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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-392

No. COA20-787

Filed 20 July 2021

Carteret County, No. 18 CRS 53002

STATE OF NORTH CAROLINA

v.

TAKIEA NICOLE TULL, Defendant.

Appeal by Defendant from judgment entered on 16 April 2020 by Judge Joshua W. Willey, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 12 May 2021.

*Attorney General Joshua H. Stein, by Assistant Attorney General Erin Hukka for the State.*

*Blass Law, PLLC, by Danielle Blass for Defendant.*

JACKSON, Judge.

¶ 1

Takiea Tull (“Defendant”) argues that the trial court erred by (1) failing to make a finding of good cause before denying Defendant the opportunity to confront and cross-examine adverse witnesses in a probation violation hearing; and (2) finding Defendant to be in willful violation of her probation for failing to pay monies owed where there was insufficient evidence that she violated the monetary condition of her

probation.

### **I. Facts and Procedural Background**

¶ 2

In May 2019, Defendant pleaded guilty to felony possession of cocaine and was sentenced to six to 17 months of imprisonment, suspended for 36 months of supervised probation. Three months later, Defendant’s probation officer, Kiki Hampton (“Ms. Hampton”), filed a violation report alleging that Defendant had violated several conditions of her probation. On 1 October 2019, Ms. Hampton filed another violation report alleging the same violations she had reported days prior. On 14 April 2020, Ms. Hampton filed a third violation report, that is the subject of this matter. In the report, Ms. Hampton alleged that Defendant (1) tested positive for cocaine in February 2020 and admitted to use; (2) has a balance of \$692.50 and has not made a payment to date; and (3) was charged with shoplifting/concealment, larceny, and possession of stolen goods/property.

¶ 3

The matter came on for hearing on 16 April 2020. During the hearing, Defendant admitted to the drug use allegation but denied the remaining allegations involving monies owed and the commission of a new criminal offense. Ms. Hampton was the first witness called to testify for the State. Ms. Hampton testified that she had received a phone call from Officer Mike Low of the Morehead Police Department (“Officer Low”) informing her that Defendant had been cited for shoplifting. After testifying about how she was notified about Defendant’s shoplifting offense at

Walmart, the State attempted to elicit information about Ms. Hampton's discussion with Officer Low regarding the circumstances surrounding the charge. Defendant's counsel objected, arguing that such testimony would violate Defendant's right to confrontation under the Due Process Clause and N.C. Gen. Stat. § 15A-1345(e), and the right to effective assistance of counsel under the Sixth Amendment. The State countered, reminding the court that the rules of evidence do not apply in probation violation hearings and that hearsay is allowed during the proceeding. Defendant's counsel reiterated that his objection was on the basis of Due Process and the right to confrontation and not a hearsay objection. Following the exchange between counsel, the court inquired about Officer Low's availability but ultimately overruled Defendant counsel's objection and allowed Ms. Hampton to testify about what Officer Low had told her.

¶ 4

Ms. Hampton testified that Officer Low gave her a description of what had happened and later provided her with an incident report. When the State moved to admit the report into evidence, Defendant's counsel renewed his objection. The trial court overruled the objection, and the report was admitted into evidence. Ms. Hampton then proceeded to testify about her investigation of the shoplifting offense, indicating that she had called Walmart security services personnel to find out more details about the event. When Ms. Hampton tried to testify about what she was told by security services, Defendant's counsel renewed his objection. The trial court

overruled the objection and allowed Ms. Hampton to testify as to what she was told.

¶ 5

Ms. Hampton testified that she was provided with a surveillance video of Defendant from Walmart security services officers. When the State requested that the video be admitted into evidence, Defendant's counsel renewed his objection, arguing that there was no one to question about the authenticity of the video which in turn violated Defendant's Due Process right to confrontation. The trial court overruled the objection and admitted the video into evidence.

¶ 6

The State also presented copies of receipts, photos, and a Walmart Asset Protection Case record and asked that the items be admitted into evidence. Defendant's counsel renewed his objection in regard to each exhibit, but the trial court overruled the objections and admitted the exhibits into evidence. Ms. Hampton then testified that Defendant had failed to make any payment towards her probation fee of \$692.50 but had made two separate secured bonds for \$90,000 and \$50,000.

¶ 7

Following Ms. Hampton's testimony, the State called Officer Low to testify, even though the court had previously overruled Defendant's request that Officer Low be present to testify. Officer Low testified that he had responded to the shoplifting incident at Walmart involving Defendant. Upon his arrival, he was informed by Walmart personnel that Defendant had not paid for some of her items at self-checkout and they had stopped Defendant once she attempted to leave the store with the items. Defense counsel renewed his objection when Officer Low testified about what he was

told by Walmart personnel and the trial court overruled his objection. Officer Low also indicated that he had a conversation with Defendant while at the store and she had indicated that she would pay for the items that were not paid for.

¶ 8

Following Officer Low's testimony, Defendant was called to testify in her own defense. Defendant testified that despite being on probation two times prior and having to make monthly payments to the clerk of court during her prior probation terms, Ms. Hampton had never discussed a monthly payment plan with Defendant and did not explain in detail where she needed to pay monies owed. Defendant further testified that she was at Walmart on the day in question and it was her in the video that had been admitted into evidence. The Defendant watched the video of herself and indicated that there were socks that were not scanned but she had placed them in the bag anyway.

¶ 9

Following Defendant's testimony, the court found that Defendant had tested positive for cocaine, willfully failed to meet her monetary obligations of probation, and engaged in new criminal conduct, and therefore revoked Defendant's probation. In making its decision, the trial court explicitly indicated that its decision was based solely on the Walmart video, Defendant's testimony, and Officer Low's testimony as to what Defendant said to him when he arrived at Walmart.

¶ 10

Defendant gave written notice of appeal on 16 April 2020.

## II. Analysis

¶ 11 Before revoking a defendant's probation, a hearing must be held to determine whether the defendant's probation should be revoked, unless the defendant waives the hearing. N.C. Gen. Stat. § 15A-1345(e) (2019). A trial court may revoke probation and activate a defendant's suspended sentence if the defendant: (1) commits a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision 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) (2019).

¶ 12 Generally, "[w]e review a trial court's decision to revoke a defendant's probation for abuse of discretion. A trial court abuses its discretion 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. Melton*, 258 N.C. App. 134, 136, 811 S.E.2d 678, 680 (2018) (internal marks and citations omitted). An alleged violation of a statutory mandate however, presents a question of law, which we review de novo on appeal. *State v. Lyons*, 250 N.C. App. 698, 705, 793 S.E.2d 755, 761 (2016).

### **A. Right to Confrontation**

¶ 13 Defendant contends that the trial court violated her right to confrontation under the Due Process Clause of the Fourteenth Amendment and the statutory right to confrontation pursuant to N.C. Gen. Stat. § 15A-1345(e), because Walmart

personnel did not testify regarding the authenticity of video footage that was admitted into evidence. The State, however, argues that Defendant was not deprived of any rights and Walmart personnel were not required to testify in this proceeding. We agree.

¶ 14 Section 15A-1345(e) of the North Carolina General Statutes provides that at a probation revocation hearing “the probationer may appear and speak in his own behalf, may present relevant information, and 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). “The statutory right conferred by N.C. Gen. Stat. § 15A-1345(e) is a codification of the probationer’s right to due process under the Fourteenth Amendment and [t]hus, Sixth Amendment rights . . . are not involved.” *State v. Jones*, 269 N.C. App. 440, 444, 838 S.E.2d 686, 689 (2020) (internal marks and citations omitted). And while a probationer has a guaranteed right to be heard, “failure of a probationer to request that a witness attend the violation hearing or be subpoenaed and required to testify can constitute waiver of the right to confrontation[.]” *Id.* To that end, “[t]he due process right to confrontation prior to a probation revocation also permits ‘use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence.’” *Id.* at 444, 838 S.E.2d at 690 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n. 5 (1973)).

¶ 15 In the present case, Defendant did not request that the trial court make a good cause finding for not allowing confrontation of Walmart personnel. Nor is there anything in the record to suggest that Defendant specifically requested the court subpoena testimony from Walmart personnel. Instead, Defendant's counsel only requested that the court limit Ms. Hampton's testimony to what she saw in the surveillance video. Defendant's counsel also requested a finding of good cause for not allowing confrontation when Ms. Hampton attempted to testify about what Officer Low told her over the phone. The trial court overruled Defendant's objection, and while the State did not intend to initially call Officer Low to testify about his encounter with Defendant at Walmart, it ultimately decided to call him to testify later in the proceeding to satisfy Defendant's confrontation concerns. Thus, it was not error for the trial court to neglect to make a ruling on whether good cause existed where such ruling was not requested.

¶ 16 Assuming that Defendant had made such request, the trial court still was not required to make a good cause finding. As our courts have recognized, probation revocation proceedings are not a formal criminal prosecution and are often regarded as informal. *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 479 (1967). All that is required in a probation violation hearing is that the evidence reasonably satisfy the judge in the exercise of her sound discretion that the defendant has willfully violated a valid condition of probation. *Id.* at 353, 154 S.E.2d at 480. As such, the



rules of evidence do not apply in these hearings and the court is free to use substitutes for live testimony, including affidavits, depositions, documentary evidence, and hearsay evidence. *Gagnon*, 411 U.S. at 782 n. 5; *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014).

¶ 17 Here, Defendant argues that she should have been able to confront Walmart personnel about the substance of the surveillance video, whether there was a proper foundation for the video, what equipment was used, what the proper procedures associated with the recording activity was, and what the chain of custody was. This argument is misplaced, as each of these concerns deal with the authenticity of the video and not Due Process. Because the rules of evidence do not apply in these proceedings, such testimony was not required or necessary during the hearing. To that end, refusal of the court to require Walmart personnel to testify about the authenticity of the video does not equate to denying Defendant the right to confront an adverse witness.

¶ 18 Defendant attempts to compare this case to our Supreme Court's decision in *State v. Coltrane*, 307 N.C. 511, 299 S.E.2d 199 (1983). However, *Coltrane* is distinguishable from this case for several reasons. In *Coltrane*, our Supreme Court found that the trial court had erroneously revoked the defendant's probation without affording her the opportunity to confront adverse witnesses. 307 N.C. at 513, 299 S.E.2d at 201. There, the defendant was not allowed to confront her probation officer

or the prosecuting attorney who claimed that the defendant's probation officer had told him that the defendant had not procured employment, in violation of the original conditions of her probation. *Id.* at 515-16, 299 S.E.2d at 202. Additionally, the court found that "[n]o findings were made that there was good cause for not allowing confrontation. By its brevity the colloquy shows that [the] defendant was not effectively allowed to speak on her own behalf nor to present information relevant to the charge that she had violated a condition of probation." *Id.* at 516, 299 S.E.2d at 202. In fact, the court interrupted the defendant and did not allow her to provide an explanation as to her efforts to obtain employment. *Id.*

¶ 19 Here, Defendant was not deprived of such right. Not only was Defendant afforded the opportunity to testify in her own defense, but she was also allowed to confront the probation officer who had accused her of violating her probation and the police officer who she had directly spoke to after being stopped at Walmart for shoplifting. Thus, Defendant was permitted to present relevant information and afforded the opportunity to cross-examine adverse witnesses, unlike the defendant in *Coltrane*.

¶ 20 Accordingly, we hold that Defendant's Due Process rights were not violated. Furthermore, it was not necessary for the trial court to make a finding of good cause for not allowing Walmart personnel to testify, as said request was never made, and admittance of the video alone was not error because the rules of evidence do not apply

in probation violation hearings.

### **B. Ineffective Assistance of Counsel**

¶ 21 Additionally, Defendant argues that without the ability to confront adverse witnesses, she was denied effective assistance of counsel by the trial court. Because we hold that Defendant was not deprived of her right to confront adverse witnesses, addressing this argument is not necessary. However, the Court will briefly address the claim.

¶ 22 “A defendant’s right to counsel includes the right to the effective assistance of counsel.” *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985). To prevail on a claim for ineffective assistance of counsel, the defendant must show that her “counsel’s conduct fell below an objective standard of reasonableness.” *Id.* at 561-62, 324 S.E.2d at 248. To meet this burden, Defendant must satisfy a two-part test:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s error[s] were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Id.* at 562, 324 S.E.2d at 248 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

¶ 23 Our Supreme Court expressly adopted the *Strickland* test, “as a uniform

standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution.” *Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248. Thus, to succeed on a claim of ineffective assistance of counsel, Defendant bears the burden of proving that her counsel’s performance was deficient and said performance prejudiced the defense.

¶ 24 Here, Defendant argues that she was not afforded effective assistance of counsel because she did not have the opportunity to confront Walmart personnel regarding the video exhibit presented to the court, while acknowledging that said failure “was at no fault of [her] trial counsel, as he repeatedly and emphatically objected to the denial of her right to adverse witnesses.” Thus, Defendant makes no showing as to what her counsel did that qualified as ineffective assistance of counsel. Without a showing that her counsel’s performance was deficient in any way, Defendant’s claim of ineffective assistance of counsel fails at the first prong of the two-part *Strickland* test.

¶ 25 Accordingly, Defendant was not deprived of her right to effective assistance of counsel.

### **C. Willfully Failing to Meet Monetary Obligation**

¶ 26 Finally, Defendant contends that the trial court abused its discretion by finding Defendant to be in willful violation of her probation for failing to pay monies owed. Specifically, Defendant argues that there was insufficient evidence that she

violated the monetary condition of her probation. We disagree.

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. Boone*, 225 N.C. App. 423, 424, 741 S.E.2d 371, 372 (2013) (internal marks and citation omitted).

¶ 27 Thus, “the State need only present competent evidence establishing a defendant's failure to comply with the terms of probation to establish the predicate required for the trial court to determine that the defendant has violated a condition.” *State v. Jones*, 269 N.C. App. 440, 444, 838 S.E.2d 686, 690 (2019) (internal marks and citations omitted). “[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.” *State v. Terry*, 149 N.C. App. 434, 437-38, 562 S.E.2d 537, 540 (2002). “If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior sentence was suspended, it may within its sound discretion revoke the probation.” *Jones*, 269 N.C. App. at 444, 838 S.E.2d at 690 (internal marks and citations omitted).

¶ 28

Here, Defendant was ordered to pay a total of \$692.50 pursuant to a schedule that was to be determined by her probation officer, Ms. Hampton. Ms. Hampton's testimony regarding Defendant's failure to make any payments was as follows:

Q. Okay. And also on that addendum is an allegation that Ms. Tull has not made any payments toward her court indebtedness; is that correct?

A. That is correct. As of the date of the addendum she had not made a payment. She had a conversation in my office or outside of my office when I served her. She alluded to the fact that she may make the payment.

Q. What do you mean she -- she said --

A. -- (interrupting) I went over each violation with her, and I let her know number two was that she had a balance of 692[.]50 and had not made a payment to date.

Q. And what was her --

A. -- (interrupting) and she said I think something along the lines that she could do that. Something along those lines.

...

Q. And is that for -- have you developed a monthly payment for her?

A. Yes. We had. And that is -- she's paying supervision fees on another case so there's no supervision fees on this particular case.

Q. What is that monthly payment?

A. I don't think I have that monthly payment with me. I don't think I have the monthly payment with me.

Q. It's customary though that if somebody's put on three years of supervised probation you set a schedule of payment to reflect over those three years.

A. We do. We do. And she has a couple additional cases too.

Q. Did you tell her about this case of where she had to go pay that?

A. When I -- I go over the rules when they first are set up, you know, you pay in the county of conviction, pay the bookkeeper in that particular county. She's had cases in other counties as well, but this particular case is a Carteret County case.

¶ 29           Thus, the State presented evidence from Ms. Hampton that Defendant had failed to make any payments on her probation, despite being notified on two separate occasions that she was required to do so—once in her initial meeting with her probation officer and another time after the probation violation report was filed, but before the matter came on for hearing. Ms. Hampton further acknowledged, during her testimony, that while Defendant had failed to meet the monetary obligations of her probation, she had made two separate secured bonds for \$90,000 and \$50,000.

¶ 30           When questioned about her failure to make any payments, Defendant testified as follows:

Q. Now, in regards to what -- what we're here today about, did Ms. Hampton ever tell you what the monthly payment you were to pay on your case was?

A. No, sir.

Q. Did she ever explain to you in detail where you needed

to pay?

A. No, sir.

Q. And did she tell you in a form of payment how you can make payments?

A. No, sir.

...

Q. Okay. And how many -- how many cases -- how many times have you been placed on probation?

A. This would be my third time.

Q. And in the course of that probation you've had to pay monies before, hadn't you --

A. Yes, sir.

Q. -- through your probation?

A. Yes, sir.

Q. Did you pay those monies?

A. Yes, sir.

Q. Where did you pay them?

A. At the clerk of court.

Q. So, your testimony here today is nobody ever told you where to come make your payment?

A. Well, what it is, sir, they give you your citation number, they give you a piece of paper with a number, a filing number, I'm not sure exactly what it is, but they give you a number so when you go to the clerk of court you have to give it to them to show them whatever -- I guess whatever case you are paying on, and when I originally had probation



it was in Craven County. So she had, with Kimberly she broke it down to me, gave me monthly payments. I signed to it. She gave me a piece of paper to take to the clerk of court to make my payments. When I got on probation in Carteret County I never received any of that to make any payments. So I didn't know how to go about it switching counties how it was done here because I've never been on probation in Carteret County.

Q. Okay. At what point then did you ask your probation officer what you needed to do to make the payments you knew you had been ordered to make?

A. Well, I never asked her because I didn't how it worked in Carteret County, because with my sister she was on nine months post release and she never paid any of her monies.

¶ 31 Thus, Defendant contends that while she had previously made payments to the clerk of court the previous times she was on probation, Ms. Hampton had failed to provide her with a payment schedule and inform her where to make payments.

¶ 32 Defendant contends that this case is analogous to *Boone*. In *Boone*, this court reversed the superior court's judgment revoking a defendant's probation and activating his sentences due to the State's failure to present evidence of a payment plan or any evidence that the defendant had not paid his required fines. *Boone*, 225 N.C. App. at 425-26, 741 S.E.2d at 372-73. In that case, the only testimony presented at the revocation hearing was from the probation officer who had been supervising the defendant at the time the violation report was filed. *Id.* at 424, 741 S.E.2d at 372. Twenty-two months after the violation report was filed, the matter came on for hearing and the filing probation officer was no longer supervising the defendant. *Id.*

During her testimony, the former probation officer failed to testify “as to any payment schedule that had been established[.]” *Id.* at 425, 741 S.E.2d at 372. This court, recognizing that the initial judgment left the scheduling for payments to the defendant’s probation officer, concluded that absent any evidence of a required payment schedule, the probation officer’s “conclusory testimony that [the] defendant was in arrears [was] insufficient to support a finding that [the] defendant had willfully violated the terms of his probation by failing to pay the required fees[.]” *Id.* at 425, 741 S.E.2d at 372-73.

¶ 33 This case, however, is distinguishable for several reasons. Here, Defendant was a current probationer of Ms. Hampton. Thus, Ms. Hampton was familiar with the status of the payments, unlike the probation officer in *Boone* who was no longer supervising the defendant she claimed had failed to make any payments. Ms. Hampton gave specific testimony detailing two accounts in which she not only provided Defendant with a monthly payment schedule, but she also gave Defendant a chance to make a payment prior to the hearing by informing her of the current violation. Despite being notified by her probation officer and having prior knowledge of how to fulfill monetary obligations of probation, Defendant chose to forgo her responsibility to satisfy her monetary condition of her probation.

¶ 34 Thus, through the testimony of Defendant’s probation officer, the State presented competent evidence establishing that Defendant was made aware of a

payment schedule but had failed to make a payment. Defendant then provided testimony confirming that she had failed to make any payments despite being familiar with how payments are made. Moreover, she claimed that she had not been provided with a payment schedule by her probation officer. In hearing from both parties, the court was satisfied with the State's evidence and found Defendant to be in violation of a condition of her probation.

¶ 35 Accordingly, we hold that the trial court did not abuse its discretion in finding Defendant willfully failed to pay monies to the clerk of court as directed by her probation officer, as Defendant's direct testimony indicates that she failed to make payments and evidence presented by the State confirms that she was made aware of the obligation.

### III. Conclusion

¶ 36 For the reasons stated above, we hold that the trial court was not required to make a finding a good cause, because Defendant was not deprived of the opportunity to confront any adverse witnesses. Thus, Defendant was not denied effective assistance of counsel due to an inability to confront adverse witnesses. We further hold that the trial court did not abuse its discretion in finding Defendant to be in willful violation of her probation for failing to meet the monetary condition of her probation. Accordingly, we affirm the decision of the trial court.

AFFIRMED.

STATE V. TULL

2021-NCCOA-392

*Opinion of the Court*

Judges DILLON and GRIFFIN concur.

Report per Rule 30(e).