REL: September 17, 2021



# Alabama Court of Criminal Appeals

## OCTOBER TERM, 2020-2021

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## CR-19-1013

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**Moriale Eugene Toombs**

**v.**

**State of Alabama**

**Appeal from Tallapoosa Circuit Court**
**(CC-17-231.71)**

WINDOM, Presiding Judge.

Moriale Eugene Toombs appeals the circuit court's order revoking his probation. In 2017, Toombs was convicted of unlawful possession of

a controlled substance with intent to distribute, see § 13A-12-211(c), Ala. Code 1975; unlawful possession of a controlled substance, see § 13A-12-212, Ala. Code 1975; and attempting to elude a law-enforcement officer, see § 13A-10-52, Ala. Code 1975. Toombs was sentenced for the 3 convictions to 10 years in prison, 5 years in prison, and 12 months in jail, respectively. Toombs's sentences for his felony convictions were split, and Toombs was placed on probation following his release from incarceration in March 2019.

In March 2020, Toombs's probation officer filed a delinquency report, alleging that Toombs had violated the terms and conditions of his probation by committing the following new offenses: two counts of unlawful distribution of a controlled substance, see § 13A-12-211(a), Ala. Code 1975; unlawful possession of a controlled substance with intent to distribute, see § 13A-12-211(d), Ala. Code 1975; unlawful possession of a controlled substance, see § 13A-12-212, Ala. Code 1975; first-degree unlawful possession of marijuana, see § 13A-12-213, Ala. Code 1975; and unlawful possession of drug paraphernalia, see § 13A-12-260, Ala. Code 1975.

A probation-revocation hearing was held on June 25, 2020. Sergeant Fred White with the Tallapoosa County Narcotics Task Force testified that law enforcement had received complaints in January 2020 about suspected drug activity at a residence on Carolyn Road in Alexander City. The task force established surveillance of the residence. Sgt. White testified that the residence, which was owned by Dewayne Jackson, did not have power or running water. Sgt. White added that Jackson had not been at the Carolyn Road residence since December 2019. Since that time, Jackson either had been in jail -- as he was at the time of Toombs's arrest in March 2020 -- or staying at his sister's house.

While conducting surveillance at the Carolyn Road residence on March 6, 2020, Sgt. White and other task-force members saw a vehicle arrive at the residence. Sgt. White testified that he "observed what appeared to be a drug transaction." (R. 8.) After the vehicle left the residence, the members of the task force initiated a traffic stop of the vehicle. During the traffic stop, substances believed to be illegal narcotics were discovered. Sgt. White stated that he had seen the individuals in the vehicle purchase the narcotics from Toombs. The task force obtained an

arrest warrant for Toombs, and, later that day, returned to Carolyn Road residence to arrest Toombs for distribution of a controlled substance.

When the officers returned to the residence, Toombs's vehicle was not there. The officers waited nearby, and Toombs soon returned in his vehicle and went inside the residence. The officers approached the residence to execute the arrest warrant. When the officers entered the residence, they saw digital scales and what appeared to be cocaine on an ironing board near the kitchen.[1] Keys were also on the ironing board. Toombs was standing in the living room near the front door.

At the conclusion of the testimony at the probation-revocation hearing, the circuit court stated that it would take the matter under advisement, and it allowed Toombs the opportunity to submit an alternative other than the revocation of his probation. Toombs subsequently filed a treatment plan, to which the State objected. On July

[1]Although not mentioned by Sgt. White, the delinquency report indicates that officers obtained a search warrant for the Carolyn Road residence after observing contraband in plain view.

7, 2020, the circuit court revoked Toombs's probation. Toombs filed a motion to reconsider, which was denied by operation of law.

On appeal, Toombs argues: 1) that the evidence was insufficient to revoke his probation and 2) that the circuit court exceeded its discretion by fully revoking his probation instead of imposing a less onerous sanction.

I.

Toombs argues that the evidence presented at the hearing was insufficient to revoke his probation. Specifically, Toombs asserts that the State failed to present sufficient evidence that he had distributed a controlled substance or that he was in constructive possession of the alleged cocaine and drug paraphernalia found inside the Carolyn Road residence.

"The standard of proof in probation revocation hearings is not the same as that in a criminal trial. It is to the 'reasonable satisfaction' rather than beyond a reasonable doubt or by a preponderance of the evidence." Hall v. State, 681 So. 2d 251, 252 (Ala. Crim. App. 1996) (quoting Ex parte Belcher, 556 So. 2d 366, 368-69 (Ala. 1989)). In Ex

parte Caffie, 516 So. 2d 831 (Ala. 1987), the Alabama Supreme Court stated:

> " ' "There is no definite criterion or measure of proof necessary to justify the revocation of one's probation." Wright v. State, 349 So. 2d 124 (Ala. Crim. App. 1977). The evidence need not "be strong enough to convince the court beyond a reasonable doubt that the probationer has violated a term of his probation," Carter v. State, 389 So. 2d 601 (Ala. Crim. App. 1980); it needs only to reasonably satisfy the court of the truth of the charge. Goodrum v. State, 418 So. 2d 942 (Ala. Crim. App. 1982). Absent a gross abuse of discretion, the trial court's ruling in a probation revocation will not be disturbed by this Court. Wright, supra.' "

516 So. 2d at 833-34 (quoting Rice v. State, 429 So. 2d 686, 687 (Ala. Crim. App. 1983)).

> " 'While proximity to a contraband alone is not enough to establish constructive possession, "where other circumstantial evidence ... is sufficiently probative, proximity to contraband coupled with inferred knowledge of its presence will support a finding of guilt of such charges." Soriano v. State, 527 So. 2d 1367, 1372 (Ala. Cr. App. 1988); United States v. Whitmire, 595 F.2d 1303, 1316 (5th Cir. 1979), cert. denied, 448 U.S. 906, 100 S. Ct. 3048, 65 L. Ed. 2d 1136 (1980).'
>
> "Mobley v. State, 563 So. 2d 29, 32 (Ala. Crim. App. 1990). ' "[T]he voluntary presence of the accused in an area obviously devoted to preparation of drugs for distribution is a circumstance potently indicative of his involvement in the

> operation." ' German v. State, 429 So. 2d [1138] at 1142 [(Ala. Crim. App. 1982)], quoting United States v. Staten, 189 U.S. App. D.C. [100] at 107 n.67, 581 F.2d [878] at 885 n.67 [(1978)]."

Flake v. State, 980 So. 2d 440, 443-44 (Ala. Crim. App. 2007).

> " 'Furthermore, knowledge is usually established by circumstantial evidence.' Mitchell v. State, 713 So. 2d 981, 984 (Ala. Crim. App. 1997), citing Rowell v. State, 666 So. 2d 830 (Ala. 1995), and Ward v. State, 484 So. 2d 536 (Ala. Crim. App. 1985). Moreover, constructive possession of a controlled substance may be established by circumstantial as well as direct evidence. Knight v. State, 622 So. 2d 426, 430-31 (Ala. Crim. App. 1992). Finally,' "[t]he kinds of circumstances which may provide a connection between a defendant and the contraband are unlimited and will naturally depend on the facts of each particular case." ' McGruder v. State, 560 So. 2d 1137, 1140 (Ala. Crim. App. 1989), quoting Temple v. State, 366 So. 2d 740, 743 (Ala. Crim. App. 1978)."

Williams v. State, 55 So. 3d 366, 375-76 (Ala. Crim. App. 2010).

Although Toombs did not own the Carolyn Road residence, he had access to the residence and was the sole occupant at the time the officers entered. Members of the task force observed Toombs coming and going from the residence, from which Toombs appeared to be selling narcotics. When members of the task force entered the residence to execute an arrest warrant, drug paraphernalia and what appeared to be cocaine were

found in plain view on an ironing board near the kitchen. Keys were also on the ironing board. Consequently, there could be little if any doubt that Toombs had knowledge of the cocaine and paraphernalia in the residence. Thus, sufficient evidence existed from which the circuit court could have been reasonably satisfied that Toombs had violated the terms and conditions of his probation by unlawfully possessing a controlled substance and drug paraphernalia. Because this Court determines that there was sufficient evidence to revoke Toombs's probation on the charges that he unlawfully possessed cocaine and drug paraphernalia, we need not address whether the evidence was sufficient to find that he violated his probation by committing the other offenses. See Beckham v. State, 872 So. 2d 208, 211 (Ala. Crim. App. 2003). Therefore, Toombs is due no relief.[2]

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[2]The dissent, relying on Nelson v. State, [Ms. CR-18-1039, Feb. 5, 2021] ___ So. 3d ___ (Ala. Crim. App. 2021), asserts that this Court should reverse the circuit court's revocation of Toombs's probation. Initially, this Court notes that, contrary to the dissent's position, it is not clear that the circuit court did, in fact, revoke Toombs's probation solely on the basis that he had been charged with new offenses. The circuit court's order is ambiguous, at most. More importantly, this Court's holding in Nelson is distinguishable because, unlike Toombs, the

II.

Toombs argues that the circuit court erred when it failed to impose a lesser sanction than full revocation for his violating probation. Rule 27.6, Ala R. Crim. P., provides that, if the circuit court finds that a probationer has violated the terms or conditions of probation, the circuit court "may revoke, modify, or continue probation." Rule 27.6(e).

> "[W]hether revocation and imposition of the original sentence or some other disposition is appropriate is a matter within the sound discretion of the trial court. Absent a clear abuse of discretion, a reviewing court will not disturb a trial court's conclusions in a probation-revocation proceeding, including the determination whether to revoke, modify, or continue the probation."

Holden v. State, 820 So. 2d 158, 160 (Ala. Crim. App. 2001). Because there was sufficient evidence to reasonably satisfy the circuit court that Toombs had violated the terms and conditions of his probation, the circuit court did not abuse its discretion in revoking Toombs's probation and ordering that Toombs serve the remainder of his sentences.

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appellant in Nelson challenged the sufficiency of the circuit court's revocation order. Toombs does not even allege that the circuit court revoked his probation on the basis of a mere arrest. This Court has addressed Toombs's claims as they were raised in his brief on appeal.

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

Kellum and Cole, JJ., concur. McCool, J., dissents, with opinion. Minor, J., dissents, without opinion.

McCOOL, Judge, dissenting.

Moriale Eugene Toombs appeals the Tallapoosa Circuit Court's order revoking his probation, and this Court today affirms that revocation order. For the reasons set forth herein, I respectfully dissent.

Facts and Procedural History

In 2017, Toombs was convicted of multiple criminal offenses and, after serving a period of incarceration, was placed on probation in March 2019. In March 2020, Toombs's probation officer filed a delinquency report alleging that Toombs had been arrested and charged with committing new drug-related offenses.

In June 2020, the circuit court held a revocation hearing at which the court heard testimony from the officer who had arrested Toombs for the new offenses. At the conclusion of the hearing, the court took the matter under advisement, declining to make a ruling at that time, and made no oral findings of fact. Instead, the court stated that it would issue an order at a later date.

On July 7, 2020, the circuit court issued an order revoking Toombs's probation. The revocation order states, in pertinent part:

> "The record reflects that the defendant was placed on probation on March 27, 2019. Less than a year later, on March 6, 2020, he was charged with two new offenses of unlawful distribution of a controlled substance, unlawful possession with intent to distribute, possession of a controlled substance, and possession of marihuana first degree. These charges came about following the execution of a search warrant. After consideration of all of the foregoing, the Court finds that the defendant's probation should be and hereby is REVOKED."

(C. 31-32.) Toombs filed a timely notice of appeal.

## Discussion

There are two well settled principles, among others, that are applicable in probation-revocation proceedings: the circuit court is the sole fact-finder, Smiley v. State, 52 So. 3d 565, 568 (Ala. 2010), and, to revoke probation, the circuit court must make a specific finding indicating that the court is " 'reasonably satisfied from the evidence that the probationer has violated the conditions of his probation.' " Miller v. State, 273 So. 3d 921, 924 (Ala. Crim. App. 2018) (quoting Puckett v. State, 680 So. 2d 980, 982 (Ala. Crim. App. 1996)). Here, the Court affirms the order revoking Toombs's probation after concluding that there was sufficient evidence from which the circuit court could have been reasonably satisfied that Toombs had committed at least two of the new offenses with which he had

been charged. The problem with the Court's conclusion is that the circuit court did not find that Toombs had committed any of the new offenses. Rather, as evidenced by the revocation order, the circuit court found only that Toombs had been charged with the new offenses, which is not a sufficient basis upon which to revoke probation. See Williford v. State, [Ms. CR-19-0481, December 16, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020) (noting that neither an arrest nor the filing of criminal charges is a sufficient basis upon which to revoke probation).

In Nelson v. State, [Ms. CR-18-1039, February 5, 2021] ___ So. 3d ___ (Ala. Crim. App. 2021), the circuit court revoked Jamon Drekez Nelson's probation solely on the basis that Nelson had been arrested for new offenses while on probation. Thus, because the circuit court revoked Nelson's probation for an improper reason, i.e., an arrest, this Court reversed the revocation order in a unanimous opinion. Before concluding the opinion, we acknowledged the State's argument that this Court could affirm the revocation order if it found sufficient evidence to support a finding that Nelson had committed the new offenses, even though the

circuit court had not made such a finding. However, we refused to review the evidence for sufficiency and, in support of that refusal, stated:

> "We recognize the State's argument (1) that the record contains evidence that arguably establishes that Nelson did in fact commit the new offenses for which he was arrested and (2) that, as a result, this Court can conclude that the State presented sufficient evidence to support the revocation of Nelson's probation. The problem with the State's argument, however, is that it was for the circuit court, not this Court, to consider the evidence and to determine whether it was reasonably satisfied that Nelson had committed the new offenses. See Calhoun [v. State], 854 So. 2d [1209,] 1210 [(Ala. Crim. App. 2002)] (noting that the State ' "must submit enough substantive evidence to reasonably satisfy the trier of the facts that a condition of probation was breached" ' (citation omitted; emphasis added); and Hunter v. State, 782 So. 2d 845, 846 (Ala. Crim. App. 2000) (' "Before revoking probation because the probationer has been arrested, the [circuit] court must be reasonably satisfied that the underlying charge against the probationer is true." ' (citation omitted; emphasis added)). However, as we have already noted, the circuit court found only that Nelson had been arrested for new offenses and did not find that it was reasonably satisfied from the evidence that Nelson actually had committed the offenses. Thus, it is of no avail to the State on appeal that there was evidence from which the circuit court arguably could have made such a finding."

Nelson, ___ So. 3d at ___ (first and final emphasis added; citation to brief omitted).

Thus, in Nelson, this Court unanimously refused to consider whether there was sufficient evidence to support a finding that Nelson had committed the new offenses because the circuit court had not found that Nelson had committed the offenses. It is clear to my mind why we refused to address the sufficiency of the evidence under such circumstances. If we had concluded that there was sufficient evidence to support a finding that Nelson had committed the new offenses, and if we had affirmed on that basis when the circuit court had not made such a finding, then our "sufficiency-of-the-evidence review," no matter what we chose to call it, would have actually constituted our own finding of fact that would have been substituted for that of the circuit court in order to affirm. Doing so would have violated the well settled principles that it is not this Court's role to "say what the facts are," Abrams v. State, [Ms. CR-19-0434, February 5, 2021] ___ So. 3d ___, ___ (Ala. Crim. App. 2021), and that this Court " 'may not substitute its judgment for that of the [circuit] court.' " Scott v. State, [Ms. CR-18-0945, August 14, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020) (quoting Ex parte Foley, 864 So. 2d 1094, 1099 (Ala. 2003)).

I see no relevant distinction between Nelson and this case, and I believe the Court is doing in this case what it unanimously refused to do in Nelson. That is, the Court ignores the circuit court's express finding that Toombs had been charged with new offenses and affirms the revocation order on the basis that there was sufficient evidence to support a finding that the circuit court did not make, i.e., that Toombs had actually committed the new offenses. Thus, although the Court frames its decision as a "sufficiency-of-the-evidence review," the reality is that the Court has cast aside the circuit court's finding, has reviewed the evidence and made its own finding of fact based on that evidence, and has substituted its judgment for that of the circuit court. We correctly refused to take such action in Nelson, and we should refuse to do so in this case.

As to the Court's contention that the revocation order is ambiguous, I fail to see the ambiguity. In relevant part, the revocation order expressly states only that Toombs had been charged with new offenses "following the execution of a search warrant." I see no basis in such a finding for reaching any conclusion other than that the circuit court revoked Toombs's probation based on new charges against him. Perhaps

the circuit court meant to say that it found Toombs had committed the new offenses, but speculation about what the circuit court intended to say does not inject ambiguity into the court's express findings.

Finally, as to the Court's contention that this case is distinguishable from Nelson because Toombs did not properly challenge the revocation order, I will concede that Toombs could have done a better job in that regard. However, Toombs did acknowledge, and in fact emphasized, that the revocation order "stated that Toombs had been charged with new offenses." (Toombs's brief at 4 (emphasis in Toombs's brief).) In addition, Toombs noted that the filing of charges is not a sufficient basis upon which to revoke probation, and he cited caselaw supporting that proposition. (Toombs's brief at 9, 12.) Toombs certainly focuses his argument primarily on the sufficiency of the evidence to revoke his probation, but the argument that the trial court found only that he was charged with new offenses and not that he actually committed new offenses is clearly intertwined with Toombs's sufficiency-of-the-evidence argument. Thus, I believe that Toombs has sufficiently raised this issue

for this Court's review and that we should therefore follow our decision in Nelson and reverse the revocation order.

Accordingly, I respectfully dissent.