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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1014

Filed: 6 October 2020

Union County, Nos. 12 CRS 51105, 12 CRS 53082, 16 CRS 51274-76

STATE OF NORTH CAROLINA

v.

TINA RENEE MOSER, Defendant.

Appeal by defendant from judgment entered 21 May 2019 by Judge Kevin M. Bridges in Union County Superior Court. Heard in the Court of Appeals 12 August 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Catherine Rogers Laney, for the State.*

*Unti & Smith, PLLC, by Sharon L. Smith, for defendant-appellant.*

BERGER, Judge.

Tina Renee Moser (“Defendant”) appeals from judgment revoking her probation. Defendant argues that the trial court erred when it revoked her probation, and further contends that her counsel rendered ineffective assistance. We disagree.

Factual and Procedural Background

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On December 12, 2013, Defendant was convicted of four counts of felony larceny and placed on supervised probation. Defendant was later convicted of three counts of felony larceny from a merchant. Defendant committed the offenses while she was on probation. Defendant was sentenced to eight to nineteen months on each count and placed on fifty months of supervised probation.

Subsequently, Defendant's probation officer filed a report alleging Defendant willfully violated the terms of her probation by absconding and by virtue of the commission of the 2016 offenses. In November 2018, while still on probation, Defendant was charged with driving while license revoked, and possession of cocaine, marijuana, and drug paraphernalia.

Defendant's probation officer filed five violation reports between January 2018 and February 2019. On May 21, 2019, three violation reports were heard in Union County Superior Court ("May 21 Hearing"). Defendant's probation officer testified regarding each of the alleged violations. When asked about the violations by the trial court, defense counsel stated,

Your Honor, she admits and we do have some explanations. . . . Your honor, what we have here is a young lady who was placed on probation, was working at Tyson's Food and at some point, your Honor, became homeless. Your honor, homelessness, your Honor, is the reason why these charges of absconding came up. Her mother had kicked her out of the house. Her house was the Trinity address that we've heard from the probation officer. And your Honor when she was kicked out she reached out to the probation officer and was asking if she could move to South Carolina where she

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could get some sort of housing. Obviously the probation officer said she couldn't because she was on probation and could not. Your honor, again I tell you this to help you understand what – why she is before you today and the issues that she has been going through.

Defendant did not testify or present any evidence. The trial court found that Defendant “admitted the willful violation of the terms and conditions of her adult probation in each case” and concluded that “[b]ased on the evidence presented and the recommendation from the probation officer” that the trial court saw “fit to revoke her probation in each case for absconding.”

Defendant then appeared in court on May 24, 2019 (“May 24 Hearing”), to enter a plea of guilty to a drug possession charge. Defendant attempted to enter oral notice of appeal on the revocation of her probation from the May 21 Hearing. At no point did Defendant enter a written notice of appeal. Due to her failure to properly perfect her appeal, Defendant petitions this Court for a writ of certiorari to review the revocation of her probation.

Defendant asserts that (1) the trial court erred when it revoked her probation; or, alternatively, (2) she was denied effective assistance of counsel at the May 21 Hearing.

Analysis

I. Writ of Certiorari

Defendant first petitions this Court to issue a writ of certiorari.

[A] writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists[.]

N.C. R. App. P. 21(a)(1).

The decision of “[w]hether to allow a petition and issue the writ of certiorari is not a matter of right and rests within the discretion of this Court.” *State v. Biddix*, 244 N.C. App. 482, 486, 780 S.E.2d 863, 866 (2015) (citing N.C. R. App. P. 21(a)(1)). In our discretion, we grant Defendant’s petition for a writ of certiorari.

## II. Probation Revocation

When reviewing probation revocations, we must determine if the evidence reasonably satisfies the trial court “in the exercise of its sound discretion that the defendant has willfully violated a valid condition upon which probation can be revoked.” *State v. Newsome*, 264 N.C. App. 659, 661, 828 S.E.2d 495, 498 (2019) (*purgandum*). “We review a trial court’s decision to revoke a defendant’s probation for an abuse of discretion. Abuse of discretion occurs when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Id.* at 661, 828 S.E.2d at 498 (citation and quotation marks omitted).

“Probation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime.” *Id.* at 661, 828 S.E.2d at 498 (citation and quotation

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marks omitted). “A probation revocation proceeding is not a formal criminal prosecution, and an alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt.” *Id.* at 661, 828 S.E.2d at 498 (citations and quotation marks omitted). “A trial court may only revoke probation for committing a new criminal offense or absconding, except as provided in G.S. 15A-1344(d2).” *Id.* at 661, 828 S.E.2d at 498 (*purgandum*).

Pursuant to N.C. Gen. Stat. § 15A-1343(b)(3a), a probationer absconds when he willfully avoids supervision or willfully makes his whereabouts unknown to the supervising probation officer. N.C. Gen. Stat. § 15A-1343(b)(3a) (2019). “It is a defendant’s responsibility to keep his probation officer apprised of his whereabouts.” *State v. Mills*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 840 S.E.2d 293, 295 (2020) (citations and quotation marks omitted).

Defendant admitted at the May 21 Hearing that she was in willful violation of the terms of her probation by absconding, which is a proper ground to revoke a defendant’s probation. N.C. Gen. Stat. § 15A-1343(b)(3a); *see also State v. Moore*, 210 N.C. 686, 691-92, 188 S.E. 421, 424 (1936); *State v. Gantt*, \_\_\_ N.C. App. \_\_\_, 844 S.E.2d 344, 347 (2020). In addition, the five violation reports filed between January 2018 and February 2019 alleged, and Defendant admitted, that she willfully violated the regular condition of probation:

“Not to abscond, by willfully avoiding supervision or by willfully making the supervisee’s whereabouts unknown to

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the supervising probation officer” in that, on or about 11/26/18 Defendant left her place of residence . . . without the knowledge or permission of her probation officer. On 12/6/18 Defendant stated that she moved, did not know her address and would let me know of the address that day. Defendant failed to advise her probation officer of that address.

On 1/8/19 Defendant texted her officer asking if she could move to South Carolina and the officer replied that she is not able to move to South Carolina. On 1/11/19 the Defendant advised that she would like to move to Laurinburg, NC and would later provide that address.

As of the date of his violation report Defendant has not provided a valid residence to her probation officer since 9/7/18. Defendant has made her whereabouts unknown to her probation officer, thereby absconding.

...

On 1/25/19 Defendant was arrested on an OFA for probation violation, which included absconding.

On 2/20/19 the probation officer texted defendant attempting to schedule an appointment and inquire as to a curren (*sic*) address. Defendant failed to report as scheduled on 2/22/19 and gave no current address.

Defendant has not reported to her probation officer since 12/6/18. Defendant has made herself unavailable for supervision and has made her whereabouts unknown, thereby absconding.

Further, at the May 21 Hearing, Defendant’s probation officer provided the trial court with a factual basis to support its determination that Defendant had absconded. Specifically, the probation officer emphasized that Defendant’s

whereabouts were unknown to him because Defendant repeatedly failed to provide her address over the course of several months.

Because Defendant admitted that she willfully absconded, and Defendant's probation officer supplied evidentiary support for the violations in the violation reports, there was sufficient "evidence . . . to reasonably satisfy the trial court in the exercise of its sound discretion that the defendant has willfully violated a valid condition upon which probation can be revoked." *State v. Mills*, \_\_\_ N.C. App. at \_\_\_, 840 S.E.2d at 294 (citations and quotation marks omitted). Therefore, the trial court did not abuse its discretion, and we affirm the revocation of Defendant's probation and activation of the suspended sentence.

### III. Ineffective Assistance of Counsel

Defendant alternatively argues that she received ineffective assistance of counsel during the May 21 Hearing.

Generally, a claim for ineffective assistance of counsel should be considered through a motion for appropriate relief ("MAR") before the trial court in post-conviction proceedings and not on direct appeal unless "the cold record reveals that no further investigation is required[.]" *State v. McNeill*, 371 N.C. 198, 216-217, 813 S.E.2d 797, 811 (2018) (citation and quotation marks omitted).

In the present case, Defendant asserts that counsel's performance was defective because his failure to proffer evidence to rebut the State's claim that

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Defendant absconded absolved the trial court of the responsibility to make findings regarding Defendant's ability to comply with her probation. We dismiss Defendant's claim for ineffective assistance of counsel without prejudice. Defendant is free to assert this claim in an MAR before the trial court.

Conclusion

Accordingly, we grant Defendant's petition for writ of certiorari. However, we affirm the trial court's decision to revoke Defendant's probation. We dismiss Defendant's ineffective assistance of counsel claim without prejudice.

AFFIRMED IN PART and DISMISSED IN PART.

Judge DIETZ concurs.

Judge ARROWOOD concurs in result only.

Report per Rule 30(e).