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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-501

Filed 6 February 2024

Cabarrus County, Nos. 21 CRS 51233-34, 22 CRS 386

STATE OF NORTH CAROLINA

v.

DUSTIN SHANE ROBERTS, Defendant.

Appeal by defendant from judgment entered 5 October 2022 by Judge Martin B. McGee in Superior Court, Cabarrus County. Heard in the Court of Appeals 23 January 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General David D. Larson, Jr., for the State.*

*Cooper Strickland, for defendant-appellant.*

ARROWOOD, Judge.

Dustin Shane Roberts (“defendant”) appeals from order revoking his probation and activating his sentence. On appeal, defendant argues the trial court abused its discretion in revoking his probation, erred by failing to find good cause to deny his right to cross-examine a witness, erred in revoking his probation based on each

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violation, and erred by failing to establish good cause to revoke probation after the period expired. For the following reasons, we find no error.

I. Background

On 30 September 2020, defendant pled guilty to possession of methamphetamine in Superior Court, Rowan County and was sentenced to a term of 8 to 19 months' imprisonment, suspended for 24 months. On 22 June 2021, defendant pled guilty in Superior Court, Cabarrus County to felony larceny, larceny of a motor vehicle, possession of a stolen motor vehicle, possession of a Schedule II controlled substance, possession with intent to manufacture, sell, or deliver, and driving while license revoked. Defendant was sentenced to 18 to 31 months' active sentence for the larceny, motor vehicle, drug possession, and driving without license charges, and terms of 15 to 27 months for each possession with intent to sell charge, suspended for 30 months of probation after his active sentence.

On 22 February 2022, Defendant was released from prison and began his probation. Probation Officer Jennifer Walker ("Officer Walker") supervised defendant's probation until 12 April 2022 when supervision was transferred to Officer Yezmin Marrero ("Officer Marrero"). On 10 June 2022, Officer Marrero filed two violation reports. Officer Walker filed a third violation report on the September 2020 case on 21 June 2022. The reports alleged that defendant violated the condition of his probation that he not "abscond by willfully avoiding supervision

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or by willfully making the defendant's whereabouts unknown to the supervising probation officer" on or about 20 April 2022. The reports specifically state that

defendant left his place of residence at 2913 Owen Drive NW Concord, NC without prior approval or knowledge of his probation officer and failed to make his whereabouts known, making himself unavailable for supervision. As of the date of this report, the defendant[s] whereabouts are unknown and all efforts to locate the defendant have been unsuccessful.

Each of the three reports alleged that defendant violated the condition that "defendant shall pay to the Clerk of Superior Court the "Total Amount Due[,] " and in the September 2020 case, defendant "failed to obtain an assessment or provide proof of an assessment" as ordered.

Defendant's probation for the 2020 charges expired on 30 September 2022. A hearing on the alleged violations was held at the 3 October 2022 criminal session in Superior Court, Cabarrus County, Judge Martin B. McGee presiding.

Officer Marrero was no longer with the department and did not testify at the hearing. Officer Walker testified as the State's witness. Officer Walker stated that after defendant was released in February 2022, she and another officer picked him up and drove him to his sister's house. Defendant signed paperwork on 25 February 2022 acknowledging he understood the conditions of his probation. Officer Walker testified that defendant "did a good job of trying to keep in contact with me for the first few months."

Officer Walker told the court that according to Officer Marrero's notes, in

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April 2022, defendant was located at the 2913 Owen Drive NW address. Defendant informed officers his electronic monitor was not working, and an on-call probation officer called defendant on 20 April 2022 and told him to be home at 4:00 p.m. so that a technician could examine the monitor. Officer Walker went to defendant's address at 5:00 p.m., and the man who answered the door told her that he did not know who defendant was and that defendant did not live there. Other officers communicated to Officer Walker that they had seen defendant at the address the day prior. On 21 April 2022, another officer called defendant and left him a message to contact him, and the next day, that officer informed Officer Marrero that he had been unable to contact defendant. Officer Marrero requested a post-release warrant.

On 27 April 2022, Officer Marrero spoke with defendant's sister who told Officer Marrero that she could send defendant a message through Facebook. Officer Marrero then began the process to list defendant as an absconder. On 9 May 2022, Officer Marrero requested an addendum violation for absconding. On 18 May 2022, defendant left a voicemail with Officer Marrero and informed her that he was in Mooresville. Officer Marrero scheduled a meeting with defendant for 2:00 p.m. that day, but defendant did not report.

On 23 May 2022, Officer Marrero contacted defendant again who told her he was in China Grove but did not provide an address. She scheduled an appointment for 3:00 p.m. the next day, and again defendant did not report. From 23 May to 13 July 2022, neither Officer Marrero nor Officer Walker had contact with defendant,

and he had not been supervised since 20 April 2022. Officer Walker testified that the department's policy is to document every contact with offenders. Defendant was picked up in Horry County, South Carolina on 9 July 2022.

In defendant's counsel's closing remarks, he noted on multiple occasions Officer Marrero's absence from the hearing, stating that because Officer Marrero was not there to testify, only her notes were available, and "[defendant] doesn't have the ability to cross-examine [her] about when she was contacted, what voicemails she had, what voicemails were left[.]" Counsel again informed the trial court that "[t]he probation officer who says he's absconded is not here, he doesn't have the opportunity to cross-examine her based on her statements."

The trial court revoked defendant's probation and entered judgment consolidating defendant's active sentence to 15 to 27 months. In doing so, the trial court checked the boxes indicating it found in each case that

Each violation [alleged in the report] is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence.

....

The Court may revoke defendant's probation . . . for the willful violation of the condition(s) that he/she not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a), as set out above.

At the close of the hearing, the trial court stated that "Defendant has willfully violated his probation as set forth in the violation reports in each of these cases, including absconding. In 22-CRS-386 case, I would also find that his probation has

expired, but there's good cause to address it following the expiration of his probation." The judgment for that case contained a note that the "court finds good cause to proceed with hearing outside period of probation." Defendant filed timely notice of appeal on 17 October 2022.

## II. Discussion

Defendant argues on appeal that (1) the trial court abused its discretion in revoking his probation, (2) the trial court erred by failing to find good cause to deny his right to cross-examine a witness, (3) the trial court erred in finding each violation was a sufficient basis to revoke probation, and (4) the trial court erred by failing to establish good cause to revoke probation after the period expired. We address each argument in turn.

### A. Revocation

Defendant argues that the trial court abused its discretion in revoking his probation because there was insufficient evidence to support a finding that he willingly made himself unavailable for supervision. We disagree.

A hearing for revocation of probation merely requires that "the evidence be such as to reasonably satisfy the trial court in the exercise of its sound discretion that the defendant has willfully violated a valid condition of probation." *State v. Harris*, 361 N.C. 400, 404 (2007) (cleaned up) (citing *State v. Hewett*, 270 N.C. 348, 353 (1967)). This Court reviews the revocation of probation for an abuse of discretion. *State v. Miller*, 205 N.C. App. 291, 293 (2010) (citation omitted). "Abuse of discretion

results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285 (1988) (citation omitted).

As a regular condition of probation, a defendant must not "abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." N.C.G.S. § 15A-1343(b)(3a) (2023). A trial court may only revoke probation if a defendant absconds under § 15A-1343(b)(3a) or commits a criminal offense. § 15A-1344(a) (2023). A defendant absconds when he "willfully makes his whereabouts unknown to his probation officer, and the probation officer is unable to contact the defendant." *State v. Melton*, 258 N.C. App. 134, 138 (2018).

Defendants have a duty to make their probation officers apprised of their whereabouts. *See State v. Trent*, 254 N.C. App. 809, 821 (2017) ("Despite the fact that he did not have a phone, it was defendant's responsibility to keep his probation officer apprised of his whereabouts."). In *State v. Thorne*, a defendant required to submit to drug testing left the probation office and did not return. 279 N.C. App. 655, 658 (2021). His probation officer twice attempted to contact him at his last known address and left a message with the defendant's relatives, but the defendant failed to report or contact the officer for at least 22 days. *Id.* This Court held that under these facts, the trial court did not abuse its discretion in revoking the defendant's probation. *Id.* at 662.

Like the defendant in *Thorne*, defendant here relies on *State v. Williams*, 243 N.C. App. 198, 205 (2015), to assert his actions did not amount to absconding. In that case, this Court held that even though a defendant missed meetings, traveled outside the state, and failed to return messages, revocation was improper because his probation officer knew his whereabouts through their phone conversations. *Williams*, 243 N.C. App. at 205. Similarly, in *Melton*, we held that a defendant's failure to attend meetings and the probation officer being unable to reach defendant for a span of two days was not sufficient evidence that the defendant absconded. 258 N.C. App. at 140. There, the officer left messages with the defendant's family to contact her and attempted to visit and contact the defendant over two days without success. *Id.*

While many of the facts in *Williams* and *Melton* are present here, key differences make this case distinguishable. Like the defendants in those cases, defendant here failed to report to meetings Officer Marrero scheduled and failed to return messages she left him. However, more like the defendant in *Thorne* who did not contact his probation officer for 22 days, defendant did not communicate with probation officers from 20 April until 18 May 2022 (28 days) when he called Officer Marrero and informed her of his location in Mooresville. This period is much longer than the span of two days in *Melton*, and unlike how the defendant in *Williams* regularly communicated his location with the officer via telephone, neither Officer Marrero nor Officer Walker received any communication from defendant for nearly one month. The evidence also showed that defendant was or should have been aware



that his monitor was not working, and he could not be electronically supervised during that time.

After this gap in communication, defendant informed Officer Marrero of his location on 23 May 2022, but he failed to report to either meeting she scheduled with him. Finally, officers did not hear from defendant again from 23 May until 13 July 2022 after he was picked up in South Carolina. Even though defendant alleges his phone required Wi-Fi to use, his lack of communication of his whereabouts for two extended periods of time during his probation provide sufficient evidence to support the trial court's finding that defendant absconded. Thus, the trial court did not abuse its discretion in revoking defendant's probation.

B. Denial of Right to Cross-Examination

Defendant next argues that the trial court erred in failing to find good cause to deny his right to confront adverse witnesses. We disagree.

At a revocation hearing, “evidence against the probationer must be disclosed to him, and 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.G.S. § 15A-1345(e); *see also State v. Coltrane*, 307 N.C. 511, 515–16 (1983) (holding that revocation was improper because defendant was not allowed to confront any adverse witnesses and no finding of good cause was made).

This Court has held that trial courts do not violate defendants' rights to

confrontation per § 15A-1345(e) when objections do not invoke the statutory right. *Compare Thorne*, 279 N.C. App. at 660, with *State v. Luck*, 272 N.C. App. 447, 2020 WL 3721579, at \*2 (2020) (unpublished) (holding that trial court erred in denying right to confrontation when defendant’s counsel objected “to Officer Clark testifying to any of Officer Bolen’s statements here in her report” and stated the defendant “still does have a right to confrontation . . . pursuant to [N.C.G.S. §] 15[A]-1345(e)[.]”).

The facts in *Thorne* are similar to the facts in this case. In *Thorne*, probation Officer Phillips supervised the defendant but was not present at the revocation hearing, and the defendant objected to probation Officer Locus, who did not supervise the defendant, testifying at the hearing. 279 N.C. App. at 659. Officer Locus testified that he did not have personal information regarding the defendant’s case, and defendant’s counsel objected on the basis that “he’s going to read from a file . . . from somebody. He’s not even involved in the case; doesn’t know any details about the matter[.]” *Id.* at 660. In holding the trial court did not err, this Court stated that the

[d]efendant did not state that the legal basis for his objection was his statutory confrontation right, nor was that ground apparent from the context. Defendant did not request to cross examine Phillips, did not request Phillips’ presence at the hearing, and did not request Phillips be subpoenaed and required to testify. At most, it could be inferred that defendant objected to Locus testifying because Locus did not have personal knowledge of the underlying events, and because Locus’s reading from Officer Phillips’ case notes constituted inadmissible hearsay.

*Id.*

During the revocation hearing in this case, defendant’s counsel noted in closing remarks that defendant “doesn’t have the ability to cross-examine [Officer Marrero] about when she was contacted, what voicemails she had, what voicemails were left[.]” However, while Officer Walker testified using Officer Marrero’s notes, defendant’s counsel did not object to Officer Walker’s testimony. Furthermore, like the defendant in *Thorne*, the record contains no evidence that defendant here requested to cross-examine Officer Marrero, nor did he request her presence at the hearing or subpoena her to testify. Therefore, at most, it could be inferred that defendant’s counsel’s statements at the close of the hearing referred to Officer Walker’s testimony as inadmissible hearsay. As was the case in *Thorne*, defendant did not invoke his statutory right to cross-examine adverse witnesses, and the trial court did not err.

C. Findings of Fact

Defendant next argues that the trial court erred in finding that each violation provided sufficient basis to revoke probation. While we agree that this finding was error, revocation was still proper.

“The court may only revoke probation for a violation of a condition of probation under G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a)[.]” N.C.G.S. § 15A-1344(a). Thus, if an offender does not commit a criminal offense or abscond, a court may not revoke probation. *See State v. Hemingway*, 278 N.C. App. 538, 544–45 (2021) (reversing finding that “[e]ach violation is, in and of itself, a sufficient basis upon which this [c]ourt should revoke probation” because a positive drug test is not a sufficient basis

to revoke probation).

Here, the trial court found that “[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence.” However, in addition to violations for absconding, the violation reports alleged that defendant violated the condition that “defendant shall pay to the Clerk of Superior Court the ‘Total Amount Due[,]’ ” and in the September 2020 case, defendant “failed to obtain an assessment or provide proof of an assessment” as ordered. These additional violations are not themselves sufficient bases for the trial court to revoke defendant’s probation. The trial court’s findings that these violations were adequate to revoke probation were error.

However, “a trial court’s ruling must be upheld if it is correct upon any theory of law, and thus it should not be set aside merely because the court gives a wrong or insufficient reason for [it].” *State v. Turner*, 239 N.C. App. 450, 455 (2015) (alteration in original) (citations omitted). Here, the trial court also found that “[t]he Court may revoke defendant’s probation . . . for the willful violation of the condition(s) that he/she not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a), as set out above.” Because the trial court indicated that it had the authority to revoke defendant’s probation based on its finding he absconded, revocation was proper despite its other erroneous findings.

D. Expiration of Probationary Period

Finally, defendant argues that the trial court erred in failing to establish good

cause to revoke his probation after the probationary period of his 2020 offense expired. We disagree.

Our statute provides that

[t]he court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

(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 the 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.G.S. § 15A-1344(f).

“[W]hether good cause exists, being fact-intensive and dependent on the circumstances which result in the delay of a probation revocation hearing, is a finding of fact delegated to the discretion of the trial court.” *State v. Geter*, 383 N.C. 484, 492 (2022) (applying an abuse of discretion standard to the trial court’s finding that good cause existed to revoke the defendant’s probation over a year after the expiration of probation). The *Geter* Court explained that “N.C.G.S. § 15A-1344(f)(3) does not delineate or describe any of [the circumstances which might justify revocation], but merely prescribes that, in each case, it is up to the trial court to decide whether ‘good cause’ to extend, modify, or revoke a defendant’s probation after the expiration of the term of probation has been shown.” *Id.* at 494.

“The ‘good cause’ contemplated by [the statute] therefore *must be shown by the State . . . and determined by the trial court*, pursuant to its broad discretionary powers.” *Id.* at 491 (emphasis added) (cleaned up). The good cause “found by the trial court must be ‘stated’ on the record, either in open court by the trial court, by a party with the trial court’s endorsement, or within the trial court record.” *Id.* In *Geter*, the State presented evidence that the defendant violated a condition of his probation by possessing a firearm as a felon. *Id.* at 491–92. The trial court, “after receiving the ‘showing’ by the State,” found orally and in writing that good cause existed to revoke the defendant’s probation despite the expiration of the probationary period. *Id.* at 492.

As in *Geter*, the trial court here made an oral finding of good cause: “I would also find that his probation has expired, but there’s good cause to address it following the expiration of his probation.” Additionally, the trial court made a written finding of good cause in the judgment: “court finds good cause to proceed with hearing outside period of probation.” Defendant argues that the evidence did not support the trial court’s finding. Officer Walker filed the violation report on 21 June 2022, and defendant’s probation ended 30 September 2022. The revocation hearing occurred on 5 October 2022, five days after the expiration of defendant’s probation, and the State presented evidence that tended to show defendant absconded from supervision for extended periods of time during his probation. Given these facts, and that the statute does not mandate that the trial court base its finding on any one consideration, we do

not conclude that it was “arbitrary, capricious, or offended substantial justice” for the trial court to find good cause to revoke defendant’s probation five days after his probationary period expired. *See Geter*, 383 N.C. at 494.

III. Conclusion

For all the foregoing reasons, we hold the trial court committed no prejudicial error.

NO ERROR.

Judges CARPENTER and FLOOD concur.

Report per Rule 30(e).