle, eluding arrest with a motor vehicle, possession of a firearm by a felon, and resisting a public officer. Defendant received a suspended sentence and was placed on 18 months of supervised probation and ordered to complete several hours of community service; pay various monetary obligations including costs, a fine, restitution, and fees; and obtain his GED and anger management treatment.

In February of 2018, Probation Officer Jenni Holste filed violation reports alleging defendant had violated his probation in several different ways.¹ Officer Holste alleged defendant had failed to complete his community service, pay his monetary obligations, obtain his GED, and complete an anger management program. Most relevant to this appeal, Officer Holste also alleged defendant had committed criminal offenses based upon charges of possession of marijuana and drug

¹ Several other probation violation reports and orders were filed but we note only the reports and judgments which were the basis of the revocation of defendant's probation and are therefore relevant to the issue on appeal. The reports and orders not discussed in this opinion are not part of this appeal nor were they any part of the stated reason the trial court revoked probation in the order on appeal.

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paraphernalia,² maintaining a vehicle or dwelling place for keeping or selling controlled substances, and possession of a firearm by a felon. In April of 2019, the trial court entered judgments and revoked defendant's probation sentencing him to a minimum of 8 months and a maximum of 19 months imprisonment for the possession of a stolen motor vehicle and eluding arrest with a motor vehicle convictions and a minimum of 14 months and a maximum of 26 months for the possession of a firearm by a felon and resisting a public officer convictions. The trial court found defendant had violated *all* of the alleged probation conditions. Defendant appeals.

II. Probation Revocation

Defendant makes several arguments of error by the trial court in revoking his probation.

A. Notice

Defendant first contends that “the trial court erred and abused its discretion in revoking . . . [defendant’s] probation because the trial court lacked jurisdiction to revoke probation for the commission of one criminal offense and two more criminal offenses were Class 3 misdemeanors.” (Original in all caps.) “This Court reviews *de novo* the issue of whether a trial court had subject matter jurisdiction to revoke a defendant’s probation. A court’s jurisdiction to review a probationer’s compliance

² The February 2018 violation reports noted the possession of paraphernalia charge in conjunction with the possession of marijuana charge; although the report did not identify the specific type of paraphernalia, in context, the report appears to assert that the paraphernalia was marijuana paraphernalia.

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with the terms of his probation is limited by statute.” *State v. Moore*, 240 N.C. App. 461, 462, 771 S.E.2d 766, 767 (2015) (citations and quotation marks omitted).

Both defendant and the State have cited in their briefs many cases decided prior to the adoption of the Justice Reinvestment Act (“JRA”) in 2011, but because the JRA made significant changes to the law regarding probation revocations, we will rely on cases based upon the JRA as it stood at the time of defendant’s probation revocation. *See generally State v. Jones*, 225 N.C. App. 181, 183, 736 S.E.2d 634, 637 (2013) (“The Justice Reinvestment Act of 2011 (“the Justice Reinvestment Act”), amended and modified certain statutory provisions governing probation revocation.” (citation omitted)).

As correctly noted by defendant,

for violations occurring on or after 1 December 2011, the trial court may only revoke a defendant’s probation 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 any condition after previously serving two periods of confinement in response to violations (“CRV”) pursuant to N.C. Gen. Stat. § 15A–1344(d2). N.C. Gen. Stat. § 15A–1344(a). For all other violations, the trial court may either modify the conditions of the defendant’s probation or impose a 90–day period of CRV.

State v. Krider, 258 N.C. App. 111, 113-14, 810 S.E.2d 828, 830 (quotation marks omitted), *modified and aff’d per curiam*, 371 N.C. 466, 818 S.E.2d 102 (2018).

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There are no allegations or findings that defendant absconded or “serv[ed] two periods of confinement in response to violations[:]”³ *id.*, therefore, we turn to the alleged criminal offenses – possessing marijuana and drug paraphernalia, maintaining a vehicle or dwelling place for keeping or selling controlled substances, and possession of a firearm by a felon. “While incurring criminal charges is not a violation of a probation condition, criminal charges are alleged criminal offenses. And committing a criminal offense is a violation of a probation condition. A statement of pending criminal charges, then, is a statement of alleged violations.” *State v. Moore*, 370 N.C. 338, 345, 807 S.E.2d 550, 555 (2017).

While the trial court order notes it found *all* of the violations alleged in the two reports, in ruling on the basis for revocation, as to the criminal charges the trial court stated,

The Court does, however, find that Mr. Geter was under the regular condition of probation, that he commit no criminal offense in any jurisdiction. That being G.S.15A-1343(b)(1). That on the particular date in question, that being January the 18th of 2017, that the Court is reasonably satisfied that Mr. Geter was in possession of illicit controlled substances, as well as drug paraphernalia, specifically, the scales, two sets of scales. That he was in possession of a firearm and ammunition, as

³ Defendant had served prior periods of confinement due to other probation violations, but none of the orders in our record required any “confinement in response to violation (CRV) – G.S. 15A-1344(d2).” (Original in all caps.) There is an entire section on an “ORDER ON VIOLATION OF PROBATION OR ON MOTION TO MODIFY[.]” form AOC-CR-609 Rev. 12/15, for CRV determinations, and on defendant’s orders in our record that section is completely blank. In other words, the trial court did not check any boxes in order to authorize CRV on any of the orders before us. Further, neither the February 2018 reports nor the order on appeal allege or find defendant “serv[ed] two periods of confinement in response to violations (‘CRV’) pursuant to N.C. Gen. Stat. § 15A–1344(d2).” *Id.*

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well as he had in the relevant past sold controlled substances illegally as shown by the marked money that was in his possession.

So the Court is reasonably satisfied that he has committed multiple criminal offenses while on probation. The Court finds that the violations were willful, without lawful justification or excuse, occurred while the probation was active.

Defendant correctly notes that “probation may not be revoked solely for conviction of a Class 3 misdemeanor[.]” N.C. Gen. Stat. § 15A-1344(d) (2017), and possession of marijuana at half an ounce and marijuana drug paraphernalia is a Class 3 misdemeanor.⁴ *See generally* N.C. Gen. Stat. §§ 90-94; -95(d)(4); -113.22A(b) (2017).⁵ This leads us to defendant’s first argument that he was not given notice as to the trial court’s determination that he “sold controlled substances illegally[.]”

“The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged.” N.C. Gen. Stat. § 15A-1345(d) (2017). North Carolina General Statute § 90-108(a)(7) provides that “[it] shall be unlawful for any person”

[t]o knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this

⁴ The February 2018 violation reports allege possession of marijuana “up to ½ oz[.]”

⁵ North Carolina General Statutes §§ 90-95 and 90-113.22A have since been amended, but the amendments do not affect the portion of the statute relevant to this appeal. *See generally* N.C. Gen. Stat. §§ 90-95, -113.22A (2019).

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Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article[.]

N.C. Gen. Stat. § 90-108 (2017).⁶ At the hearing, the State presented evidence in the form of testimony from law enforcement that defendant *sold* drugs, and this is what the trial court found. But the violation report states only that defendant was charged with “MAINTAIN VEH/DWELL/PLACE CS” without mentioning selling.

A violation of North Carolina General Statute § 90-108(a)(7) is generally a Class 1 misdemeanor, *see* N.C. Gen. Stat. § 90-108(b), and thus is subject to probation revocation. *See generally* N.C. Gen. Stat. § 15A-1344. A similar issue was addressed by our Supreme Court in *Moore* wherein the Court explained that

the purpose of the notice mandated by N.C.G.S. § 15A-1345(e) is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act. A statement of a defendant’s alleged actions that constitute the alleged violation will give that 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.

Moore, 370 at 342, 807 S.E.2d at 553 (citation, quotation marks, and brackets omitted). The Supreme Court went on to explain,

Turning to the specifics of this case, the State sought

⁶ This statute has also been amended but the amendment does not affect our statements of law which are still in effect today. *See generally* N.C. Gen. Stat. § 90-108 (2019).

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to prove that defendant had violated the condition that he commit no criminal offense. As we have seen, subsection 15A-1345(e) required the State to give defendant notice of his probation revocation hearing that included a statement of the violations alleged. This means that *the notice needed to contain a statement of the actions* defendant allegedly took that constituted a violation of a condition of probation—that is, a statement of what defendant allegedly did that violated a probation condition. Here the alleged violation was the act of committing a criminal offense. Defendant therefore needed to *receive a statement of the criminal offense or offenses that he allegedly committed*.

Id. at 344, 807 S.E.2d at 554–55 (2017) (emphasis added) (quotation marks and brackets omitted). In *Moore*, the violation allegation was that

[t]he defendant has the following pending charges in Orange County. 15CR 051315 No Operators License 6/8/15, 15CR 51309 Flee/Elude Arrest w/MV 6/8/15. 13CR 709525 No Operators License 6/15/15, 14CR 052225 Possess Drug Paraphernalia 6/16/15, 14CR 052224 Resisting Public Officer 6/16/15, 14CR706236 No Motorcycle Endorsement 6/29/15, 14CR 706235 Cover Reg Sticker/Plate 6/29/15, and 14CR 706234 Reg Card Address Change Violation.

Id. at 339, 807 S.E.2d at 551. Thus, in *Moore*, reference to the case number and a brief description of the crime was sufficient to provide notice without further description of defendant’s actions or even the statute number upon which the crime was based. *See generally id.*, 370 N.C. 338, 807 S.E.2d 550.

Here, the violation report alleged defendant’s violation as follows:

General Statute 15A-1343(b)(1) “Commit no criminal offense in any jurisdiction” in that THE DEFNDANT HAS BEEN CHARGED WITH THE FOLLOWING FELONIES:

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17CRS084323 MAINTAIN VEH/DWELL/PLACE CS[.]

Again, the relevant statute would be North Carolina General Statute § 90-108(a)(7) which provides that “[it] shall be unlawful for any person” “[t]o knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article[.]” N.C. Gen. Stat. § 90-108. Within the alleged felony of “MAINTAIN VEH/DWELL/PLACE CS” is the element of “keeping or selling;” accordingly, we conclude defendant was provided sufficient notice.

In addition, as the State has noted, defendant failed to address the charge of the possession of a firearm by a felon violation which would also be a valid basis for revocation. *See generally State v. Jones*, ___ N.C. App. ___, 838 S.E.2d 686 (2020) (affirming and remanding for a clerical error the trial court’s order revoking defendant’s probation for committing new criminal offenses, including possession of a firearm by a felon). We conclude defendant did receive proper notice and thus address his next argument, based upon the order itself.

B. Proper Grounds for Revocation

In defendant’s reply brief he cites *State v. Sitosky*, 238 N.C. App. 558, 767 S.E.2d 623 (2014), and contends that because the trial court’s judgment noted it found

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all of the violations, with only two of the four being valid grounds for revocation, his case must be remanded as it is unclear if defendant's probation was revoked on proper grounds. In *Sitoksy*, this Court stated,

the judgments in this case do not provide us with a basis to determine whether the trial court would have decided to revoke Defendant's probation on the basis of her admission to committing the new crime of driving while license revoked in the absence of the other alleged violations that it mistakenly found that Defendant had admitted. We note that the trial court did not mark the box on the judgment forms specifying that each violation "in and of itself" would be a sufficient basis for revocation. Thus, we must remand for further proceedings so that the trial court can determine whether the revocation of Defendant's probation is appropriate in file numbers 10 CRS 53201–03.

Id. at 565, 767 S.E.2d at 627–28 (2014). Again, here, only two of the four alleged criminal offense probation violations could serve as grounds for revocation – maintaining a vehicle or dwelling place for the purpose of keeping or selling a controlled substance and possession of a firearm by a felon. Further, the trial court did not check the box noting that each crime in itself was sufficient, and therefore we must remand for the trial court to address which alleged violations were the basis for the revocation. *See generally id.* Defendant ultimately contends that the trial court erred by deciding to revoke his probation, but because we are remanding for the trial court to address the violations upon which probation is being revoked and whether there is good cause for revocation, we need not consider this issue.

C. Good Cause

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Defendant, relying on *State v. Sasek*, ___ N.C. App. ___, ___ S.E.2d ___ (COA19-769) (19 May 2020), further argues that because his probation had already expired the trial court erred by failing to make a finding as to whether his probation was revoked for good cause. The State concedes defendant's argument citing *State v. Morgan*, 372 N.C. 609, 831 S.E.2d 254, 258 (2019), and requests "remand to the trial court so that it can review whether or not good cause exists to revoke defendant's probation despite the expiration of his probationary period." We agree with both parties and thus also remand for the trial court to make a good cause determination.

D. Sentencing

Defendant also contends that "the trial court abused its discretion by imposing consecutive sentences after revoking Mr. Geter's probation because it acted under the mistaken belief that it was bound by the original structure of the sentences." The State contends "[t]he trial court was silent on its reasoning" but this does not rise to the level of abuse of discretion. Because we must reverse and remand for the trial court to address the basis for the revocation and the good cause determination as discussed above, the trial court must necessarily enter a new order on remand and we need not review this issue.

E. Clerical Errors

Lastly, defendant raises clerical errors within the orders. The basis of these errors for defendant is in perceived differences in the oral rendition of the ruling and

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the actual orders entered. The State contends there are no such inconsistencies. But since we must reverse and remand for entry of a new order, we need not address this issue. Any clerical errors which may exist in the order on appeal will likely not occur on remand.

III. Conclusion

For the foregoing reasons, we reverse and remand for entry of a new order.

REVERSED and REMANDED.

Chief Judge McGEE and Judge BROOK concur.

Report per Rule 30(e).