IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-107

Filed: 17 October 2017

Harnett County, Nos. 13 CRS 50614, 50616

STATE OF NORTH CAROLINA

v.

JACQUEZ MCKOY

Appeal by defendant from judgments entered 28 April 2016 by Judge Charles W. Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Mark L. Hayes for defendant-appellant.

DAVIS, Judge.

Jacquez McKoy ("Defendant") appeals from the trial court's judgments revoking his probation. After careful review, we affirm the trial court's revocation of his probation and dismiss without prejudice his ineffective assistance of counsel claim.

Factual and Procedural Background

On 6 January 2014, Defendant was convicted of two counts of conspiracy to commit robbery with a dangerous weapon and sentenced to two consecutive sentences of 24 to 41 months imprisonment. The court suspended Defendant's sentences and placed him on supervised probation for 36 months. The trial court also ordered that Defendant receive a mental health assessment and follow the recommended treatment.

On or around 15 July 2014, Defendant failed to abide by his curfew, and a report was filed by his probation officer stating that he was in violation of a condition of his probation. That same day, the trial court modified his probation to require an immediate mental health assessment and ordered that he "follow recommended treatment[,] appear to all appointments and take medications."

On 17 June 2015, a second violation report was filed, alleging that Defendant (1) had "admitted to and tested positive for [m]arijuana use on April 8, 2015[;]" (2) "was in arrears $2,102 of court indebtedness[;]" (3) had "failed to report to the Task office as instructed on March 6, 2015[;]" (4) had "failed to report to have his DNA sample collected as instructed[;]" and (5) had been charged with robbery with a dangerous weapon, possession of a firearm by a felon, and possession of a stolen firearm.

On 12 August 2015, the violation report was amended to include the following violations:

> Of the conditions of probation imposed in that judgment, the defendant has willfully violated:
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> 1. Regular Condition of Probation: "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, DESPITE NUMEROUS HOME VISITIS [sic] TO THE LAST KNOW [sic] RESIDENCE, THE DEFENDANT HAS FAILED AND REFUSED TO CONTACT HIS PROBATION OFFICER SINCE 7/9/2015. THIS UNWILLINGNESS TO MAKE HIMSELF AVAILABLE FOR SUPERVISION IS THE BASIS FOR ALLEGING THAT THE DEFENDANT HAS ABSCONDED SUPERVISION.
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> 2. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places . . ." in that OFFENDER WAS A NO SHOW[,] NO CALL FOR HIS SCHEDULED APPOINTMENT ON 08/06/2015."

On 18 September 2015, Defendant was evaluated by Amy Brown, a certified forensic screener evaluator. She determined that "defendant has the capacity to proceed."

On 5 October 2015, a preliminary hearing (the "First Hearing") was held before the Honorable Charles W. Gilchrist in Harnett County Superior Court. The trial court heard testimony from Defendant's probation officer, Brendan Murphy, and from Defendant.

Mr. Murphy testified that he had been in contact with Defendant regularly from January to July 2015 but that Defendant had failed to appear at his 20 July

2015 court date. Mr. Murphy attempted to contact Defendant multiple times in July and August 2015 but was unsuccessful. Defendant did not show up to meet Mr. Murphy at his scheduled 6 August 2015 appointment.

Defendant testified that he had bipolar disorder, depression, seizures, and other mental health issues. He stated that he had been committed to a hospital eight times because of mental health issues. During his probation period, he had attempted suicide three times, and his most recent commitment to a hospital was due to a suicide attempt. He stated that he had been prescribed medication for his mental health issues but had not been taking the medication when he was out of custody.

Defendant's counsel informed the trial court that he had filed a motion to have Defendant evaluated to determine whether he was competent to proceed. The trial court made an oral finding that Defendant was competent to proceed and then turned to the question of the probation violation.

After Defendant and his probation officer had testified, Defendant's counsel requested that the court place Defendant in a Confinement in Response to Violation (CRV) facility where he could have access to mental health treatment. The State requested that the trial court revoke Defendant's probation based on the 12 August 2015 amended report that Defendant had willfully absconded from supervision in violation of a regular condition of his probation. At the close of the hearing, Judge

Gilchrist stated, "I want to think about this case for a little bit, so bring him back out in a few minutes."

On 7 October 2015, a second preliminary hearing (the "Second Hearing") was held before Judge Gilchrist. At this hearing, the court stated as follows:

> THE COURT: . . . Based on the evidence that has been presented to the Court by both sides, Court finds that the defendant is in wilful [sic] violations of the terms and conditions of his probation. Court finds that the defendant did abscond from supervision as a part of those findings. Defendant's violation were [sic] wilful [sic].
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> . . . .
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> THE COURT: . . . So, my inclination is just to continue judgment in the probation cases for some period of time, probably six months, and allow both sides an opportunity to obtain whatever evaluations and records you want to obtain, and then see if that has any relevance or any arguments you want to offer with respect to the proper sentence in the probation case.

That same day, the trial court entered two written orders. In the first order, the court concluded that "Defendant has the capacity to proceed in these matters as required by N.C.G.S. 15A-1001." In the second order, the court found that Defendant had "willfully violated probation."

On 25 April 2016, a revocation hearing (the "Revocation Hearing") was held before Judge Gilchrist. At the beginning of the hearing, Judge Gilchrist asked, "Why did we continue judgment?" Defendant's counsel informed the court that it had reserved judgment "to see what [Defendant's] mental status was at the time."

Defendant's counsel stated that he had "sent the information to [the Department of Correction], [but] they said they did not do an eval[uation]" and that they "[d]idn't know what I was talking about." He informed the court that he sent additional information back to the Department, but "we have not gotten anything, and I don't know if the Court got it or not." The trial court proceeded to revoke Defendant's probation, activate his suspended sentences, and recommend that he receive a mental health evaluation and treatment during his incarceration. Defendant filed a timely notice of appeal of the trial court's judgment.

Analysis

Defendant argues that during the Revocation Hearing the trial court violated Defendant's due process rights and abused its discretion in failing to consider or to recall evidence of the discussion during the First Hearing regarding a future mental health evaluation of Defendant. He also argues that he was deprived of effective assistance of counsel because his trial counsel did not produce evidence of a new evaluation at the Revocation Hearing. We address each argument in turn.

I. Due Process

Initially, Defendant contends that the trial court violated his due process rights in revoking his probation without receiving and taking into consideration the additional mental health evaluation or other records it had contemplated receiving

based on its remarks at the Second Hearing. However — as the State correctly points out — Defendant did not raise this argument before the trial court.

"[I]n order for an appellant to assert a constitutional . . . right on appeal, the right must have been asserted and the issue raised before the trial court. In addition, it must affirmatively appear on the record that the issue was passed upon by the trial court." *State v. McDowell*, 301 N.C. 279, 291, 271 S.E.2d 286, 294 (1980) (internal citations omitted), *cert. denied*, 450 U.S. 1025, 68 L. Ed. 2d (1981). Here, the record is devoid of any indication that Defendant objected on due process grounds at the Revocation Hearing. Thus, he has failed to preserve this issue for appeal. *See State v. Jones*, 216 N.C. App. 225, 230, 715 S.E.2d 896, 900-01 (2011) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error." (citation and quotation marks omitted)), *appeal dismissed and disc. review denied*, 365 N.C. 559, 723 S.E.2d 767 (2012).

II. Abuse of Discretion

Defendant next argues that — for the same reasons — the trial court abused its discretion in revoking his probation "because it could not recall the evidence from the 5 October 2015 hearing" and "completely forgot about it." "We review the revocation of probation for an abuse of discretion." *State v. Miller*, 205 N.C. App. 291, 293, 695 S.E.2d 149, 150 (2010) (citation omitted). Under an abuse of discretion standard, "we review to determine whether a decision is manifestly unsupported by

reason, or so arbitrary that it could not have been the result of a reasoned decision." *Brewer v. Hunter*, 236 N.C. App. 1, 8, 762 S.E.2d 654, 658 (citation and quotation marks omitted), *disc. review dismissed*, 367 N.C. 800, 766 S.E.2d 679 (2014).

"[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, 758 S.E.2d 356, 358 (2014) (citation and quotation marks omitted). Thus, "the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *Id.* (citation and quotation marks omitted). "Instead, all that is required in a hearing of this character is that the evidence 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." *Id.* (citation, quotation marks, and brackets omitted).

> The enactment of the JRA brought two significant changes to North Carolina's probation system. First, for probation violations occurring on or after 1 December 2011, the JRA limited trial courts' authority to revoke probation to those circumstances in which the probationer: (1) commits a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two prior periods of CRV under N.C. Gen. Stat. § 15A-1344(d2). For all other probation violations, the JRA authorizes courts to alter the terms of probation pursuant to N.C. Gen. Stat. § 15A-1344(a) or impose a CRV in accordance with N.C. Gen. Stat. § 15A-1344(d2), but not to revoke probation.
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> Second, the JRA made the following a regular condition of probation: Not to abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer.

State v. Nolen, 228 N.C. App. 203, 205, 743 S.E.2d 729, 730-31 (2013) (internal citations and quotation marks omitted).

In the present case, the trial court made the following pertinent finding of fact in its 28 April 2016 judgments:

> After considering the record contained in the files numbered above, together with the evidence presented by the parties and the statements made on behalf of the State and the defendant, the Court finds:
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> . . . .
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> 5. . . . The Court may revoke defendant's probation . . .
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> a. 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.

The trial court checked the box next to Finding No. 5 and subsection (a). Based on its findings of fact, the court concluded that "defendant has violated a valid condition of probation upon which the execution of the active sentence was suspended" and ordered that his probation be revoked. Notably, Defendant does not challenge any of the trial court's findings of fact, including Finding No. 5 and subsection (a). Thus, they are binding on appeal. *See State v. Ramseur*, 226 N.C. App. 363, 366, 739 S.E.2d 599, 602 ("[T]he trial court's unchallenged findings of fact are binding on appeal."), *appeal dismissed and disc. review denied*, 366 N.C. 599, 743 S.E.2d 219 (2013).

Instead, Defendant appears to be arguing that the trial court abused its discretion at the Revocation Hearing by revoking Defendant's probation despite having implicitly suggested at the Second Hearing that it might not do so depending on the findings in a new mental health evaluation of Defendant or based upon other records to be obtained by the parties during the six-month period following the Second Hearing. We disagree.

The trial court's unchallenged findings supported its conclusion that Defendant absconded, thereby violating a regular condition of his probation. As stated above, the trial court may revoke a defendant's probation based on his willful violation of N.C. Gen. Stat. § 15A-1343(b)(3a). *See Nolen*, 228 N.C. App. at 205, 743 S.E.2d at 731. Even assuming the trial court's statement at the Second Hearing raised the possibility that it might subsequently decide to impose a judgment less severe than revocation of his probation, the court clearly possessed the discretion at the Revocation Hearing to do exactly what it did — that is, revoke Defendant's probation and activate his sentence. Accordingly, the trial court did not abuse its discretion in revoking Defendant's probation and activating his suspended sentence for willfully absconding from supervision.

III. Ineffective Assistance of Counsel

Finally, Defendant argues that he was deprived of effective assistance of counsel because his trial counsel failed to actually produce new evidence regarding

Defendant's mental health at the Revocation Hearing. In order to prevail on an ineffective assistance of counsel claim, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d (2012).

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

> In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendants to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Turner, 237 N.C. App. 388, 395, 765 S.E.2d 77, 83 (2014) (internal citations, quotation marks, and brackets omitted), *disc. review denied*, 368 N.C. 245, 786 S.E.2d 563 (2015).

We do not believe that the cold record before us enables us to adjudicate Defendant's ineffective assistance of counsel claim given that the record is unclear as to what steps were actually taken by Defendant's counsel between the Second Hearing and the Revocation Hearing. Accordingly, we dismiss this claim without prejudice to his right to reassert it in a motion for appropriate relief. *See State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (holding that when reviewing court determines that ineffective assistance of counsel claim has been prematurely asserted on direct appeal, it shall dismiss that claim without prejudice to defendant's right to reassert it during subsequent motion for appropriate relief in trial court), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

Conclusion

For the reasons stated above, we (1) affirm the trial court's judgment revoking Defendant's probation and activating his suspended sentences; and (2) dismiss without prejudice his ineffective assistance of counsel claim.

AFFIRMED IN PART; DISMISSED IN PART.

Judges HUNTER, JR. and MURPHY concur.

Report per Rule 30(e).