IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-22

No. COA20-853

Filed 4 January 2022

Mecklenburg County, No. 17CRS235673

STATE OF NORTH CAROLINA

v.

PHILLIP DAKOTA MILES, Defendant.

Appeal by Defendant from judgment entered 29 June 2020 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 October 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly Randolph, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for the Defendant.

JACKSON, Judge.

¶ 1 Phillip Dakota Miles ("Defendant") appeals from judgment revoking his probation and activating his sentence based on the commission of a new criminal offense. Defendant argues that the trial court erred in violating N.C. Gen. Stat. § 15A-1345(e) by reviewing a civil 50B order after the close of evidence and relying on it to find a criminal offense was committed, without affording Defendant the

opportunity to speak about or to confront the order. After careful review, we affirm the revocation of Defendant's probation and the activation of his suspended sentence.

I. Factual and Procedural Background

¶ 2 On 25 June 2018, Defendant pled guilty to felony larceny of a motor vehicle and was sentenced to five to 15 months of imprisonment, suspended for 24 months of supervised probation.

¶ 3 On 4 September 2019, Defendant's probation officer, Officer T. Maebry ("Officer Maebry"), filed a violation report alleging that Defendant was in arrears, failed to provide proof of substance abuse treatment, and committed a new criminal offense, specifically intentional child abuse inflicting serious bodily injury. The victim was Defendant's infant daughter. On 16 September 2019, Judge W. Pomeroy entered an order modifying Defendant's probation conditions, adding a no contact provision with the victim and the victim's caretakers, forbidding Defendant from being found at the residence of the victim or the victim's caretakers, and placing Defendant under electronic house arrest with allowance only to leave for work.

¶ 4 On 9 January 2020, Officer Maebry filed a second violation report alleging that Defendant left his residence without permission, was mapped and admitted to being in an exclusion zone, and tested positive for marijuana on 12 September 2019. On 29 January 2020, Officer Maebry filed a third violation report alleging that Defendant resided at an unapproved residence, was mapped at an unapproved location, reported

to his probation officer in an unreasonable manner, failed to allow home visits, failed to answer the reasonable inquires of his probation officer, and failed to provide proof of verifiable employment. On 3 February 2020, Judge Daniel Kuehnert entered an order placing Defendant on electronic house arrest upon his release from custody and forbidding Defendant from being within 1000 feet of the victim's residence.

¶ 5 On 4 May 2020, Officer Maebry filed a fourth violation report alleging that Defendant left his residence without permission and entered an exclusion zone and that Defendant committed a new criminal offense, specifically assault on a female on or about 2 May 2020. This matter came on for a probation revocation hearing on 29 June 2020 before the Honorable Lisa C. Bell. The State brought forth all four violation reports and Defendant denied the allegations.

¶ 6 At the hearing, the State called Officer Maebry to testify. Officer Maebry first testified about the events surrounding the 4 September 2019 violation report, explaining that on or about 3 or 4 September, Defendant was arrested and charged with three counts of child abuse inflicting serious injury. The child involved was Defendant's infant daughter. Officer Maebry explained that the 9 January 2020 violation report stemmed from Defendant leaving a custody hearing and going immediately to the home of his daughter's maternal grandmother where his daughter was staying. Defendant had previously been placed on electronic monitoring and ordered not to go to his daughter's residence. Next, Officer Maebry testified about

the 29 January 2019 violation report, explaining that among other violations, Defendant was mapped at the street corner of his daughter's residence on 27 January.

¶ 7 Officer Maebry then testified about the events surrounding the 4 May 2020 violation report, explaining that she was notified on 2 May that Defendant had entered an exclusion zone and was alerted by his daughter's maternal grandmother that Defendant had come to her residence. Officer Maebry called the grandmother who said she told Defendant to leave and he responded that the case had been dropped and he could see his daughter now. The grandmother called Officer Maebry back shortly thereafter and stated Defendant was at her house again looking for his daughter's mother. While on the phone, Officer Maebry heard the grandmother make comments that Defendant found the mother on the street, cornered her in, and then followed her in his car after the mother drove off. Defendant then came back to the residence and Officer Maebry heard through the phone a man tell him to leave and Defendant respond that he would not. Defendant drove off again when police arrived on scene. Officer Maebry later learned that Defendant was charged on 2 May 2020 with assault on a female against his daughter's mother.

¶ 8 Defendant declined to cross-examine Officer Maebry. The State offered nothing further and Defendant offered no evidence. Both parties provided closing arguments to the trial court. The trial court then asked Defendant and the State respectively their positions on the appropriate disposition of the probation violation.

Officer Maebry was also given the opportunity to comment on disposition. Officer Maebry detailed the difficulties she had in supervising Defendant and stated:

> The Defendant does what the Defendant wants to do, and at this point, with the seriousness of his charges and the fact that we have tried house arrest since September and modifications have been done for the house arrest, he has been reprimanded by judges about this house arrest and not being around these victims. He's continued to do so, subsequently resulting in even a 50B order now in place against him in the victim's– the victim's mother, which circles around her child and her family.

Officer Maebry concluded by advocating for revocation. The trial court asked Defense Counsel whether he wanted to respond further after Officer Maebry's comments, and Defense Counsel declined.

¶ 9 The following exchange then occurred regarding the 50B order:

> THE COURT: Are you representing Mr. Miles in the child abuse case, [Defense Counsel]?
>
> DEFENSE COUNSEL: Yes, Your Honor.
>
> THE COURT: You are? Okay.
>
> (Pause.)
>
> THE COURT: The 50B that was entered, is that the one-year 50B? So has the one-year order been done?
>
> OFFICER MAEBRY: Yes. Yes, Your Honor.
>
> THE COURT: Okay.
>
> OFFICER MAEBRY: And that's for the assault on a female.

> (Pause.)
>
> THE COURT: Do you have a copy of that?
>
> OFFICER MAEBRY: I may in my file?
>
> THE COURT: Yes. Uh-huh *(yes)*.
>
> (Pause.)
>
> OFFICER MAEBRY: May I approach?
>
> THE COURT: Yes, please. But if you'd show that to [Defense Counsel] first, please.
>
> (Pause.)
>
> THE COURT: Thank you.

After considering the 50B order, the trial court announced its findings. The trial court found that it was satisfied Defendant had violated Paragraph Two of the 9 January 2020 violation report, Paragraphs One and Two of the 29 January 2020 violation report, and Paragraph One of the 4 May 2020 violation report, all alleging noncompliance with conditions of his probation. The trial court also found it was reasonably satisfied Defendant had violated Paragraph Two of the 4 May 2020 violation report, alleging the commission of assault on a female. Based on the finding Defendant had committed a new criminal offense, the trial court revoked Defendant's probation and activated his sentence.

¶ 10 Later, after a discussion regarding a potential modification of Defendant's sentence, Defense Counsel asked the trial court "to state what facts the Court relied

on in making the determination that it was satisfied that [Defendant] committed the new offense." The trial court responded:

> It was the testimony offered by Officer Maebry, and I will note that the Court requested to see a copy of the 50B order that was put in effect, and that 50B made a finding that the act– and I understand that it's a civil proceeding, but both the prosecuting witness, plaintiff was present as was [Defendant], and it was after the hearing that the judge entered an order of– the protective order.
>
> So it was between the testimony offered, the reports that were offered, and then the Court's consideration of the filed judgment in the 50B case.

The following exchange then occurred:

> [DEFENSE COUNSEL]: I guess I would just take issue with that because we did not have the opportunity to ask any question about *(inaudible)*. So I don't have a problem with the first part *(inaudible)*.
>
> THE COURT: Uh-huh *(yes)*.
>
> [DEFENSE COUNSEL]: If you would just note that I would object to that being considered.
>
> THE COURT: I'll note it for the record.

¶ 11 Defendant gave notice of appeal in open court.

II. Analysis

¶ 12 Defendant argues that the trial court violated Defendant's statutory due process rights as codified in N.C. Gen. Stat. § 15A-1345(e) when it reviewed a civil 50B order after the State rested, Defendant declined to present evidence, and both

the State and Defendant had given their closing arguments. Defendant contends that the trial court did not proactively give Defendant an opportunity to be heard and present evidence on the 50B order or to cross-examine a witness about the 50B order. Defendant argues the trial court therefore violated § 15A-1345(e) by relying on the 50B order to ultimately revoke Defendant's probation and this violation prejudiced Defendant because without the 50B order as evidence, the trial court may not have been reasonably satisfied that Defendant committed a new criminal offense. We disagree.

¶ 13 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) (quoting *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014)). An alleged violation of a statutory mandate, however, presents a question of law and is reviewed *de novo*. *State v. Lyons*, 250 N.C. App. 698, 705, 793 S.E.2d 755, 761 (2016). "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).

¶ 14 Before revoking a defendant's probation, the trial court must hold a hearing to determine whether to revoke probation, unless the defendant waives the hearing, and

must make findings to support the decision. N.C. Gen. Stat. § 15A-1345(e) (2019). A trial court may only revoke probation and active 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). *Id.* § 15A-1344. Only the commission of a new criminal offense is at issue in this case.

¶ 15 "A probation revocation proceeding is not a formal criminal prosecution, and probationers thus have 'more limited due process right[s].'" *Murchinson*, 367 N.C. at 464, 758 S.E.2d at 358 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973)). At a revocation hearing, the due process rights available to a probationer include: (1) the disclosure of evidence against him; (2) the opportunity to appear and speak on his own behalf; (3) the opportunity to present relevant information; and (4) the opportunity to "confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." N.C. Gen. Stat. § 15A-1345(e). Further, the hearing is intended to be "informal or summary," *Murchinson*, 367 N.C. at 464, 758 S.E.2d at 358, and "flexible enough to consider evidence . . . that would not be admissible in an adversary criminal trial," *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). "Formal rules of evidence do not apply[.]" N.C. Gen. Stat. § 15A-1345(e).

> All that is required in a hearing of this character is 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.

State v. Hewett, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967). The State has the burden to present such evidence. *State v. Kerrin*, 209 N.C. App. 72, 79, 703 S.E.2d 816, 820 (2011).

¶ 16 In *State v. Coltrane*, 307 N.C. 511, 299 S.E.2d 199 (1983), our Supreme Court held that a trial court violated a probationer's rights to be heard, to present relevant information, and to confront and cross-examine adverse witnesses under § 15A-1345(e). The Court found the probationer's right to confront and cross-examine adverse witnesses was violated when the probationer was not permitted to confront "the prosecuting attorney who claimed the probation officer had told him that defendant had not procured employment nor the probation officer herself." *Id.* at 515-16, 299 S.E.2d at 202. The trial court made no finding that there was good cause for not allowing confrontation. *Id.* at 516, 299 S.E.2d at 202. The Court found the probationer's rights to speak on her own behalf and to present relevant information were violated when the trial court "interrupted defendant and did not permit her to offer any explanation of her failure to obtain employment in the previous two weeks or to explain the expected telephone call concerning a job prospect." *Id.* The Court therefore concluded that the probationer's due process rights were violated, which in

turn belied the trial court's conclusion that the probationer had willfully and without lawful excuse violated a condition of probation. *Id.*

¶ 17 In the case at bar, the trial court did not prevent Defendant from speaking on his own behalf, from presenting relevant information, or from confronting or cross-examining an adverse witness. Unlike in *Coltrane*, the trial court gave Defendant the opportunity to present relevant information and to speak on his own behalf. Defendant declined both opportunities. Defendant was given the opportunity to cross-examine Officer Maebry after her initial testimony and Defendant declined. Additionally, the trial court specifically asked Defense Counsel whether he wanted to respond after Officer Maebry spoke about disposition and mentioned the 50B order. Defense Counsel declined.

¶ 18 While the trial court did not proactively give Defendant the opportunity to respond to the 50B order after it reviewed the physical copy, given the informal and flexible nature of a probation revocation hearing, as well as the nonapplication of the formal rules of evidence, Defendant could have asked the trial court for the opportunity to respond. Defense Counsel did not object when the trial court asked to see a copy of the 50B order or when the 50B order was shown to him before it was presented to the trial court. At that point, it became apparent that the trial court was going to review the 50B order and again considering the informal nature of a probation revocation hearing, Defendant could have asked the trial court for the

opportunity to present relevant information or to be heard on the 50B order. Defendant did not do so, and the trial court took no action preventing Defendant from asking. Accordingly, we hold that the trial court did not violate Defendant's due process rights under N.C. Gen. Stat. § 15A-1345(e).

¶ 19 We next examine whether the trial court's review of the 50B order and reliance on it in determining that Defendant committed a criminal offense was an abuse of discretion. The 50B order did not need to be authenticated by a witness and it could be considered by the trial court despite being hearsay evidence because the formal rules of evidence do not apply in a probation revocation hearing. The informal and flexible nature of a revocation hearing indicates that it was not unreasonable for the trial court to review the 50B order after both the State and Defendant had presented their evidence. Similarly, it was not arbitrary for the trial court to ask for a copy of the 50B order after Officer Maebry stated that a 50B order had been granted during her remarks about disposition. Accordingly, we hold that the trial court did not abuse its discretion in reviewing and relying on the 50B order to find Defendant committed a new criminal offense.

¶ 20 Given that the trial court did not violate Defendant's due process rights, the trial court properly relied on the 50B order in finding Defendant committed a criminal offense. The evidence presented by the State—the 50B order, the violation reports, and Officer Maebry's testimony—was sufficient to meet its burden of proof. Based on

that evidence, the trial court in its sound discretion could be reasonably satisfied that Defendant willfully violated a condition of probation because the trial court knew Defendant was charged with assault on a female, a 50B order had been issued in relation to the charge, and the prosecuting witness and Defendant were both present at the civil proceeding about the 50B order. Therefore, the trial court did not err in revoking Defendant's probation on the ground Defendant committed a new criminal offense.

III. Conclusion

¶ 21 For the reasons stated above, we hold that the trial court did not violate Defendant's due process rights under N.C. Gen. Stat. § 15A-1345(e) in reviewing and relying on the 50B order to find Defendant committed a new criminal offense, specifically assault on a female. As the commission of a criminal offense is grounds for revoking Defendant's probation, we affirm the decision of the trial court.

AFFIRMED.

Judges DILLON and MURPHY concur.

Report per Rule 30(e).