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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-1167

Filed: 7 July 2020

Forsyth County, No. 18 CRS 533

STATE OF NORTH CAROLINA

v.

CHARITY MARIE LUCK, Defendant.

Appeal by defendant from judgment entered 14 June 2019 by Judge Stanley L. Allen in Forsyth County District Court. Heard in the Court of Appeals 26 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Allison Angell, for the State.

Benjamin J. Kull, for defendant-appellant.

YOUNG, Judge.

This appeal arises out of a probation revocation. The trial court failed to make a finding for good cause pursuant to N.C. Gen. Stat. § 15A-1345(e). Accordingly, we reverse and remand.

I. Factual and Procedural History

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On 10 May 2016, Charity Marie Luck (“Defendant”) pled guilty to one count of obtaining property by false pretenses, one count of second-degree trespass and one count of misdemeanor larceny. The court imposed a suspended sentence, ordered the payment of restitution and fees, and placed Defendant on 30 months of supervised probation. On 6 March 2016, Probation Officer Yvonne Bolen (“Officer Bolen”) filed a probation violation report against Defendant alleging that: (1) Defendant absconded from supervision, in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); (2) Defendant failed to complete community service requirement; and (3) Defendant failed to pay the restitution and fees on her case.

In the violation report, the facts concerning the absconding allegation span from 30 October 2017 until 5 March 2018. On 30 October 2017, Defendant missed a court date, resulting in the issuance of an order for her arrest with a \$3,000 cash bond. Four days later, Defendant called and left Officer Bolen a voicemail explaining that she had been in the hospital.

On 3 December 2017, Officer Bolen went to Defendant’s last known address. No one answered so he left a note telling Defendant to report to the probation office the next day. On 4 December 2017, Defendant called Officer Bolen again to report that she was hospitalized. Officer Bolen spoke to a nurse at the hospital to confirm that Defendant was in the hospital. Defendant was placed in an “unavailable status”

with the probation office. On 19 January 2018, Officer Bolen noted in Defendant's records that Defendant was hospitalized with kidney issues.

On 12 February 2018, Officer Bolen spoke with Defendant on the phone. Defendant said she was out of the hospital and understood that she had a \$3,000 cash bond. Defendant said she would turn herself in on 16 February 2018, and that she was staying with a friend but did not know the friend's address.

On 20 February 2018, Defendant's mother called Officer Bolen and left him a voicemail explaining that Defendant was in ICU for heart blockage. Officer Bolen asked for paperwork. As of 5 March 2018, Officer Bolen had not received any paperwork, and the hospital said there was no one there by Defendant's name. On 6 March 2018, Officer Bolen filed the violation report.

Although Officer Bolen was in charge of Defendant's case during the timeframe documented in the violation report, Officer Laura Clark ("Officer Clark") was assigned to Defendant's case ten days before trial and Officer Clark was the only one to testify at trial. On 14 June 2019, the trial court held a hearing and entered judgment revoking Defendant's probation. Defendant filed timely written notice of appeal.

II. Standard of Review

"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) (citation and quotation marks omitted).

III. Probation Revocation

Defendant contends that the trial court erred by failing to make a finding of good cause before denying Defendant an opportunity to confront and cross examine Officer Bolen, an adverse witness. We agree.

During a revocation hearing, the probationer has a statutory right to "confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." N.C. Gen. Stat. § 15A-1345(e) (2019). In *State v. Coltrane*, the trial court made no findings that there was good cause to deny the probationer the opportunity to confront and cross-examine adverse witnesses. Accordingly, the Supreme Court reversed the trial court's order revoking probation. 307 N.C. 511, 516, 299 S.E.2d 199, 202 (1983).

Here, Defendant's counsel objected to Officer Clark's testimony on the grounds that she was merely reading from Officer Bolen's reports, denying Defendant the opportunity to confront and cross-examine Officer Bolen. Defendant's counsel

specifically cited to N.C. Gen. Stat. § 15A-1345 (e) and noted that no showing of good cause had been made to excuse Officer Bolen's absence:

Your Honor, at this time, I'm going to object to Officer Clark testifying to any of Officer Bolen's statements here in her report. I understand the rules of evidence are relaxed in probation hearings, however [Defendant] still does have a right to confrontation. I don't have the statute printed out with me, but pursuant to [N.C. Gen. Stat. §] 15[A]-1345(e), she still does have that right to confrontation and cross-examination, unless good cause is shown. And I don't believe that good cause has been shown, as to why [Officer] Bolen can't be here to testify to this herself.

Despite this statement by Defense counsel, the State contends that Defendant did not request that the trial court make a good cause finding that confrontation should not be allowed. Furthermore, the State contends that Defendant did not request testimony from Officer Bolen or subpoena Officer Bolen to attend the revocation hearing. However, there is no evidence to suggest that Defendant knew that anyone other than Officer Bolen would be presenting testimony at the hearing, since Officer Bolen was the only person in charge of her case during the timeframe provided in the violation report. Defendant had been incarcerated since her arrest on 17 May 2019, when Officer Bolen was replaced with Officer Clark only ten days before the hearing. There is no evidence that Defendant knew that she would need to request or subpoena Officer Bolen to appear at the hearing.

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Officer Bolen was an adverse witness who did not testify. Because Defendant invoked her right under N.C. Gen. Stat. § 15A-1345(e) to confront and cross-examine Officer Bolen, the court was required to make a finding of good cause before denying that right. The trial court failed to make a finding of good cause, and that decision was not manifestly supported by reason. Accordingly, the trial court abused its discretion, and we reverse and remand.

IV. Willful Absconding

Defendant contends that the trial court improperly considered evidence regarding events that occurred outside the timeframe described in the violation report, and that the events within the relevant timeframe do not amount to absconding. Since we remanded on the first issue, we do not reach the merits of this remaining issue.

REVERSED AND REMANDED.

Judge BRYANT concurs.

Judge TYSON dissents.

Report per Rule 30(e).

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TYSON, Judge, dissenting.

I. Good Cause

The statutes provide a probationer a right to “confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation” during a revocation hearing. N.C. Gen. Stat. § 15A-1345(e) (2019). Defendant argues the trial court failed to make a finding of good cause and erred by denying her an opportunity to confront and cross-examine her former probation officer Bolen, an adverse witness. Officer Clark had replaced Officer Bolen as Defendant’s probation officer on 4 June 2019, ten days prior to the hearing, and testified at the hearing.

The State responds that Defendant failed to request testimony from Officer Bolen and did not subpoena her to attend or to testify at the revocation hearing. Defendant does not argue she failed to receive prior timely notice of her alleged violations. Defendant did not move for a continuance.

The State’s burden at a probation revocation hearing is limited to presenting “competent evidence establishing a defendant’s failure to comply with the terms and conditions of probation” to enable the trial court to determine whether Defendant violated a condition of probation. *State v. Terry*, 149 N.C. App. 434, 437, 562 S.E.2d 537, 540 (2002).

The State argues Officer Bolen's sworn violation report constitutes competent evidence that is sufficient to support the order revoking Defendant's probation. The State correctly asserts N.C. Gen. Stat. § 15A-1345(e) commits the issue of whether good cause exists for not allowing confrontation to the discretion of the trial court. To justify a new hearing, Defendant must show a manifest abuse of that discretion. Officer Clark was permitted to testify to Officer Bolen's notes contained in Defendant's file. N.C. Gen. Stat. § 8C-1, Rule 1101(b)(3) (2019) (North Carolina Rules of Evidence do not apply to probation revocation hearings); *see also State v. Pratt*, 21 N.C. App. 538, 540, 204 S.E.2d 906, 907 (1974) (citations omitted).

The State also relies upon this Court's recent opinion in *State v. Jones*, __ N.C. App. __, __, 838 S.E.2d 686, 690 (2020). In *Jones*, this Court concluded Defendant was required to request the trial court to make a good cause finding. *Id.* Defendant failed to request the court make a good cause finding that confrontation was unnecessary.

Defendant cites *State v. Coltrane*, 307 N.C. 511, 516, 299 S.E.2d 199, 202 (1983), as controlling. In *Coltrane*, our Supreme Court reversed the revocation of the defendant's probation where no competent evidence supported a conclusion she had willfully violated probation. *Id.* Several provisions of N.C. Gen. Stat. § 15A-1345(e) had been violated. *Id.* at 515, 299 S.E.2d at 202. Defendant argues without cross-

examining Officer Bolen, the court's conclusion that she willfully absconded supervision is erroneous.

Defendant's challenges before us are very different from the defendant in *Coltrane*. In that case, the defendant did not have counsel present at the hearing, nor was she allowed to confront or correct the prosecuting attorney, who relayed information to the court about the allegations against her. *Id.* at 515-16, 299 S.E.2d at 202. In contrast to the competent evidence of violations presented here, in *Coltrane* no evidence was presented at all. *Id.*

This Court has held:

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 internal quotation marks omitted).

Presuming the trial court failed to make a finding of good cause, sufficient evidence supports the court's order to revoke Defendant's probation. That decision was not manifestly unsupported by reason to compel a new hearing. Defendant has failed to show any abuse of discretion in the trial court's ruling. The trial court's order is properly affirmed. *See Jones*, __ N.C. App. at __, 838 S.E.2d at 690.

II. Willful Absconding

Defendant contends the trial court improperly considered evidence regarding events, which had occurred outside the timeframe described in the violation report, and also argues the events within the relevant timeframe do not amount to absconding supervision. The issue becomes whether Defendant has shown the trial court abused its discretion by revoking Defendant's probation.

A defendant absconds from supervision when she "willfully makes [her] whereabouts unknown to [her] probation officer, and the probation officer is unable to contact the defendant." *State v. Melton*, 258 N.C. App. 134, 138, 811 S.E.2d 678, 681 (2018) (citation omitted).

Defendant argues the trial court's oral findings of fact included the State's efforts to locate Defendant in October and November 2018, even though the violation report listed events ranging from 30 October 2017 to 5 March 2018. Defendant asserts at no time between the dates on the violation report did she willfully make her whereabouts unknown to Officer Bolen because of her hospitalizations and her achieving contact with Officer Bolen.

The State asserts the evidence showed the address Defendant provided to Officer Bolen was invalid, and Defendant repeatedly failed to report or contact Officer Bolen with an updated address, contact information, or the requested medical

documentation. During her alleged hospital visits and admissions, Defendant chose a private listing, so Officer Bolen was unable to locate and confirm her whereabouts.

Officer Bolen requested Defendant to provide documentation of her hospitalization. She waited for weeks and was not provided the requested proof to support Defendant's claims prior to filing the violation report. The State asserts these acts constitute a willful failure to make her whereabouts known.

In the written revocation judgment, the trial court only addressed the events occurring between the dates listed in the violation report. The events occurring between the dates listed on the violation report support a conclusion that Defendant willfully made her whereabouts unknown to her probation officer. Defendant has failed to show the trial court abused its discretion by revoking Defendant's probation for absconding supervision.

III. Conclusion

Sufficient evidence shows Defendant willfully absconded to affirm the trial court's revocation of her probation. Officer Bolen's sworn violation report alleged Defendant willfully avoided supervision and made her whereabouts unknown, and was properly admitted into evidence. Defendant provided an invalid address to Officer Bolen; repeatedly failed to report to or contact her probation officer; failed to provide a corrected address or contact information; and, failed to provide requested verification of her subsequent claimed hospitalization.

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TYSON, J., dissenting

The trial court's order is properly affirmed on both issues. I respectfully dissent.