

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-95

Filed 21 November 2023

Henderson County, No. 12 CRS 657

STATE OF NORTH CAROLINA

v.

DON SAMUEL NEILL, Defendant.

Appeal by defendant from order entered 23 February 2022 by Judge Bradley B. Letts in Henderson County Superior Court. Heard in the Court of Appeals 1 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ameshia Cooper Chester, for the State.

Stephen G. Driggers, PLLC, by Stephen G. Driggers, for defendant-appellant.

ARROWOOD, Judge.

Don Samuel Neill (“defendant”) appeals from order entered holding him in violation of his probation, extending his probation 24 months, and ordering him to serve 90 days in custody. On appeal, defendant argues that the trial court abused its discretion in finding that he willfully and without lawful excuse violated his probation. For the following reasons, we vacate the judgment and remand this matter

for further proceedings.

I. Background

Defendant was indicted on 14 May 2012 for charges of embezzlement and pled guilty on 17 September 2012. Defendant was previously convicted on related federal charges. On two of the state charges, Judge William R. Pittman sentenced defendant to a minimum of 72 and maximum of 96 months in the North Carolina Division of Adult Corrections to run concurrent with his federal sentence. Judge Pittman combined the remaining charges and sentenced defendant to a minimum of 80 months and maximum of 105 months, but he suspended the sentence and ordered that defendant be placed on 36 months of supervised probation after his active sentence concluded.

Prior to his sentencing, defendant transferred real property to his victims via deeds of trust. Proceeds from the sale of this conveyed real estate resulted in a total of \$1,075,000.00 paid to some of the victims, with additional property sales pending that would compensate other victims.

After serving his active sentence in state and federal prison, defendant was released and placed on probation 8 June 2019. One of the terms of defendant's probation was that he pay restitution to the Clerk of Court. Defendant owed a total of \$2,780,262.09 to be paid in monthly installments of \$89,730.00. Defendant was not credited for the previous land transfers in this calculation. Defendant's sole source of income was his Social Security check in the amount of \$3,183.70, but after

the federal government garnished wages for defendant's federal debt, he lived on approximately \$2,500.00 per month. Defendant did not pay any money to the clerk's office until December 2019 when his probation officer Tracy Howell ("Officer Howell") informed him he owed \$240.00 for his probation supervision. Defendant paid the supervision fee immediately thereafter and began making monthly restitution payments to the court in the amount of \$20.00. On 23 September 2021, Officer Howell filed a violation report alleging defendant was behind on his payment schedule.

A hearing on the alleged violation occurred on 23 February 2022. Officer Howell testified that as of that date, defendant had paid a total of \$780.00 toward his restitution requirement. Officer Howell informed the court that defendant had cared for his mother until her death in March 2020. When defendant was released from prison, he was 70 years old. Officer Howell testified that defendant told her he was retired. She further stated that though defendant did not seek employment, she did not tell him he needed to get a job. She did not know of any disability preventing him from working but stated she was aware of some general health issues defendant experienced. She acknowledged that the payment schedule may have been an unreasonable amount, and she told defendant he needed to pay "as much as he [could] as often as he [could]" and never stated that \$20.00 was insufficient. Other than the nonpayment, Officer Howell testified that defendant was cooperative, respectful, and abided by all other terms of his probation. Officer Howell recommended a civil

judgment on the restitution and to extend probation an additional two years.

Defendant also testified at the hearing and presented evidence of the various deeds of trusts he executed and accompanying land sales that benefited some of his victims. In addition to presenting “an affidavit [he] prepared with exhibits showing the properties that were sold, . . . and where the benefit went to[,]” defendant testified and presented evidence that \$1,075,000.00 had been received by some of the victims and another \$467,500.00 was under contract to be received.

Defendant further detailed his lifestyle since his release from prison. Defendant testified that he had been hospitalized twice with pneumonia and experienced other health issues without health insurance, although he did not provide any supporting documentation of these incidents. Defendant described for the court his debts and costs of living, including a car payment, food and rent costs, \$50.00 per month to see matinee movies, and a \$100.00 donation to his church. He further testified that he lived his life modestly and had done “everything [he knew to] do to make whole restitution.”

The trial court concluded that defendant violated the terms of his probation willfully and without lawful excuse. The trial court extended defendant’s probation period an additional 24 months and also stated that “the lack of good faith required on [defendant’s] part” warranted defendant serve 90 days in custody. To support its conclusion, the trial court’s findings of fact included, in relevant part, the following:

10. As of the date of this hearing, the Defendant has paid

STATE V. NEILL

Opinion of the Court

\$780.00 toward the \$2,780,057.09 in restitution and costs ordered in the April 25, 2013, order.

....

11. A payment plan was set up...[requiring] the Defendant to pay \$89,730.00 per month.

....

12. A monthly payment in this amount would be difficult for nearly every individual to comply with and is therefore deemed by the undersigned to be unreasonable.... Notwithstanding the unreasonableness of the amount, the calculation was appropriate and done correctly according to policy by the probation officer in this case.

13. Despite the large amount of money owed, the Defendant made no payments in the first several months of his supervision. Eventually, the Defendant began to pay \$20.00 per month.

....

18. The Defendant testified that his income comes solely from the Social Security Administration in the amount of \$3,183.00.

....

22. The position taken by the Defendant that he is retired, unable to work, and thus lacking a capacity to earn an income is without merit and unsupported by the facts.

....

24. While the deeds done by the Defendant were voluntary, they were done under his terms and prepared by him. None of these deeds or proceeds from the deeds were paid to the Clerk of Court in Henderson County.

....

26. ... [I]n the final analysis the defendant has not paid the money he was ordered to pay, moreover, he has not paid even a reasonable amount.

....

38. The Court has considered all of the evidence presented by the Defendant regarding his efforts to comply and his failure to pay the restitution and other monies set forth in Judge Pittman's April 25, 2013, order. While the monthly amount agreed upon with probation, \$89,730.00, is not

reasonable, the Court finds that the Defendant's failure to pay substantial and material amounts of money evidences a willfulness on behalf of the Defendant. By failing to make any payments for nearly 5 months, and then only paying \$20.00 per month, the Defendant did not make a good faith effort to comply with the conditions of probation. Moreover, the manner in which the Defendant transferred, or claims to have transferred, the real property outside payments made directly to the Clerk of Court prevents the Court from finding a good faith effort was undertaken by the Defendant pursuant to N.C. Gen. Stat. 15A-1364, as the Defendant made no efforts, given his legal acumen, to obtain consent and credit from the Court to satisfy his conditions of probation.

39. In making the findings of fact, the undersigned has weighed all of the evidence and has assessed the credibility of the witnesses[.]

The trial court also found that defendant's testimony regarding rent and transportation was "contradictory and inconsistent" based on differences in his testimony and other documents presented to the court.

The court concluded as follows:

6. While the monthly amount agreed upon with probation, \$89,730.00, is not reasonable, the Court finds that the Defendant's failure to pay substantial and material amounts of money evidences a willfulness on behalf of the Defendant.

....

7. The Defendant lacks a valid and lawful excuse for violation of the terms of his probation.

The court also ordered that the State's and defendant's counsel provide the court with an accounting of money paid to the victims. Defendant gave oral notice of appeal in open court.

The ordered accounting confirmed that the land transfers defendant completed resulted in \$1,075,000.00 paid to the victims. The trial court issued a supplemental order on 14 September 2022 crediting the amount to defendant's restitution owed and ordering the probation officer to calculate a new payment schedule. The order did not contain any other additions or amendments to the previous order.

II. Discussion

On appeal, defendant contends the trial court abused its discretion by finding that defendant willfully and without lawful excuse violated a condition of his probation. We agree that the trial court abused its discretion, and we remand for the trial court to make findings in light of the \$1,075,000.00 payment credited to the restitution amount, the additional property previously transferred, and other proceedings consistent with this opinion.

“When a superior court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, . . . the defendant may appeal under G.S. 7A-27.” N.C.G.S. § 15A-1347(a) (2022).

This Court reviews the decision of the trial court in a probation violation hearing for abuse of discretion. *State v. Murchison*, 367 N.C. 461, 464 (2014) (citing *State v. Maness*, 363 N.C. 261, 279 (2009)). 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 (2009) (citation and internal quotation marks omitted).

In a probation violation hearing,

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. Young, 190 N.C. App. 458, 459 (2008) (citation and internal quotation marks 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 (2002) (citation omitted). If the proceeding is based upon a defendant's failure to pay a fine or restitution which was a condition of his probation, the defendant has the burden to “offer evidence of his inability to pay money according to the terms of the [probationary] judgment.” *State v. Jones*, 78 N.C. App. 507, 509 (1985) (alteration in original) (citation and internal quotation marks omitted).

This Court has explained that “the judicial discretion afforded judges in probation revocation proceedings ‘implies conscientious judgment, not arbitrary or willful action. It takes account of the law and the particular circumstances of the case and is directed by the reason and conscience of the judge as to a just result.’ ”

State v. Hill, 132 N.C. App. 209, 212 (1999) (quoting *State v. Duncan*, 270 N.C. 241, 245 (1967)) (cleaned up). Thus, “fairness dictates that in some instances a defendant’s probation should not be revoked because of circumstances beyond his control.” *Id.*

Here, the trial court found that “the Defendant’s failure to pay substantial and material amounts of money evidences a willfulness on behalf of the Defendant.” Additionally, the trial court stated that defendant “has not paid restitution ordered by the Court. . . . [M]oreover, he has not paid even a reasonable amount.” After the accounting of defendant’s land transfers was complete, the trial court issued a supplemental order crediting \$1,075,000.00 to the restitution defendant owed. In the supplemental order, the trial court did not address any of its previous findings and conclusions regarding defendant’s failure to pay “substantial and material amounts of money” toward the restitution, defendant’s willfulness in failing to do so, or whether he had paid a “reasonable amount” in light of the credited payment.

The trial court’s initial failure to consider any of the amounts received by the victims, together with the deeds of trust and contracts for the sale of land, was arbitrary and unsupported by any reasonable basis, and, as such, it constitutes an abuse of discretion. The court also erred in failing to consider defendant’s advanced age of 74 years old and his health conditions when making its determination. The court’s later amendment to add this \$1,075,000.00 payment to the victims while

failing to revisit any of its other findings or conclusions constitutes additional evidence of and a further abuse of discretion.

Furthermore, the trial court found that “the manner in which the Defendant transferred . . . the real property outside payments made directly to the Clerk of Court prevents the Court from finding a good faith effort was undertaken by the Defendant pursuant to N.C. Gen. Stat. § 15A-1364[.]” That statute states, in relevant part, that the trial court may impose consequences for nonpayment “unless the defendant shows inability to comply and that his nonpayment was not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment[.]” N.C.G.S. § 15A-1364(b) (2022). Defendant here conveyed the deeds of trust even before his sentencing in 2013 to ensure the victims would receive the proceeds from the sale of the properties directly. Nothing in the record suggests defendant’s actions in conveying these deeds were not done in a good faith effort to pay his restitution. Nor does the statute in any way prevent the court from taking those transfers into account in making its findings. Such determination constitutes legal error not governed by the abuse of discretion standard.

Finally, we note that modification of probation as a result of a violation generally must be completed before the expiration of a person’s probationary period. *See* N.C.G.S. § 15A-1344(d) (2022) (“Any time prior to the expiration or termination of the probation period[,] . . . the court may after notice and hearing and for good

cause shown extend the period of probation[.]”). *But see* § 15A-1344(f) (listing an exception to the rule).

Here, defendant was assigned to 36 months of supervised probation to begin upon his release from prison. His probationary period began 8 June 2019, and the violation report filed September 2021 and the hearing conducted February 2022 were within the 36-month window granting the trial court jurisdiction to modify defendant’s probation. However, the trial court failed to state its grounds for jurisdiction under § 15A-1344(d); the court merely concluded it had jurisdiction over the subject matter. The trial court should make more detailed findings regarding jurisdiction in further proceedings.

Defendant’s embezzlement of enormous sums of money from his clients while acting as their attorney was repugnant. However, the trial court’s refusal to properly consider whether defendant’s actions in transferring property that had substantial value to the victims constituted a good faith effort to obtain the necessary funds to repay the sums they are owed constituted an abuse of discretion. Furthermore, the trial court acted under a misapprehension of the law when it determined that these actions could not constitute good faith actions under the statute since they were not directed through the clerk of superior court.

Once the proceeds of the sale of the properties have been appropriately credited, defendant will still owe a substantial debt to some of the victims. Given these facts, it may still be reasonable for the trial court to extend defendant’s terms

STATE V. NEILL

Opinion of the Court

of probation and to require defendant to make additional payments taking into account his income, age, and health. Accordingly, the order is vacated, and the matter is remanded back to the trial court for further proceedings consistent with this opinion.

III. Conclusion

For all the foregoing reasons, we vacate the judgment and remand this matter for further proceedings.

VACATED AND REMANDED.

Judges CARPENTER and FLOOD concur.

Report per Rule 30(e).