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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-430

No. COA21-522

Filed 21 June 2022

Brunswick County, Nos. 19 CRS 52832, 52833, 55710

STATE OF NORTH CAROLINA

v.

JAMES CHARLES COLE, Defendant.

Appeal by Defendant from orders and judgments entered 17 March 2021 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 9 February 2022.

*Attorney General Joshua H. Stein, by Assistant Attorney General Donna A. Hart, for the State.*

*Mary McCullers Reece for the Defendant.*

JACKSON, Judge.

¶ 1 James Charles Cole (“Defendant”) appeals from orders and judgments revoking his probation for absconding. Defendant argues that the trial court abused its discretion because the State did not present competent evidence that Defendant willfully absconded from supervision. We agree and reverse the trial court’s judgments.

## **I. Background**

¶ 2

On 4 December 2019, Defendant entered an *Alford* plea to four counts of indecent liberties with a child. Defendant received four consecutive sentences of 16 to 29 months suspended for a period of 60 months of supervised probation.

¶ 3

On 14 January 2021, Defendant attended a scheduled meeting with his probation officer, R. Neilsen (“Officer Neilsen”), who had been supervising Defendant since November 2019. Over the course of this supervision, Defendant’s living arrangements included two hotels, a Holiday Inn Express and Best Western, and a tent behind a Wal-Mart in Leland. During their last meeting, Defendant told Officer Neilsen that he had taken down his tent and was temporarily staying at the Best Western “until he figured something out.”

¶ 4

On 28 January 2021, Officer Neilsen visited the Best Western in an unscheduled attempt to see Defendant. However, Defendant was not present, and the assistant general manager of the hotel told Officer Neilsen that Defendant’s room was vacant. Subsequently, Officer Neilsen called and texted Defendant’s cellphone “several times,” but Defendant did not respond. Officer Neilsen later testified that it appeared the messages went through on his end, though he admitted it was unusual for Defendant not to respond, as Defendant typically kept in regular contact with him, had attended every scheduled office meeting, and was “always punctual.”

¶ 5

On 3 February 2021, Officer Neilsen filed a report alleging that Defendant

violated his supervised probation by absconding from supervision under N.C. Gen. Stat. § 15A-1343(b)(3a). The report stated that

[t]he Defendant's last known address was the Best Western hotel, room 308, Leland. This officer attempted to make contact with the Defendant at this address on 1/28 and was advised by the assistant general manager of the Best Western that room 308 is currently vacant and the Defendant is no longer staying there, this officer called and texted offender several times on his cell phone instructing him to contact this officer as soon as possible. As of this writing the defendant has not contacted this officer and it is believed that he has absconded super[vision].

On or about 12 February 2021, Defendant was arrested for violating his probation at a Planet Fitness in Wilmington.

¶ 6 A hearing on the violation was held on 17 March 2021 in Brunswick County District Court. Ultimately, the trial court found that Defendant had violated the terms of his probation by absconding. The trial court revoked Defendant's probation for each of his sentences.

¶ 7 Defendant timely filed notice of appeal.

## **II. Discussion**

¶ 8 Defendant argues that the trial court erred when revoking his probation because the State presented insufficient evidence to support the trial court's finding that Defendant willfully absconded from supervision under N.C. Gen. Stat. § 15A-1343(b)(3a). We agree.

**A. Standard of Review**

¶ 9

In order for the trial court to revoke a defendant's probationary sentence,

the evidence [must] 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. Krider*, 258 N.C. App. 111, 112-13, 810 S.E.2d 828, 829 (2018) (internal quotation and citation omitted).

**B. Revocation of Defendant's Probation for Absconding**

¶ 10

Probationers who "abscond" under N.C. Gen. Stat. § 15A-1343(b)(3a) may have their probation revoked. N.C. Gen. Stat. §§ 15A-1343(b)(3a), 1344(f) (2021). Absconding is defined as "willfully avoiding supervision or [] willfully making the defendant's whereabouts unknown to the supervising probation officer[.]" *Id.* § 15A-1343(b)(3a).

¶ 11

The relevant date range to consider for absconding is that alleged in the violation report. *See State v. Melton*, 258 N.C. App. 134, 139, 811 S.E.2d 678, 682 (2018) (considering only the evidence relevant to the time period alleged in the violation report). Here, the relevant six-day period during which Defendant purportedly absconded is 28 January 2021, the date of Officer Neilsen's unsuccessful, unscheduled visit, to 3 February 2021, the date the violation report was filed.

¶ 12 When determining if sufficient evidence of willful absconding exists, this Court considers a multitude of factors, often including what means the probation officer used to reach the defendant and whether the defendant missed any scheduled meetings during the relevant period. *See Melton*, 258 N.C. App. at 140, 811 S.E.2d at 682 (“Where, as here, the State’s evidence only includes that a defendant failed to attend scheduled meetings, and the probation officer is unable to reach a defendant after merely two days of attempts, only leaving messages with a defendant’s relatives, the evidence is insufficient to reasonably satisfy a trial judge that defendant willfully failed to keep her probation officer informed of her whereabouts.”). *See also State v. Crompton*, 270 N.C. App. 439, 441-42, 842 S.E.2d 106, 109 (2020) (holding that the evidence was sufficient to prove absconding where “[d]uring this investigation, the officer went to Defendant’s last known residence twice, called all of Defendant’s references and contact numbers, called the local hospital, checked legal databases to see whether Defendant was in custody, and called the vocational program Defendant was supposed to attend. . . . Defendant also failed to report for scheduled appointments . . . without contacting the probation officer”).

¶ 13 Although § 15A-1343(b)(3a) does not define “willfully,” the term is defined by case law. “When used in criminal statutes, ‘willful’ has been defined as the wrongful doing of an act without justification or excuse, or the commission of an act purposefully and deliberately in violation of the law.” *Crompton*, 270 N.C. App. at

443, 842 S.E.2d at 110 (internal marks and citation omitted). Willful intent “is seldom provable by direct evidence, and must usually be shown through circumstantial evidence.” *State v. Walston*, 140 N.C. App. 327, 332, 536 S.E.2d 630, 633 (2000) (internal quotation and citation omitted). “In determining the presence or absence of the element of intent, the fact finder may consider the acts and conduct of the defendant and general circumstances existing at the time of the charged probation violation.” *Crompton*, 270 N.C. App. at 443, 842 S.E.2d at 110 (citation omitted).

¶ 14

Although willfulness need not be proved by direct evidence, this Court often considers whether there is any evidence, or reasonable inference, that the defendant knew his probation officer was attempting to reach him. For example, in *Melton*, the probation officer testified that the defendant missed two scheduled meetings, the officer “attempted to call and visit defendant, and [the officer] left messages with defendant’s parents for defendant to contact her,” however, the defendant testified that her phone was missing and she did not receive any messages at home or from her parents. *Melton*, 258 N.C. App. at 139, 811 S.E.2d at 681-82. We held that the State did not present sufficient evidence of willfulness because “there was no showing that a message was given to defendant or, more generally, that defendant knew [the probation officer] was attempting to contact her.” *Id.* at 139, 811 S.E.2d at 682. We ultimately held that, “although there was competent evidence that [the probation

officer] attempted to contact defendant, there was insufficient evidence that defendant willfully refused to make herself available for supervision[.]” *Id.*

¶ 15 Similarly, in *Crompton*, we held that the State presented sufficient evidence of willfulness where the State showed that the defendant likely knew his probation officer was attempting to contact him. *Crompton*, 270 N.C. App. at 448, 842 S.E.2d at 113, *aff’d*, 2022-NCSC-14, 380 N.C. 220 (2022). In *Crompton*, the defendant’s probation officer “was completely unaware of Defendant’s whereabouts and exhausted all available avenues of contacting Defendant over the course of ten days.” *Id.* During his investigation, the probation officer “visited Defendant’s last known residence twice, called all of Defendant’s references and contact numbers, called the local hospital, checked legal databases to see whether Defendant was in custody, and called the vocational program Defendant was supposed to attend.” *Id.* Additionally, during this investigation, the defendant missed two scheduled appointments with his probation officer. *Id.* This Court concluded that the State’s evidence was “more than sufficient” for the trial court to infer that the defendant knew his probation officer was attempting to contact him and willfully failed to make himself available for supervision. *Id.*

¶ 16 Likewise, in *Trent*, this Court held that there was competent evidence to support the defendant’s willfulness where “[e]ven after learning about [his probation officer’s] unscheduled visits during [the defendant’s] travels, defendant still did not

contact” his probation officer. *State v. Trent*, 254 N.C. App. 809, 821, 803 S.E.2d 224, 232 (2017). The probation officer had attempted two unscheduled visits approximately two weeks apart before filing the absconding violation. *Id.* at 818, 803 S.E.2d at 230-31. During both visits, the defendant’s wife informed the probation officer that the defendant had left the residence and she did not know where he was. *Id.* Significantly, the defendant admitted that he failed to contact his probation officer even after learning that the officer was looking for him. *Id.* at 820, 803 S.E.2d at 231.

¶ 17 Considering the above, we hold that the State did not present sufficient evidence of Defendant’s willfulness in order to prove absconding. Here, Officer Neilsen testified that he attempted to visit Defendant once at the Best Western but was informed by hotel management that Defendant’s room was vacant. Officer Neilsen followed up his unsuccessful visit with an unspecified number of phone calls and text messages to Defendant during the relevant period. Officer Neilsen did not return to the Best Western, nor did he attempt to call or visit the treatment center where Defendant was regularly attending treatment at the time.<sup>1</sup>

¶ 18 Without contradiction from the State, the Defendant testified that he attended

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<sup>1</sup> When asked if he had called the treatment center to see if Defendant had been in attendance as part of his absconding investigation, Officer Neilsen replied, “No. There was no reason to.”



treatment every Wednesday, and on the day of Officer Neilsen’s only visit to the Best Western, Defendant was at his scheduled treatment appointment. Defendant also testified that, during the relevant period, his phone was damaged and not working properly—phone calls were inexplicably being filtered as spam calls and his text messages were not appearing. Significantly, Defendant had never missed any scheduled appointments with Officer Neilsen, nor had he missed any of his scheduled treatment appointments up until the day of his arrest for the probation violation. Before residing at the Best Western, Defendant had been living in a tent behind the Wal-Mart in Leland. Defendant notified his probation officer that he took his tent down and would be staying at the Best Western until he figured something else out. Defendant testified that when he left the Best Western, he was “pretty much” homeless again, indicating that he did not, in fact, have a change of address to report to his probation officer at that time.<sup>2</sup>

¶ 19 Accordingly, this case is more analogous to *Melton* than *Crompton* or *Trent*. Unlike in *Crompton*, where the probation officer had exhausted “all available avenues” of reaching the defendant which allowed the trial court to reasonably infer that the defendant knew the officer was attempting to reach him, or *Trent* where the

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<sup>2</sup> Although Defendant is a convicted sex offender, our use of the phrase “change of address to report” as shorthand in this probation context is not in any way informed by our case law interpreting Article 27A of Chapter 14 of the North Carolina General Statutes.

defendant admitted to knowing his probation officer was trying to contact him, here, Defendant testified that he was not aware Officer Neilsen was looking for him. Significantly, Defendant testified that his phone was not working properly, and if he had seen Officer Neilsen's messages, he would have responded to them, which Officer Neilsen admitted was Defendant's usual practice. Moreover, unlike the defendants in *Crompton* or *Melton*, Defendant had not missed any scheduled appointments. Although not necessarily required to exhaust *all* means in an investigation for absconding, Officer Neilsen only attempted to visit Defendant once and then subsequently tried to reach Defendant by phone in an unspecified number of calls and messages spanning the six-day period. This is not enough to reasonably infer that Defendant *knew* Officer Neilsen was looking for him, especially given Defendant's unchallenged testimony that his phone was not working at the time. Consequently, this case is more like *Melton*, which held that the evidence was insufficient to infer that the defendant knew her probation officer was attempting to reach her when the probation officer's unspecified number of phone calls to the defendant were unsuccessful because the defendant's phone was missing, and the probation officer visited the defendant's address only once, leaving messages with her parents that the record did not show she received. *See Melton*, 258 N.C. App. at 138-39, 811 S.E.2d at 682.

Defendant knew he was supposed to report a change in address and that his failure to do so, whether he had a functioning phone or not, is competent evidence to support his willfulness. We disagree. It is true that Defendant knew he was obligated to report any change in address, and he admitted that he failed to do so at the hearing. However, Defendant also testified that he was homeless at the time, indicating that when he left the Best Western, he did not yet have an address to give his probation officer. Additionally, the State's argument that Defendant should have borrowed someone's phone to notify his probation officer that he had left the Best Western is unavailing to prove that Defendant willfully absconded from supervision. As described above, this case is distinguishable from *Trent*, and this Court's emphasis in *Trent* on the defendant's responsibility to contact his probation officer was premised, in significant part, on the fact that the defendant admitted he made no attempt to contact his probation officer *even after learning about her attempted visits*. See *Trent*, 254 N.C. App. at 821, 803 S.E.2d at 232.

### III. Conclusion

¶ 21 For the reasons above, we hold that the trial court abused its discretion because there was insufficient evidence that Defendant willfully absconded in violation of N.C. Gen. Stat. § 15A-1343(b)(3a), and the trial court's judgments revoking Defendant's probation are reversed.

REVERSED.

STATE V. COLE

2022-NCCOA-430

*Opinion of the Court*

Judges DIETZ and MURPHY concur.

Report per Rule 30(e).