NO. COA12-1321
NORTH CAROLINA COURT OF APPEALS

Filed: 7 MAY 2013

STATE OF NORTH CAROLINA

v. Moore County
No. 10 CRS 53284, 53470; 11 CRS 51566

BRUCE TYLER MURCHISON

Appeal by Defendant from judgments entered 8 August 2012 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 13 March 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

William B. Gibson, for Defendant.

DILLON, Judge.

Bruce Tyler Murchison (Defendant) appeals from judgments revoking his probation and activating his suspended sentences. We reverse.

I. Factual & Procedural Background

On 17 November 2011, Defendant pled guilty pursuant to a plea arrangement to two counts of assault with a deadly weapon

with intent to kill, one count of assault with a deadly weapon, and one count of possession of marijuana with intent to sell or deliver. Although Defendant was sentenced to 24 to 38 months imprisonment for each count of assault with a deadly weapon with intent to kill and 6 to 8 months imprisonment for the remaining convictions, the court suspended these sentences and placed Defendant on supervised probation. One condition of Defendant's probation was that he "[c]ommit no criminal offense in any jurisdiction." *See* N.C. Gen. Stat. § 15A-1343(b)(1) (2011).

On 2 February 2012 and 13 February 2012, Defendant's probation officer, Leslie Tyree (Officer Tyree), filed reports alleging that Defendant had violated the conditions of his probation by, *inter alia*, committing the offense of assault with a deadly weapon, missing curfews, and failing to seek counseling for anger management and drug-related problems. Consequently, the court modified the terms of Defendant's probation and ordered that Defendant be incarcerated for a period of 90 days. *See* N.C. Gen. Stat. § 15A-1344(d2) (2011).

On 21 June 2012, Officer Tyree filed additional reports alleging that Defendant had again violated the terms of his probation "in that [Defendant] ha[d] been charges (sic) with first degree burglary, first degree kidnapping and assault with

a deadly weapon on 06/17/2012." The matter came on for hearing in Moore County Superior Court on 8 August 2012. At the hearing, Officer Tyree testified over objection that Defendant's mother had told her that Defendant had broken into a residence occupied by Defendant's mother and girlfriend and that Defendant had brandished a knife while the two occupants hid in a closet "[b]ecause they were scared that [Defendant] was going to hurt them or kill them." Officer Tyree testified that her account of this incident was based upon a telephone conversation that she had had with Defendant's mother. Officer Tyree further testified that Defendant had been charged in connection with the incident and that the case was pending in Lee County. The State subsequently introduced over objection a computer printout from the Administrative Office of the Courts indicating that Defendant had been indicted for first degree burglary in Lee County. When asked on direct examination whether she had "concerns" about Defendant remaining on probation, Officer Tyree responded, "I have a feeling he's going to kill somebody." On cross examination, Officer Tyree admitted that she had not reviewed Defendant's mother's statement to the police or the subsequently compiled police report in order to verify that they

were consistent with the account that had been related to her by Defendant's mother during their telephone conversation.

On 9 August 2012, the trial court entered judgments in which it found and concluded that Defendant had "violated a valid condition of probation" and ordered that Defendant's "probation be revoked, that the suspended sentence be activated, and [that Defendant] be imprisoned" as originally prescribed in the 17 November 2011 judgments. The trial court further ordered that the sentences – 28 to 35 months imprisonment for each of the two counts of assault with a deadly with intent to kill and 6 to 8 months imprisonment for the remaining convictions – be served consecutively. Defendant appeals.

II. Analysis

Defendant contends that the trial court erred in revoking his probation because the State failed to produce any competent evidence demonstrating that he had committed a criminal offense. More specifically, Defendant argues that Officer Tyree's testimony and reports were based entirely on hearsay and thus could not serve as competent evidence in support of revocation. We agree.

Preliminarily, we note that are our disposition of this matter is governed by the following standard of review:

> A proceeding "to revoke probation [is] often regarded as informal or summary," and the court is not bound by strict rules of evidence. An alleged violation by a defendant of a condition upon which his sentence is suspended "need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended." "The findings of the judge, ***if supported by competent evidence***, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion."

State v. Tennant, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (emphasis added) (citations omitted) (alteration in original).

As previously stated, the terms of Defendant's probation mandated that he "[c]ommit no criminal offense in any jurisdiction." Our General Statutes specifically authorize the trial judge to revoke probation upon determining that a condition of this nature has been violated. N.C. Gen. Stat. § 15A-1344(a) (2011); N.C. Gen. Stat. § 15A-1343(b)(1) (2011). "[T]he 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, 145 S.E.2d 327, 329 (1965).

The State's evidence here regarding the alleged criminal offense by Defendant consisted of Officer Tyree's testimony relating what Defendant's mother had told her about the incident[1], her verified probation violation reports and a printout reflecting a pending burglary charge against Defendant in Lee County. It is well established that a trial court may not revoke probation "solely upon a pending criminal charge; a conviction or a plea of guilty is required." *State v. Causby*, 269 N.C. 747, 749, 153 S.E.2d 467, 469 (1967) (citing *State v. Coffey*, 255 N.C. 293, 121 S.E.2d 736 (1961); *State v. Guffey*, 253 N.C. 43, 116 S.E.2d 148 (1960); *State v. Hardin*, 183 N.C. 815, 112 S.E. 593 (1922)). The trial court's decision to revoke probation must be based upon its own independent judgment and findings of fact. *See State v. Monroe*, 83 N.C. App. 143, 145-

[1] We note that the State argues that Defendant failed to preserve his objection to Officer Tyree's hearsay testimony under N.C. R. App. P. 10(a)(1) (2013) by failing to state the specific ground for his objection. At the hearing, Defendant's counsel objected when Officer Tyree was asked, "And what did [Defendant's mother] tell you?" Defendant's counsel also objected following Officer Tyree's statement that "[Defendant's] mother called me the next day telling me what happened." Defendant's counsel, however, did not specifically state the ground for either objection. Nonetheless, the trial court overruled each objection. After careful review of the transcript, we believe that Defendant's objections to Officer Tyree's hearsay testimony were properly preserved under Rule 10(a)(1) because the ground for each objection was "apparent from the context" and Defendant "obtain[ed] a ruling" from the trial court each time.

46, 349 S.E.2d 315, 317 (1986) (affirming the trial court's decision to revoke probation where "the judge upon revoking defendant's probation made independent findings of his own as to the commission of [the alleged] crimes" and "did not base his holding of revocation solely upon pending criminal charges"); *State v. Debnam*, 23 N.C. App. 478, 480, 209 S.E.2d 409, 410 (1974). The issue in the present case thus becomes whether Officer Tyree's testimony and reports served as competent evidence sufficient to support revocation.

In resolving this issue, we find instructive this Court's prior ruling in *State v. Pratt*, 21 N.C. App. 538, 204 S.E.2d 906 (1974). In *Pratt*, the trial court determined that the defendant had violated a condition of her probation requiring that she "[r]emain within a specified area and [] not change [her] place of residence without written consent of [her] probation officer." *Id.* at 539, 204 S.E.2d at 906. At the revocation hearing, the defendant's probation officer testified that she had been unable to locate the defendant after several visits to her purported address and had been informed by a third party that the defendant was "running a club" in Moore County; a second witness also testified that he had been unable to locate the defendant after attempting to visit her several times and

that, on one of his visits, "a lady came to the door and stated that defendant no longer lived there." *Id.* at 540-41, 204 S.E.2d at 907. On appeal, this Court reversed the trial court's decision to revoke probation, holding that "there was no *competent* evidence that defendant had changed her address in violation of a provision of her probation." *Id.* at 540, 204 S.E.2d at 907 (emphasis in original). We explained our reasoning as follows:

> Although there was direct evidence that on eight or ten occasions defendant was not found at the place that was supposed to be her residence, the evidence which tended to show that she had established her residence elsewhere *was hearsay and insufficient to support the order of revocation*.

Id. at 541, 204 S.E.2d at 907-08 (emphasis added). Similarly, in *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967), our Supreme Court concluded that "[s]ome of [the trial court's] findings of fact [were] based on hearsay evidence, and should not have been considered by the judge" in determining that the defendant had violated a condition of his probation. *Id.* at 356, 154 S.E.2d at 482. The trial court's decision in *Hewett* was ultimately upheld, however, because there was "enough competent evidence in the record to support the judge's crucial findings of fact that the defendant ha[d] willfully" violated a condition of his probation. *Id.* The *Hewett* court noted that

the competent evidence supporting the trial court's decision in that case was "plenary." *Id.* at 357, 154 S.E.2d at 482.

Here, our review of the transcript reveals that Officer Tyree, who was the only witness for the State, had no firsthand knowledge of the incident that served as the basis for the allegations in her reports. It is apparent that Officer Tyree gleaned what little she knew of the alleged crimes from a telephone conversation that she had had with Defendant's mother the day after the incident. Officer Tyree's allegations and testimony relating this conversation consisted entirely of hearsay[2] and, under *Hewett*, "should not have been considered by the judge."[3] *Hewett*, 270 N.C. at 356, 154 S.E.2d at 482. Those portions of Officer Tyree's testimony not based upon hearsay pertained only to Defendant's past violations and had no bearing on the allegations at issue; and, unlike in *Hewett*, in this case there was no additional witness evidence supporting the trial court's finding that a probation violation had occurred.

With respect to Officer Tyree's probation reports, we

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[2] Our General Statutes define "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2011).

[3] Although not critical to our holding, we note Officer Tyree's concession that she had not taken any steps to corroborate the allegations relayed to her by Defendant's mother.

recognize that our Courts have previously allowed a verified report from a probation officer to serve as competent evidence in a probation revocation hearing, even though the report itself would otherwise be considered hearsay. *State v. Duncan*, 270 N.C. 241, 246, 154 S.E.2d 53, 58 (1967). However, it appears that in those cases, the verified probation reports contained the firsthand observations of the probation officers. *See id.* at 243-44, 154 S.E.2d at 55-56; *State v. Hunnicutt*, _ N.C. App. _, _, _ S.E.2d _, _, (2013) (holding that probation officer's report alleging that the defendant had failed to report to his supervising officer in violation of a condition of his probation constituted competent evidence in support of revocation). Here, the allegations set forth in Officer Tyree's reports and during her testimony were not based upon her firsthand observations, rendering her reports and testimony more analogous to the hearsay evidence presented in *Hewett* and *Pratt*, which was held to be incompetent.

In light of the foregoing, we must hold that the evidence presented at the revocation hearing was not competent so "as to *reasonably* satisfy the judge in the exercise of his sound discretion that the defendant ha[d] willfully violated a valid

condition of probation." *Hewett*, 270 N.C. at 356, 154 S.E.2d at 482 (emphasis added).

REVERSED.

Judges CALABRIA and ERVIN concur.

Report per Rule 30(e).