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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-673

No. COA22-219

Filed 4 October 2022

Richmond County, No. 16CRS52685

STATE OF NORTH CAROLINA

v.

KIMO NEIKY WARD

Appeal by Defendant from judgment entered 12 August 2021 by Judge N. Hunt Gwyn in Richmond County Superior Court. Heard in the Court of Appeals 7 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kayla D. Britt, for the State-Appellee.

Stephen G. Driggers for Defendant-Appellant.

COLLINS, Judge.

¶ 1

Defendant Kimo Neiky Ward appeals from judgment revoking his probation. Defendant argues that the trial court erred by failing to make a finding of good cause for revocation, as required by N.C. Gen. Stat. § 15A-1344(f). Defendant also argues that the trial court erred by revoking his probation for both failing to report and absconding where only absconding could serve as the basis for revocation under N.C.

Gen. Stat. § 15A-1344(a). The trial court erred by failing to make a finding of good cause. The trial court also erred by indicating that Defendant's failure to report was a sufficient basis for revoking probation, but such error was harmless. We remand for the trial court to determine whether good cause exists to revoke Defendant's probation and, if so, to make an appropriate finding of fact as required by N.C. Gen. Stat. § 15A-1344(f).

I. Factual and Procedural Background

¶ 2

Defendant was indicted for possession of a firearm by a felon in 2017. In July 2018, Defendant entered an *Alford* plea, pursuant to which he received a suspended sentence and was placed on 30 months' supervised probation. Defendant reported to the probation office, but no intake officer was present. Defendant left the office without completing intake. Probation Officer Andrew Scott attempted, without success, to reach Defendant several times over the following weeks and ultimately filed a probation violation report stating that Defendant had failed to report for intake, and that Defendant had absconded supervision.

¶ 3

The United States Marshal Task Force took over Defendant's case and arrested Defendant in the summer of 2021, roughly four months after Defendant's probation period had ended. At Defendant's probation revocation hearing, the trial court found that Defendant "violated the terms and conditions of his probation as set forth in the violation report filed most recently, and that he has failed to report as well as him

having absconded.” The trial court made no other findings. The trial court entered judgment reflecting its findings and revoking Defendant’s probation. On the judgment sheet, the trial court checked box 4 which states, “[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence.” Defendant timely appealed.

II. Discussion

A. Standard of Review

¶ 4 Defendant argues that the trial court lacked jurisdiction to revoke his probation and erred by revoking his probation based on two grounds when only one provided a statutory basis for revocation. These arguments present issues of law, which we review de novo. *State v. Collins*, 245 N.C. App. 288, 292, 782 S.E.2d 350, 354 (2016).

B. Jurisdiction

¶ 5 Defendant first argues, and the State concedes, that the trial court lacked jurisdiction to revoke his probation after the probation period ended because the trial court failed to make an explicit finding of good cause, as required by N.C. Gen. Stat. § 15A-1344(f).

¶ 6 A trial court is without jurisdiction to revoke a defendant’s probation “after the expiration of the period of probation except as provided in G.S. 15A-1344(f).” *State v. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980) (citations omitted). Subsection

15A-1344(f) provides that a trial court may revoke probation after the probation period expires if

(1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

(2) The court finds that probationer did violate one or more conditions of probation prior to the expiration of the period of probation.

(3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

N.C. Gen. Stat. § 15A-1344(f) (2021). Subsection 15A-1344(f) requires a trial court to make a “finding of good cause shown and stated to justify the revocation of probation even though the defendant’s probationary term has expired.” *State v. Morgan*, 372 N.C. 609, 617, 831 S.E.2d 254, 259 (2019). “[T]he specific finding described in the statute must actually be made by the trial court and such a finding cannot simply be inferred from the record.” *Id.* at 616, 831 S.E.2d at 259.

¶ 7 During Defendant’s probation hearing, the trial court stated,

In this particular case, after having a listen to the facts and the testimony rather closely, I am going to find that the Defendant has violated the terms and conditions of his probation as set forth in the violation report filed most recently, and that he has failed to report as well as him having absconded. And based on these facts, I am going to place the Defendant – I am revoking his suspended sentence and placing that into effect.

The trial court made no express finding of good cause as required by subsection

15A-1344(f) and, therefore, “the trial court’s jurisdiction to revoke probation after expiration of the probationary period [wa]s not preserved.” *State v. Bryant*, 361 N.C. 100, 103, 637 S.E.2d 532, 534 (2006).

¶ 8

Where a trial court revokes probation after the probationary period has expired without making the requisite finding of good cause, the case must be remanded for a proper finding unless the record lacks sufficient evidence to support the necessary finding. *See id.* at 104, 637 S.E.2d at 535-36 (vacating judgment because, “although ordinarily this case would be remanded for a proper finding, remand is not a proper remedy *sub judice* because the record lacks sufficient evidence to support such a finding”); *Morgan*, 372 N.C. at 618, 831 S.E.2d at 260 (remanding because “we are unable to say from our review of the record that no evidence exists that would allow the trial court on remand to make a finding of good cause shown and stated under subsection (f)(3)”).

¶ 9

As in *Morgan*, we cannot say from our review of the record that no evidence exists that would allow the trial court on remand to make a finding of good cause shown and stated. Accordingly, as both the State and Defendant assert, the appropriate remedy here is to remand the case for the trial court to determine whether good cause exists to revoke Defendant’s probation and, if so, to make an appropriate finding of fact as required by N.C. Gen. Stat. § 15A-1344(f).

C. Probation Revocation

¶ 10 Defendant next argues that the trial court erred by revoking his probation based on two grounds when only one provided a statutory basis for revocation.

¶ 11 A defendant's probation can be revoked only if the defendant (1) commits a criminal offense in any jurisdiction, (2) absconds from supervision, or (3) has already served two periods of confinement for violating other conditions of probation. N.C. Gen. Stat. § 15A-1344(a) (2021); *State v. Williams*, 243 N.C. App. 198, 199-200, 776 S.E.2d 741, 742 (2015). A defendant absconds by "willfully avoiding supervision or by willfully making [his] whereabouts unknown to the supervising probation officer[.]" N.C. Gen. Stat. § 1343(b)(3a) (2021). A simple failure to report as directed is not a valid basis for revocation. *See State v. Johnson*, 246 N.C. App. 139, 146, 783 S.E.2d 21, 26 (2016).

¶ 12 At Defendant's revocation hearing, the trial court found that "Defendant has violated the terms and conditions of his probation as set forth in the violation report filed most recently, and that he has failed to report as well as him having absconded." The trial court's findings are accurately reflected on the judgment and commitment form. The trial court also checked box 4, indicating that "[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence." Because failing to report is not a sufficient basis upon which probation may be revoked, this box was checked in error.

¶ 13 Relying on *State v. Sitoski*, 238 N.C. App. 558, 767 S.E.2d 623 (2014),¹ Defendant contends that he was prejudiced by this error because the trial court may not have revoked Defendant’s probation had it been aware that only one of Defendant’s violations was a sufficient basis for revocation. *Sitoski* is distinguishable.

¶ 14 In *Sitoski*, probation violation reports were filed alleging that the defendant had violated conditions of her probation. 238 N.C. App. at 559-60, 767 S.E.2d at 624. At the hearing on the violation reports, the defendant admitted that she had violated three conditions of her probation, including driving while license revoked. *Id.* at 560, 767 S.E.2d at 624. However, she did not admit to — and the State offered no evidence to prove — the remaining alleged probation violations. *Id.* at 564, 767 S.E.2d at 627. Nonetheless, the trial court’s judgment revoking the defendant’s probation stated that the defendant had admitted to all the violations alleged. *Id.* Furthermore, the trial court “did not mark the box indicating each violation ‘in and of itself’ would be a sufficient basis for revocation.” *Id.* at 565, 767 S.E.2d at 627-28.

¶ 15 Although the trial court could have properly revoked the defendant’s probation, pursuant to N.C. Gen. Stat. § 15A-1344(a) and (d), on the basis that she committed a new crime in violation of the conditions of her probation, this Court

¹ Defendant’s reliance on *State v. Wortham*, 318 N.C. 669, 351 S.E.2d 294 (1987), is also misplaced as *Wortham* involves consolidating sentences, not probation violations.

remanded the case to the trial court because the judgment did not provide “a basis to determine whether the trial court would have decided to revoke [d]efendant’s probation . . . in the absence of the other alleged violations that it mistakenly found [d]efendant had admitted.” *Id.* at 564-65, 767 S.E.2d at 627.

¶ 16 Unlike in *Sitoski*, the trial court’s findings in this case were supported by the record. Additionally, the trial court checked box 4 indicating that “[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence.” Because absconding, standing alone, is a sufficient basis for revocation under § 15A-1344, and the trial court checked box 4 signifying that it should revoke Defendant’s probation for absconding, the trial court’s error was harmless.

III. Conclusion

¶ 17 Because the trial court did not make a finding of good cause as required under N.C. Gen. Stat. § 15A-1344(f), we remand for the trial court to determine whether good cause exists to revoke Defendant’s probation and, if so, to make an appropriate finding of fact.

REMANDED.

Judges DIETZ and CARPENTER concur.

Report per Rule 30(e).