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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-275

Filed 7 May 2024

Columbus County, No. 13 CRS 50656

STATE OF NORTH CAROLINA

v.

GERALD LAMONT HEMINGWAY, Defendant.

Appeal by Defendant from judgment entered 14 August 2019 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 3 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

MURPHY, Judge.

When issuing a ruling concerning a defendant's ability to confront a witness during a probation revocation hearing, formal procedures associated with a criminal trial do not apply. Accordingly, if a trial court finds good cause for denying a probationer defendant's right to confrontation, we review that determination only for abuse of discretion. Here, where the trial court denied Defendant the opportunity to

confront an informant referenced in law enforcement testimony on the basis that Defendant did not subpoena the informant despite knowing her identity, we cannot say the trial court abused its discretion in its good cause determination.

BACKGROUND

This is Defendant Gerald Lamont Hemingway's second appeal from the revocation of his probation imposed pursuant to his conviction of one count of possession with intent to sell or distribute marijuana in August 2017. The bulk of the relevant background was discussed in the previous appeal:

In August 2017, Defendant Gerald Lamont Hemingway pled guilty to one count of possession with intent to sell or distribute marijuana. Defendant was sentenced to 8 to 19 months in prison and his sentence was suspended for 24 months of supervised probation. As part of the standard conditions of his probation (AOC-CR-603C), Defendant was not to commit any criminal offense in any jurisdiction and Defendant could "[n]ot use, possess, or control any illegal drug or controlled substance unless it ha[d] been prescribed for [him] by a licensed physician and [was] in the original container with the prescription number affixed on it[.]" See N.C.G.S. § 15A-1343(b)(15) (2019).

The State alleged Defendant violated the conditions of his probation in two violation reports by (1) committing new criminal offenses; and (2) testing positive for cocaine. Paragraph 3 of the *Violation Report* dated 20 March 2018 alleges:

Of the conditions of probation imposed in that judgment, [Defendant] has willfully violated:

. . .

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3. [N.C.G.S. §] 15A-1343(b)(1) “Commit no criminal offense in any jurisdiction” in that [Defendant] HAS THE FOLLOWING CHARGES THAT ARE VIOLATIONS OF [Defendant's] CURRENT PROBATION: 18CR050542 FELONY POSSESSION OF COCAINE, MAINTAIN VEH/DWELL/PLACE CS (F) OFFENSE DATE [13 March 2018];

18CR050550 (F) CONSPIRE TO TRAFFIC IN COCAINE OFFENSE DATE [13 March 2018]

18CR050551 (F) SELL COCAINE, MAINTAIN VEH/DWELL/PLACE CS (F) OFFENSE DATE [12 March 2018]

18CR050552 (F) SELL COCAINE, MAINTAIN VEH/DWELL/PLACE CS (F) OFFENSE DATE [12 March 2018]

18CR050557 (F) CONSPIRE TO TRAFFIC COCAINE (F) CONSPIRE TO TRAFFIC COCAINE OFFENSE DATE [13 March 2018]

18CR050558 (F) SELL OR DELIVER COUNTERFEIT CS (F) PWISD COUNTERFEIT CS OFFENSE DATE [13 March 2018]

Paragraph 1 of the *Violation Report* dated 4 April 2018 alleges:

Of the conditions of probation imposed in that judgment, [Defendant] has willfully violated:

1. Condition of Probation “Not use, possess or control any illegal drug or controlled substance unless it has been prescribed for [Defendant] by a licensed physician and is in the original container with the prescription number affixed on it . . .” in that

[Defendant] TESTED POSITIVE FOR COCAINE ON [4 April 2018].

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A properly noticed probation violation hearing was held on 14 August 2019. At the probation violation hearing, . . . Lieutenant Barrett Thompson (“Lieutenant Thompson”) [] testified about two purchases he initiated with Defendant through a paid informant.

State v. Hemingway, 278 N.C. App. 538, 539-41 (2021).

Before Lieutenant Thompson provided details about the purchases, Defendant objected to Lieutenant Thompson’s testimony:

[DEFENSE COUNSEL]: Your Honor, objection. I realize the Rules of Evidence don’t apply in probation violation cases, but we do have some very fundamental constitutional rights, including due process, equal protection, and confrontation.

And if [the State is] soliciting hearsay about a [purchase] from an officer who wasn't present at the [purchase], it’s hearsay, and it denies [Defendant] the right to confront the accuser, who would be the person that allegedly bought the narcotics from [Defendant]. And that’s a fundamental problem.

I recognize that -- but it’s just no right of confrontation to bring an officer in and say, [“I know there was a [purchase] and so-and-so bought such and such from somebody.”] I don’t believe that due process and equal protection -- even though we do know that the Rules of Evidence don’t apply to probation matters, it’s just a -- it’s a fundamental constitutional right.

The trial court overruled Defendant’s objection and Lieutenant Thompson began to testify. Defendant objected again:

[THE STATE:] And how much was given on that day at that time, the 12:00 hour?

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[LIEUTENANT THOMPSON:] At that time, \$200[.00].

[THE STATE:] \$200[.00]. Okay. And that [paid informant] was whom?

. . .

[LIEUTENANT THOMPSON:] [Paid informant's name].

[THE STATE:] And [the paid informant], she was searched before and after the [purchase]?

[LIEUTENANT THOMPSON:] Yes, sir -- I mean, yes, ma'am.

[THE STATE:] And the vehicle that she rode in was searched before and after?

[LIEUTENANT THOMPSON:] Yes, ma'am.

[THE STATE:] And did she return and turn over any contraband or evidence to the detectives?

[LIEUTENANT THOMPSON:] Yes, ma'am.

[THE STATE:] And what was seized?

[LIEUTENANT THOMPSON:] A white powder substance.

[THE STATE:] Okay. And was that what was the agreed-upon transaction between the [paid informant] and the target, [Defendant]?

[LIEUTENANT THOMPSON:] Yes, ma'am.

[DEFENSE COUNSEL]: Objection. That's hearsay.

THE COURT: Hearsay is admissible. Overruled.

[DEFENSE COUNSEL]: By the confrontation, Your Honor; we don't have this lady here to confront.

THE COURT: *State v. Murchison*. Again, understanding the nature of these proceedings, the [trial court] overrules the objection.

Id. at 549-51.

Defendant was subsequently charged with possession of cocaine, possession of marijuana, maintaining a dwelling place, and sale and delivery of cocaine.

The trial court revoked Defendant's probation, finding:

3. The condition(s) violated and the facts of each violation are as set forth . . .

a. In Paragraph(s) 3 of the Violation Report or Notice dated [20 March 2018].

b. In Paragraph(s) 1 of the Violation Report or Notice dated [4 April 2018].

. . . [.]

4. Each of the conditions violated as set forth above is valid; [Defendant] violated each condition willfully and without valid excuse; and each violation occurred at a time prior to the expiration or termination of the period of [Defendant]'s probation.

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

According to the trial court's written findings, Defendant's probation was revoked for (1) committing new criminal offenses and (2) testing positive for cocaine. However, at the probation revocation hearing, the judge orally stated

“[t]he basis of the revocation is that [Defendant] has committed a new criminal offense.”

Id. at 541-42.

Defendant argued in the previous appeal that,

[first,] his probation [could not] be revoked solely for a positive drug test; [second,] there was insufficient evidence for the trial court to conclude Defendant had committed new crimes, namely the sale, delivery and/or possession of illegal narcotics; and, [third,] he was deprived of his constitutional right to confrontation pursuant to the Due Process Clause, as well as his statutory right to confrontation in a probation revocation hearing pursuant to N.C.G.S. § 15A-1345(e).

Id. at 542. We reversed in part and vacated and remanded in part, holding that, while Defendant’s positive drug test was not itself an adequate ground for revoking his probation, adequate evidence existed on the record from which the trial court could have revoked Defendant’s probation for his purchase of illegal narcotics pursuant to N.C.G.S. § 15A-1343(b)(1). *See* N.C.G.S. § 15A-1343(b)(1) (2022) (“As [a] regular condition[] of probation, a defendant must[] . . . [c]ommit no criminal offense in any jurisdiction.”). However, we also held that the trial court abused its discretion in failing to make any findings relating to good cause when it denied Defendant the ability to confront the State’s informant who was not present at his revocation hearing.

On remand, on 20 January 2022, the trial court entered a *Supplemental Order Regarding Further Findings of Fact Pursuant to N.C.G.S. § 15A-1345(e)*:

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Pursuant to an order of remand from the North Carolina Court of Appeals (2021-NCCOA-352), the [trial] [c]ourt hereby makes the following further findings of fact pursuant to N.C.G.S. § 15A-1345(e), to supplement the prior order issued by this Court on [14 August] 2019:

1. That the [trial [c]ourt conducted a supplemental hearing regarding this matter on [8 December] 2021.
2. That [] [D]efendant[] . . . was present with his attorney of record[.]
3. That in addition to representing [] [D]efendant on the probation violation in 13 CRS 50656, [Defendant's attorney] also represents [] [D]efendant in 18 CRS 50541, 18 CRS 50542, 18 CRS 50551, and 18 CRS 50552, which are the pending new criminal offenses which were part of the basis of allegation against [] [D]efendant in the violation report.
4. That the court file reflects, and [Defendant's attorney] acknowledged, that [] [D]efendant was indicted on the new criminal charges on [9 May] 2018.
5. That [Defendant's attorney] acknowledged that he was aware of the existence of the confidential informant connected to the new criminal offenses well in advance of the [14 August] 2019 probation violation hearing.
6. That, prior to the probation violation hearing that was held on [14 August] 2019, [] [D]efendant, through his attorney . . . , was provided discovery that disclosed the name of the confidential informant.
7. That [] [D]efendant did not subpoena the confidential informant for the [14 December] 2019 court date, nor did [D]efendant request a continuance, prior to Lieutenant Thompson's testimony, in order subpoena the confidential informant

8. That good cause existed to not require the State to call the confidential informant and to allow Lieutenant Thompson, in the Court's discretion, to testify regarding his interaction with the confidential informant.

We allowed Defendant's petition for writ of certiorari on 30 June 2022.

ANALYSIS

On appeal, Defendant argues that the trial court erred in finding good cause to deny Defendant the ability to cross-examine the State's informant.¹

When evaluating the sufficiency of the confrontation rights observed in a probation revocation hearing, our Supreme Court has remarked that "trial courts are granted great discretion in admitting any evidence relevant to the revocation of defendant's probation." *State v. Jones*, 382 N.C. 267, 272 (2022) (marks omitted). "[A] proceeding to revoke probation is not a criminal prosecution and is often regarded as informal or summary[.]" *State v. Murchison*, 367 N.C. 461, 464 (2014) (marks omitted); therefore, procedural hallmarks of a criminal trial like our Rules of Evidence and the Sixth Amendment's Confrontation Clause do not apply.

¹ Defendant expresses these arguments in primarily constitutional terms, though we note that his repeated invocation of N.C.G.S. § 15A-1345 throughout his brief satisfies the requirement we articulated in Defendant's first appeal that due process rights to confrontation be raised in statutory terms on appeal. *Hemingway*, 278 N.C. App. at 548-49 (2021) ("Defendant argues he has both a constitutional right to confrontation and a statutory right to confrontation. However, . . . Defendant's constitutional argument, to the extent it sounds in due process, collapses into his statutory argument below because N.C.G.S. § 15A-1345(e) codifies the due process requirements concerning confrontation in probation revocation hearings."); *State v. Singletary*, 290 N.C. App. 540, 548 (2023) (marks omitted) ("[N.C.G.S.] § 15A-1345(e) is a codification of the probationer's right to due process under the Fourteenth Amendment and controls the probationer's right to confrontation in a probation revocation hearing.").

Hemingway, 278 N.C. App. at 545, 548. “Ultimately, all that is required in a probation revocation hearing is that the evidence reasonably satisfy the trial court that a probationer has willfully or without lawful excuse violated a condition of probation.” *Jones*, 382 N.C. at 272 (marks omitted). Accordingly, we review the trial court’s determination of good cause to accept testimony without confrontation for abuse of discretion. *Hemingway*, 278 N.C. App. at 551-52.

Bearing this in mind, Defendant’s first argument is that we should not employ the abuse of discretion standard in this case and should, instead, review the trial court’s finding of good cause de novo as the deprivation of a constitutional right. This argument fails for two reasons. First, we are not at liberty to deviate from our prior holdings or those of our Supreme Court, and they have held squarely that we review the issue of good cause to deny confrontation in a probation revocation hearing for abuse of discretion. *See id.*; *Jones*, 382 N.C. at 272. Second, even if we could reevaluate the existing caselaw, we have already said that the abuse of discretion standard applies to this issue during Defendant’s first appeal *and* specified in the mandate of that appeal that the trial court’s ruling on remand would be discretionary. *Hemingway*, 278 N.C. App. at 551-52. A contrary holding now would therefore violate the law of the case. *See State v. Paul*, 231 N.C. App. 448, 450 (2013) (marks omitted) (“[U]nder the law of the case doctrine, an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were

determined in the previous appeal, are involved in the second appeal.”); *see also Appalachian Materials, LLC v. Watauga Cnty.*, 283 N.C. App. 117, 120 (2022) (“It may be that our mandate in *Appalachian I* was too sweeping[,] . . . [b]ut our prior mandate is the law of the case. The [defendant] could have asked us to reconsider our mandate in the first appeal. The [defendant] could have presented this issue in its petition to our Supreme Court for discretionary review. But the [defendant] did neither.”). Accordingly, we proceed under the abuse of discretion standard.

Applying this standard, we cannot say the trial court erred in its determination that there was good cause to deny Defendant the ability to confront the confidential informant. Exercising its “great discretion” to determine whether such confrontation was necessary for its ultimate determination that revocation was proper, *Jones*, 382 N.C. at 272, the trial court found Defendant’s failure to subpoena—or attempt to subpoena—the known informant constituted good cause to deny confrontation. This exercise of discretion was eminently material to the trial court’s assessment of the evidence’s reliability, as it may have gleaned from Defendant’s failure to subpoena the informant that Defendant himself doubted the tendency of the informant’s testimony to identify the substance at issue as anything other than cocaine. Alternatively, the trial court may have simply based its discretionary determination on Defendant’s failure to take action within his control to procure the informant’s

testimony.² In either case, the trial court was within its discretion to deny confrontation on these bases.

Further arguing against the validity of this exercise of discretion, Defendant raises two additional arguments. First, Defendant argues the trial court’s denial of confrontation impermissibly shifts the burden of production and persuasion in a probation revocation hearing to the defendant. However, while it is true that “the burden of proof is upon the State to show that the defendant has violated one of the conditions of his probation[,]” *State v. Seagraves*, 266 N.C. 112, 113 (1965), this argument ignores the function of confrontation: to test “the trustworthiness of the evidence presented to the court” *State v. McLaughlin*, 246 N.C. App. 306, 318 (2016). In a proceeding such as this one, where the right to confrontation is circumstantial and grounded solely in due process, *see Hemingway*, 278 N.C. App. at 548, the act of confrontation is essentially supplementary to the production of the evidence itself. In other words, while Defendant’s argument presupposes that testimony does not help satisfy the State’s burden of production unless and until the

² Defendant argues that the trial court’s ruling, to the extent it was based on this rationale, runs afoul of our Supreme Court’s ruling in *State v. Jones*, 382 N.C. 267 (2022), which he interprets as disavowing a waiver rule in cases where a defendant fails to subpoena a witness in a probation revocation hearing. *Cf. State v. Jones*, 269 N.C. App. 440, 444 (2020) (“[T]he failure of a probationer to request that a witness attend the violation hearing or be subpoenaed and required to testify can constitute waiver of the right to confrontation[.]”), *aff’d as modified, id.* Even if we were to read *Jones* as standing for this proposition, it would concern a *procedural* waiver on appeal, not a ruling on the merits at trial of whether good cause existed to deny confrontation. *Jones* is therefore inapposite, and we conclude that a defendant’s failure to subpoena a known witness he deems important to confront would constitute good cause to deny confrontation in a merits-based ruling.

declarant personally testifies, a more accurate characterization in a procedural context where the right to confrontation is qualified is that the declarant's testimony serves as an *independent* verification of, or rebuttal to, the State's evidence. Thus, the State met its burden of production, and no shifting of that burden or the burden of proof took place.

Second, Defendant contends that the trial court's denial of confrontation with respect to the informant, even if it did not independently constitute an abuse of discretion, was arbitrary when contrasted with the trial court's sustaining of a similar objection during the hearing with respect to a lab analyst. However, Defendant has not pointed us to any lapse in reasoning reflected by the allegedly disparate rulings beyond the mere fact of their different outcomes, and it would be improper for us to overturn a determination where the trial court retains such wide latitude without a more specific showing that the trial court's reasoning was deficient.

Accordingly, the trial court did not abuse its discretion.

CONCLUSION

The trial court permissibly held, in its discretion, that Defendant's failure to subpoena the State's informant constituted good cause not to allow confrontation.

AFFIRMED.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).