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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-59

No. COA20-301

Filed 2 March 2021

Durham County, No. 18 CRS 1110

STATE OF NORTH CAROLINA

v.

HENRY FREDERICK SAULPAUGH, Defendant.

Appeal from judgment entered 10 December 2019 by Judge Michael O’Foghludha in Durham County Superior Court. Heard in the Court of Appeals 27 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth Jenkins, for the State.

Benjamin J. Kull for Defendant.

GRIFFIN, Judge.

¶ 1

Defendant Henry Frederick Saulpaugh (“Defendant”) appeals from a judgment of the Durham County Superior Court which revoked his probation. Defendant argues that the trial court (1) violated his statutory right to confront and cross-examine adverse witnesses without making a finding of good cause; and (2) abused its discretion by finding he had willfully absconded absent competent evidence.

Because Defendant cross-examined the one adverse witness who testified, and competent evidence supported the trial court's finding that Defendant had willfully absconded, we affirm. However, since the trial court's form order did not mark the appropriate box consistent with its findings and conclusions, we remand for correction of the clerical error.

I. Factual and Procedural Background

¶ 2 Evidence introduced by the State in Defendant's probation violation hearing tended to show the following:

¶ 3 In June 2017, Defendant was sentenced to 8 to 19 months in prison, suspended for 18 months of supervised probation. His case was later transferred to Durham County, as he was living at an Extended Stay hotel in Durham. On 12 March 2018, Defendant participated in a drug screen and, on 12 April 2018, he attended a probation office appointment.

¶ 4 Defendant's probation was initially supervised by Officer James Adams. Officer Adams last saw Defendant in April 2018 and thereafter tried without success to contact Defendant. Officer Adams transferred to another county, and in June 2018 Defendant's probation case was reassigned to Officer Keisha Tuck. Officer Tuck attempted to locate Defendant and learned that Defendant had checked out of the Extended Stay and left no forwarding address. Officer Tuck called the Durham County Jail on 11 July 2018 in an attempt to locate Defendant before proceeding with

filing a violation report. Officer Tuck was told that the Defendant was not at the jail. Officer Tuck's subsequent attempts to contact Defendant were likewise unsuccessful.

¶ 5 On 11 July 2018, Officer Tuck filed a sworn violation report alleging that Defendant had violated the terms of his probation by, among other things, willfully absconding supervision. Defendant was ultimately arrested on 14 May 2019. By that date, Officer Tuck had left her employment and Defendant's probation case had been reassigned to Officer David Ventura. Because Defendant's whereabouts were unknown until his arrest, Officer Ventura never actually supervised Defendant.

¶ 6 Defendant's probation violation hearing was held in Durham County Superior Court on 10 December 2019. The trial court took judicial notice of the sworn violation report filed by Officer Tuck, which alleged that Defendant willfully absconded supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a)

in that, ON OR ABUT [sic] JUNE 18, 2018, THE DEFENDANT LEFT HIS PLACE OF RESIDENCE AT 2504 HIGHWAY 55 ROOM 220 AT THE EXTENDED STAY WITHOUT PRIO [sic] APPROVAL OR KNOWLEDGE OF HIS PROBATION [sic] OFFICER AND FAILED TO MAKE HIS WHEREABOUTS KNOWN, MAKING HIMSELF UNAVAILABLE FOR SUPERVISION AND THEREBY ABSCONDING SUPERVISION. AS OF THE DATE OF THIS REPORT, THE DEFENDANT'S WHEREABOUTS ARE UNKNOWN AND ALL EFFORTS TO LOCATE THE DEFENDANT HAVE BEEN UNSUCCESSFUL.

The report alleged four other probation violations: positive drug tests; failure to pay

\$1,630.72 in court indebtedness; failure to obtain a substance abuse assessment; and failure to pay \$520.00 in probation supervision fees.

¶ 7

Officer Ventura was the sole witness for the State. Defendant’s trial counsel cross-examined Officer Ventura at the hearing. Officer Ventura testified that Officer Tuck no longer worked for the Department of Public Safety in North Carolina, and that Officer Adams had been transferred from the Durham County to the Wake County probation office. The Record does not reflect that either the State or Defendant had attempted to subpoena Officer Adams or Officer Tuck.

¶ 8

Defendant testified that in their last conversation with each other, Defendant told Officer Adams that he had been evicted from the Extended Stay and was homeless. Officer Adams also told Defendant that he was no longer going to be his probation officer. Defendant testified that he interpreted Officer Adam’s statement to mean that Defendant had been placed on unsupervised probation, and thus no longer needed to report his whereabouts “every time [he] moved from one location to another, being homeless.”

¶ 9

At the close of the State’s evidence, Defendant’s counsel moved to dismiss the violation. Counsel asserted Defendant’s “right to confront and cross-examine any witnesses against him,” and argued that Officer Ventura’s testimony was thirdhand information. The court denied the motion.

¶ 10

The trial court found that the usual practice of probation officers is to make

notes about each contact that they make with a probationer, generally at a time when the officer has knowledge of the facts; and that such reports are made in the ordinary course of business, even if testified to by another officer. The court found that Defendant violated all conditions alleged in the probation violation report, and specifically that he willfully absconded by failing to inform his probation officer of his whereabouts. The court revoked Defendant's probation and activated his suspended sentence. Defendant gave notice of appeal in open court.

II. Analysis

¶ 11 On appeal, Defendant argues that (1) the trial court violated his statutory right to confront adverse witnesses without making a finding of good cause; and (2) competent evidence did not support the trial court's finding that he had absconded. For the following reasons, we disagree and affirm.

A. Confrontation of Adverse Witnesses

¶ 12 Defendant contends that the trial court erred by denying his statutory right to cross-examine adverse witnesses without making a finding of good cause. Specifically, Defendant argues that he was denied the right to cross-examine Officer Adams (his first probation officer) and Officer Tuck (the probation officer who wrote the violation report).

¶ 13 At a probation revocation hearing, "the probationer . . . may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing

confrontation.” N.C. Gen. Stat. § 15A-1345(e) (2019).

¶ 14 This Court applies de novo review to the question of whether a trial court violated a statutory mandate. *State v. Rutledge*, 267 N.C. App. 91, 95, 832 S.E.2d 745, 747 (2019). “Under a de novo review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation omitted).

¶ 15 Defendant cites *State v. Coltrane*, 307 N.C. 511, 299 S.E.2d 199 (1983), in support of his argument that the trial court denied his statutory right to confrontation. However, this case is distinguishable from *Coltrane*. Here, the trial court heard evidence from both the State and Defendant. In *Coltrane*, the “defendant was not effectively allowed to speak on her own behalf nor to present information relevant to the charge.” *Id.* at 515–16, 299 S.E.2d at 202. Here, Defendant cross-examined Officer Ventura, who effectively relayed Officer Adams’ and Tuck’s notes regarding Defendant’s probation history and alleged violations. By contrast, in *Coltrane*, the defendant was not allowed to cross-examine the prosecutor who simply relayed the probation officer’s statement that the defendant allegedly violated a condition of her probation. *Id.*

¶ 16 Although Defendant argues that he was not allowed to confront Officers Adams and Tuck in particular, Defendant does not cite any authority giving him that right. Moreover, Defendant did not request that Officers Adams or Tuck be subpoenaed and

required to testify. *See State v. Terry*, 149 N.C. App. 434, 438, 562 S.E.2d 537, 540 (2002) (rejecting the defendant’s right to confront an absent witness where the defendant did not request that the witness be subpoenaed).

¶ 17 We conclude that the trial court did not violate Defendant’s rights under N.C. Gen. Stat. § 15A-1345(e).

B. Revocation of Probation

¶ 18 Defendant next argues that the trial court abused its discretion in revoking his probation, because competent evidence did not support the court’s finding that he had absconded. Specifically, Defendant contends that (1) the trial court improperly considered evidence regarding events that occurred outside the timeframe described in the violation report (18 June to 11 July 2018), and (2) the events that occurred within the timeframe described in the violation report did not amount to absconding.

¶ 19 A trial court’s decision to revoke a defendant’s probation is reviewed for abuse of discretion. *State v. Miller*, 205 N.C. App. 291, 293, 695 S.E.2d 149, 150 (2010). Abuse of discretion occurs “when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009).

¶ 20 A trial court may revoke a defendant’s probation where the defendant “absconds by willfully avoiding supervision or by willfully making her whereabouts unknown to the supervising probation officer, in violation of § 15A-1343(b)(3a).” *State*

v. Melton, 258 N.C. App. 134, 136–37, 811 S.E.2d 678, 680–81 (2018) (citing N.C. Gen. Stat. § 15A-1344(a) (2017)). The statute does not define “willfully” specifically for the purpose of § 15A-1343(b)(3a), but criminal statutes and case law define “willful” as “the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of the law.” *State v. Crompton*, ___ N.C. App. ___, ___, 842 S.E.2d 106, 110 (2020) (quoting *State v. Bradsher*, 255 N.C. App. 625, 633, 805 S.E.2d 191, 196 (2017) (internal quotation marks omitted)). A defendant’s willful intent is usually shown through circumstantial evidence. *Id.* (citing *State v. Walston*, 140 N.C. App. 327, 332, 536 S.E.2d 630, 633 (2000) (*purgandum*)).

¶ 21 Probation is an act of grace, and an alleged probation violation need not be proved beyond a reasonable doubt. *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). “[O]nce the State has presented competent evidence establishing a defendant’s failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms.” *Terry*, 149 N.C. App. at 437–38, 562 S.E.2d at 540. The court “may within its sound discretion revoke the probation” if it is “reasonably satisfied that the defendant has violated a condition upon which a prior sentence was suspended.” *Id.* (citation omitted).

¶ 22 Defendant argues that the State’s evidence was insufficient to support the trial

court's finding that he willfully absconded. He relies on *State v. Melton*, 258 N.C. App. 134, 811 S.E.2d 678. But *Melton* is distinguishable on its facts. There, competent evidence showed that the probation officer had unsuccessfully attempted to contact the defendant. *Id.* at 138–39, 811 S.E.2d at 682. The State did not present evidence showing that the defendant was aware that her probation officer was attempting to contact her during the timespan of merely two days alleged in the violation report. *Id.* The *Melton* court concluded that “there was insufficient evidence that [the] defendant willfully refused to make herself available for supervision.” *Id.* at 139, 811 S.E.2d at 682. Here, Defendant testified at the revocation hearing that he deliberately did not provide his whereabouts or address to the probation department, due to his belief that he was now on unsupervised probation. *Cf. id.*

¶ 23 The State presented competent evidence that the Defendant had willfully absconded supervision. Here, through the sworn violation report and the testimony of Officer Ventura, the State presented evidence of events within the timeframe of the violation report sufficient to support a finding that Defendant had willfully absconded. *See State v. Gamble*, 50 N.C. App. 658, 661, 274 S.E.2d 874, 876 (“[T]he sworn probation violation report constituted competent evidence sufficient to support the order revoking his probation.” (citation omitted)). Between 18 June and 11 July 2018, the officer's notes state that Defendant checked out of an Extended Stay and left no forwarding address. Officer Tuck was unable to locate the Defendant as of 11

July 2018 despite her attempts. That same day, Officer Tuck filed a probation violation report that the Defendant had willfully absconded.

¶ 24 The trial court did not abuse its discretion by finding that Defendant had willfully absconded probation.

C. Clerical Error

¶ 25 Although N.C. Gen. Stat. § 15A-1343(b)(3a) was clearly the basis for revocation of Defendant's probation, the trial court did not check box "5.a." in the "FINDINGS" section, on its written order. Box 5.a. is a required finding for revoking probation based on a section 15A-1343(b)(3a) violation. *Id.* "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'" *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696–97 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)). Accordingly, we remand for correction of this clerical error.

III. Conclusion

For the foregoing reasons, we affirm and remand for correction of a clerical error.

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges INMAN and COLLINS concur.

Report per Rule 30(e).