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NO. COA10-1459
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

STATE OF NORTH CAROLINA

v.

Buncombe County
No. 08 CRS 58820

MORRIS TIRRELL LITTLE,

Defendant.

Appeal by defendant from judgment entered 19 August 2010 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 11 April 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Donald R. Teeter, Sr., for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders Mary Cook and Kristen L. Todd, for defendant-appellant.

GEER, Judge.

Defendant Morris Tirrell Little appeals from the trial court's revocation of his probation for failure to pay fines and court costs. Defendant primarily contends that the trial court erred in finding that he willfully violated the monetary condition of his probation because the evidence established that

he was disabled from working. In arguing that he had a lawful excuse for not making any payments at all on the \$491.50 owed, defendant relies only upon (1) his own testimony that he cannot work because he has one leg amputated below the knee (with a prosthesis) and (2) the fact that he applied for disability benefits, which were denied. We hold that the trial court was entitled to determine that this evidence did not establish a lawful excuse and, consequently, that defendant's probation should be revoked.

Facts

Defendant pled guilty to misdemeanor maintaining a dwelling house for the use of controlled substances and, in a judgment signed 27 April 2009, was sentenced to 45 days imprisonment. The trial court suspended the sentence and placed defendant on 18 months of supervised probation. As a condition of his probation, defendant was required to pay to the Clerk of Superior Court \$491.50 in court costs, fines, and attorneys' fees.

On 29 October 2009, defendant's probation officer filed a violation report alleging that defendant had made no payments towards the \$491.50 owed and had violated the regular condition of probation that he "[c]ommit no criminal offense in any jurisdiction." Since being placed on probation, defendant had

been charged with misdemeanor larceny, two counts of simple assault, assault on a female, injury to real property, and injury to personal property.

At the probation revocation hearing on 10 December 2009, the State informed the trial court that it was only proceeding on the allegation that defendant had failed to make payments to the Clerk. Defendant's probation officer, Chris Jennings, testified that although defendant was required to pay fines and court costs in the amount of \$491.50, he had made no payments. She acknowledged being aware that defendant was not working and that defendant had told her he was applying for disability benefits because part of one of his legs had been amputated.

Defendant testified at the hearing on his own behalf. He explained to the trial court that in 2003, his leg had been amputated below the knee and he had a prosthetic leg. He had been involved in the process of applying for disability benefits based on that injury for approximately one year. He testified that he had no source of income and lived with and was supported by his grandmother. According to defendant, he was required to pay \$550.00 per month in child support, although his child support obligation had been put on hold pending the outcome of the disability application. Defendant introduced a letter from his attorney for his disability claim, which verified that she

represented defendant in connection with his ongoing claim for disability benefits and estimated that the process would take approximately another six months.

Defendant acknowledged that he had waived his right to court-appointed counsel and had instead retained his own attorney. He testified that his retained counsel was being paid by his girlfriend.

Based on this testimony, defendant's attorney argued that defendant's "violation of probation is an unwillful financial violation. He is unable to pay." The trial court expressed concern that defendant had paid nothing into the court system and yet had retained an attorney. Defendant's counsel explained that he had not actually been paid, but instead had worked out a fee arrangement that was conditioned on defendant's receiving disability payments -- defendant's girlfriend was simply guaranteeing payment. The trial court pointed out that that information should have been provided while defendant was on the witness stand.

The trial court then found that defendant had paid nothing towards the amounts owed for court costs and attorney's fees. The court further found that defendant's "unwillingness to pay is willful and intentional and substantial." The court revoked

defendant's probation and continued prayer for judgment until the first term after 1 May 2010.

A second hearing was held on 19 August 2010. Defendant's counsel informed the trial court that defendant's disability application had been denied but that his attorney was appealing the denial. Counsel also reported to the trial court that defendant had borrowed \$100.00 and paid it towards his indebtedness. The trial court then asked the probation officer for her recommendation. In recommending that the court activate defendant's sentence, she noted that defendant had two additional pending cases in district court and that he was "still testing positive for marijuana and still admits to continued drug use." Defendant's counsel responded by pointing out that the State had only proceeded on the monetary violation.

The trial court determined that defendant's probation should be revoked, and defendant was committed to the county jail for 45 days. Defendant gave oral notice of appeal at the 19 August 2010 hearing.

Discussion

The State contends that this Court is without jurisdiction to review this matter because defendant did not appeal the revocation of probation at the 10 December 2009 hearing. The State bases its argument on *State v. Yonce*, ___ N.C. App. ___,

701 S.E.2d 264, 267 (2010), *disc. review denied*, 365 N.C. 80, 706 S.E.2d 233 (2011), in which this Court concluded it lacked jurisdiction over an appeal from a probation revocation when the trial court stayed execution of the order that determined defendant had willfully violated his probation, and the defendant did not appeal until after the trial court activated his sentence at a second hearing.

In response to this argument, made in the State's brief, defendant filed a petition for writ of certiorari in the event that this Court deems his notice of appeal untimely. Defendant argues that *Yonce* is distinguishable because the trial court, in this case, did not stay its judgment, but rather continued prayer for judgment. Assuming, without deciding, that *Yonce* applies to a prayer for judgment continued, we find that defendant has lost his appeal, through no fault of his own, for failure to take timely action. Under the circumstances of this case, we elect to exercise our discretion under Rule 21 of the Rules of Appellate Procedure to allow defendant's petition.

Turning to the merits of defendant's appeal, we first address defendant's contention that the trial court, in revoking his probation, erroneously considered evidence regarding facts not alleged in the violation report. Pursuant to N.C. Gen. Stat. § 15A-1345(e) (2009), "[t]he State must give the

probationer notice of the hearing and its purpose, including a statement of the violations alleged."

In *State v. Cunningham*, 63 N.C. App. 470, 475, 305 S.E.2d 193, 196 (1983), this Court held that a defendant's probation may not be revoked based on evidence of conduct not alleged in the notice of violation. This Court reversed the order revoking the defendant's suspended sentence when the notice of violation alleged that the defendant had disturbed his neighbors by playing loud music and had taken their personal property, but the trial court had actually revoked his probation for playing loud music and trespass and damage to property. *Id.*

In arguing that *Cunningham* applies, defendant points to the probation officer's recommendation in the second hearing that the trial court should activate defendant's sentence because of two pending criminal cases and defendant's continued drug use. Immediately after that recommendation, however, defense counsel pointed out to the court that the only issue before the court was defendant's failure to make payments on the \$491.50 that was owed.

In contrast to *Cunningham*, the record in this case contains no indication that the trial court based its activation of defendant's sentence on the information provided by the probation officer in the second hearing. Indeed, the trial

court had already concluded in the first hearing -- in the absence of that information -- that defendant had willfully violated his probation and that his probation should be revoked. Defendant has, therefore, failed to show that the revocation of his probation was based on improperly-considered evidence.

Defendant next contends that the trial court failed to make sufficient findings of fact demonstrating that it considered and evaluated the evidence he offered in support of his contention that his failure to comply with the conditions of his probation was not willful. We disagree.

In *State v. Williamson*, 61 N.C. App. 531, 534, 301 S.E.2d 423, 425 (1983), this Court held that due process requires a written judgment that contains "(a) findings of fact as to the evidence relied on, [and] (b) reasons for revoking probation." The trial court "has a duty, when the defendant does offer evidence of his ability or inability to make the money payments required, to make findings of fact which clearly show that he did consider and did evaluate the defendant's evidence." *Id.* at 535, 301 S.E.2d at 426.

In *Williamson*, the trial court "heard lengthy testimony and received evidence concerning defendant's inability to find employment and his medical and mental problems." *Id.* Based upon this evidence, the trial court then made a finding of fact

that the defendant violated the conditions of his probation without lawful excuse. *Id.* This Court found that this finding was sufficient although it would have been preferable for the trial court to make a more specific finding. *Id.*

The judgment in this case is a standard form judgment. It incorporates by reference the violation report, which specified the details of the violation, and then finds that "the 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 the defendant's probation." Under *Williamson*, this finding of fact is sufficient.

Defendant further contends, however, that the evidence establishes that the trial court erred in determining that he lacked a lawful excuse for his failure to pay. It is well established that "[a] trial court's judgment revoking a defendant's probation will be disturbed only upon a showing of a manifest abuse of discretion." *State v. Hubbard*, 198 N.C. App. 154, 159, 678 S.E.2d 390, 394 (2009).

In support of this argument, defendant relies upon the unpublished decision of *State v. Turner*, 149 N.C. App. 974, 563 S.E.2d 100, 2002 WL 553656, 2002 N.C. App. LEXIS 1884 (April 16, 2002) (unpublished). Even if this decision were of precedential value, the probation officer in *Turner* had acknowledged that the

defendant was in fact unable to work due to back injuries, and the probation violation reports were filed during a period in which a doctor had indisputably removed the defendant from all work. *Id.*, 2002 WL 553656, *6, 2002 N.C. App. LEXIS 1884, *17. Further, the probation officer had confirmed that the defendant had applied for vocational rehabilitation and had a projected job placement date. *Id.*

By contrast, here, defendant presented no evidence that he was unable to work other than his own testimony and the fact that he had applied for disability, which had been denied. Further, as the trial court pointed out in the hearing, the amounts due were small, but defendant chose to waive court-appointed counsel and use the financial resources he had available to retain an attorney rather than make his court-ordered payments.¹ The trial court was not required to accept defendant's own assertions, without more, that he was unable to work, especially in light of the denial of his application for disability benefits. *See Williamson*, 61 N.C. App. at 535, 301 S.E.2d at 426 ("The trial judge, as the finder of facts, is not required to accept defendant's evidence as true.") (quoting

¹Defendant relies upon his counsel's statement that his attorney's fees were conditioned on his receiving disability payments. Counsel's arguments are not, however, evidence. *See State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) ("[I]t is axiomatic that the arguments of counsel are not evidence.").

State v. Young, 21 N.C. App. 316, 321, 204 S.E.2d 185, 188 (1974))).

Defendant, however, argues that the trial court should have considered alternatives to imprisonment set out in N.C. Gen. Stat. § 15A-1364(c) (2009), such as allowing defendant additional time to make payment, reducing the amount of the costs, or eliminating that condition of probation. N.C. Gen. Stat. § 15A-1364(c), however, authorizes these alternatives only "[i]f it appears that the default in the payment of a fine or costs is not attributable to failure on the defendant's part to make a good faith effort to obtain the necessary funds for payment"

Because the trial court determined that defendant had willfully failed to make the required payments, there was no need to consider the alternatives. The trial court was entitled to conclude, in the absence of any evidence of defendant's inability to work other than his own testimony, that the fact he had applied for disability benefits was not sufficient to prove a good faith effort to obtain the funds necessary to make the court-ordered payments. We note, nonetheless, that defendant was effectively given an additional eight months after the initial hearing in which to pay the \$491.50, but he only paid \$100.00 in that time.

Finally, we must remand for correction of clerical errors in the judgment. See *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'" (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999))). In the findings section of the judgment, a box is checked indicating that "the defendant waived a violation hearing and admitted that the defendant violated each of the conditions of the defendant's probation as set forth below." Instead, the court should have checked the box indicating that "a hearing was held before the Court and, by the evidence presented, the Court is reasonably satisfied in its discretion that the defendant violated each of the conditions of the defendant's probation as set forth below."

In addition, the findings section states: "The condition(s) violated and the facts of each violation are as set forth . . . [i]n paragraph(s) 1-2 in the Violation Report or Notice dated 10/29/2009." This appears to be a clerical error as well as the transcript reveals -- and the parties agree -- that the trial court only addressed the failure to pay fines and costs.

Therefore, it appears that the judgment should be corrected to refer only to paragraph 1 of the violation report.

We, therefore, affirm the trial court's revocation of defendant's probation. We remand, however, to allow the trial court to correct the above clerical errors.

Affirmed in part; remanded in part.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).