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# ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

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CR-17-1108

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Anthony Lynn Emerson

v.

State of Alabama

Appeal from Madison Circuit Court  
(CC-17-3759.70)

McCOOL, Judge.

Anthony Lynn Emerson appeals the Madison Circuit Court's revocation of his probation. Emerson was originally convicted of violating the Sex Offender Registration and Community Notification Act, § 15-20A-1 et seq., Ala. Code 1975

CR-17-1108

("SORNA"), and was sentenced to 15 years' imprisonment. His sentence was split, and he was ordered to serve 18 months' imprisonment, followed by 2 years of probation.

On or about May 2, 2018, Emerson's probation officer filed a delinquency report, in which he alleged that Emerson had violated the terms and conditions of his probation by: 1) committing the new offense of disorderly conduct; 2) failing to report as directed; and 3) failing to pay court-ordered moneys.

The circuit court held a revocation hearing on July 13, 2018. At the hearing, Officer William Frost with the Huntsville Police Department testified that on April 21, 2018, he and other officers responded to a call regarding a disturbance in a neighborhood in Madison County. When Officer Frost arrived at the scene, Emerson and another man were on the ground and he was able to discern from the men that they had been in a fight. The men assured Officer Frost that the fight was over, and the officers started to leave. According to Officer Frost, as soon as he and the other officers "got out of sight," the fight started again. (R. 4.) The officers

CR-17-1108

went back and arrested both men. Officer Frost stated that he was unsure which individual had started the fight.

Officer Christine Baker, a probation officer with the Alabama Board of Pardons and Paroles, testified that on March 6, 2018, Emerson's probation officer instructed Emerson to report to the probation office on March 9, 2018, to sign the rules of probation for a separate offense. According to Officer Baker, Emerson rescheduled the appointment for March 13, 2018, and then failed to report on that date. Officer Baker indicated that Emerson was supposed to be reporting to the probation office for his probation in the underlying case of violating SORNA, as well as his probation on a separate offense. Officer Baker testified that Emerson owed \$1,025 for his conviction in Case No. CC-17-3759. Officer Baker testified that Emerson's probation officer had spoken with Emerson's supervisor at his place of employment to verify employment and that Emerson was employed and was receiving a paycheck.

At the end of the hearing, Emerson's counsel argued that the State failed to present sufficient evidence to show that he had committed the new offense. The court found that "the State did prove probable cause to believe that the new offense

CR-17-1108

did occur, so I am going to revoke Mr. Emerson's probation." (R. 29.) The circuit court entered a written revocation order stating that the court found that Emerson had violated the conditions of his probation by committing the new offense of disorderly conduct, failing to report, and failing to pay court-ordered moneys.

On appeal, Emerson argues that the only evidence indicating that Emerson failed to report or failed to pay court-ordered moneys was hearsay. Emerson also alleges that the circuit court's written order does not contain a statement of the evidence relied on and the reasons for revoking his probation.

To the extent that Emerson contends that the only evidence indicating that Emerson failed to report to his probation officer or that he failed to pay court-ordered moneys was hearsay, that claim is not preserved for appellate review.

""The general rules of preservation apply to probation revocation hearings. Puckett v. State, 680 So. 2d 980, 983 (Ala. Crim. App. 1996), citing Taylor v. State, 600 So. 2d 1080, 1081 (Ala. Crim. App. 1992). This Court 'has recognized, in probation revocation proceedings, only two exceptions to the general rule that issues

not presented to the trial court are waived on appeal: (1) the requirement that there be an adequate written order of revocation ..., and (2) the requirement that a revocation hearing actually be held.' Puckett, 680 So. 2d at 983."'

"Bauer v. State, 891 So. 2d 1004, 1006 (Ala. Crim. App. 2004) (quoting Owens v. State, 728 So. 2d 673, 680 (Ala. Crim. App. 1998)). This court has also recognized a third exception that a defendant can raise for the first time on appeal--the requirement that the court advise the defendant of his or her right to request an attorney to represent the defendant during probation-revocation proceedings. See Law v. State, 778 So. 2d 249, 250 (Ala. Crim. App. 2000). A fourth exception to the preservation rule recently announced by our Supreme Court also allows a defendant to raise for the first time on appeal the allegation that the circuit court erred in failing to appoint counsel to represent the defendant during probation-revocation proceedings. See Dean v. State, 57 So. 3d 169 (Ala. 2010)."

Saffold v. State, 77 So. 3d 178, 179 (Ala. Crim. App. 2011).

Emerson's argument at the conclusion of the hearing challenging the sufficiency of the State's evidence was limited to the charged violation of committing a new offense. Because Emerson's claim relating to the other alleged violations was not raised in the circuit court and does not fall within one of the exceptions listed above, this claim was not preserved for appellate review. See Stinson v. State, 901 So. 2d 748 (Ala. Crim. App. 2004) (holding that claim that

CR-17-1108

revocation was based solely on hearsay is not exception to preservation).

On the other hand, Emerson's remaining claim -- that the circuit court's written order does not contain a statement of the evidence relied on and the reasons for revoking probation -- does fall within one of the exceptions to the preservation requirement. Although the circuit court is not necessarily required to make written findings, the circuit court must at least state for the record its reasons for revoking probation and the specific evidence relied upon in making its decision.

"Rule 27.6(f), Ala. R. Crim. P., provides that, when revoking probation, '[t]he judge shall make a written statement or state for the record the evidence relied upon and the reasons for revoking probation.' In order to meet the requirements of Rule 27.6(f), as well as those of constitutional due process, it is 'the duty of the trial court to take some affirmative action, either by a statement recorded in the transcript or by written order, to state its reasons for revoking probation, with appropriate reference to the evidence supporting those reasons.'"

Ex parte Garlington, 998 So. 2d 458, 458-59 (Ala. 2008) (quoting McCoo v. State, 921 So. 2d 450, 462 (Ala. 2005) (emphasis omitted)).

In this case, at the conclusion of the revocation hearing, the court stated that "the State did prove probable

cause to believe that the new offense did occur, so I am going to revoke Mr. Emerson's probation." (R. 29.) The court's written revocation order merely states that, "[u]pon consideration of the evidence presented by the State at the Defendant's probation hearing," the court finds that the defendant violated the rules of probation by committing the new offense of disorderly conduct, failing to report, and failing to pay court-ordered moneys. (C. 30.) The State admits in its brief on appeal that the circuit court did not specifically state on the record at the hearing what evidence the court relied on in making its determination; however, the State argues that the record was "abundantly clear" that the circuit court's finding "was based on Officer's Frost's testimony." (State's brief, at 7.) We disagree.

The State is correct that this Court

"may examine the record and conclude that oral findings, if recorded or transcribed, can satisfy the requirements of [due process] when those findings create a record sufficiently complete to advise the parties and the reviewing court of the reasons for the revocation of supervised release and the evidence the decision maker relied upon."

McCoo v. State, 921 So. 2d 450, 462 (Ala. 2005). However, in this case, not only did the court fail to state what evidence

CR-17-1108

it relied on in revoking Emerson's probation, there is also a discrepancy between the court's statement in the transcript from the revocation hearing, in which the court stated that it was revoking Emerson's probation based on his violation of probation by committing a new offense, and the court's written order, in which the court indicated that it was revoking his probation for all three of the charged violations of his probation. Given this discrepancy in the court's statements of its reasons for revoking probation and the court's failure to include what evidence it had relied on in revoking Emerson's probation, we conclude that the court's order does conflict with McCoo.

"Under these circumstances, the appropriate remedy is to 'remand this case to the circuit court with instructions that it enter a written order in which it specifically states the evidence upon which it relied and its reasons for revoking the appellant's probation.'" Garlington, 998 So. 2d at 459 (quoting Kenney v. State, 949 So. 2d 192, 195 (Ala. Crim. App. 2006)). Consequently, we remand this case to the circuit court for the entry of such an order. Due return shall be made within 21 days from the date of this opinion.



CR-17-1108

REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Kellum and Cole, JJ., concur. Minor,  
J., concurs in the result.