

Rel: July 12, 2019

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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-18-0554

Robert Lee Jacobs

v.

State of Alabama

Appeal from Madison Circuit Court
(CC-16-3994.71)

KELLUM, Judge.

The appellant, Robert Lee Jacobs, appeals from the circuit court's revocation of his probation.

The record indicates that in February 2017 Jacobs was convicted of robbery in the third degree, see § 13A-8-43, Ala.

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Code 1975. The circuit court sentenced Jacobs to 173 months' imprisonment; that sentence was split, and Jacobs was sentenced to 18 months' imprisonment followed by 3 years' supervised probation.

On August 21, 2018, Jacobs's probation officer filed a delinquency report alleging that Jacobs had violated the terms and conditions of his probation following his arrest on a new criminal charge of theft of property in the first degree. Jacobs's probation officer also alleged Jacobs violated the terms and conditions of his probation by failing to complete the Alabama Certain Enforcement Supervision Program (hereinafter the "ACES program") as ordered by the circuit court. Based on Jacobs's violations, the probation officer recommended that the circuit court fully revoke Jacobs's probation.

On October 10, 2018, the circuit court conducted a probation-revocation hearing at which Jacobs was represented by counsel. At the conclusion of the hearing, the circuit court found that the State did not present sufficient evidence that Jacobs had committed a new criminal offense. The court, however, entered an order on October 10, 2018, revoking

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Jacobs's probation based on his failure to successfully complete the ACES program. The circuit court ordered Jacobs serve the balance of his 173-month sentence in the custody of the Alabama Department of Corrections.

Jacobs filed a timely motion to reconsider in which he argued, among other things, that the circuit court erred by revoking his probation "for a period of longer than 45 days under [§ 15-22-54(e)(1), Ala. Code 1975]." (C. 23.) The circuit court denied the motion to reconsider; this appeal followed.

Jacobs's sole contention on appeal is that the circuit court erred when it fully revoked his probation after the court found that the State had failed to prove that Jacobs violated his probation by committing a new criminal offense. Specifically, Jacobs contends that the circuit court could not fully revoke his probation based on "a mere arrest or filing of charges" but "could only give [him] a 45-day 'dunk' based on the technical violation." (Jacobs's brief, p. 14.) The State argues on appeal that "an allegation of a new arrest or conviction or an allegation of absconding suffice to remove the case from the 'dunk' sanction." (State's brief, p. 7.)

Section 15-22-54(e)(1), Ala. Code 1975, provides, in pertinent part:

"(e) After conducting a violation hearing and finding sufficient evidence to support a probation violation, the court may revoke probation to impose a sentence of imprisonment, and credit shall be given for all time spent in custody prior to revocation. ... However, in all cases, excluding violent offenses defined pursuant to Section 12-25-32 and classified as a Class A felony, and sex offenses, defined pursuant to Section 15-20A-5, the court may only revoke probation as provided below:

"(1) Unless the underlying offense is a violent offense as defined in Section 12-25-32 and classified as a Class A felony, when a defendant under supervision for a felony conviction has violated a condition of probation, other than arrest or conviction of a new offense or absconding, the court may impose a period of confinement of no more than 45 consecutive days to be served in the custody population of the Department of Corrections."

(Emphasis added.)

As our Supreme Court recently recognized in Ex Parte Wayne, [Ms. 1171213, April 26, 2019] ___ So. 3d ___, ___ (Ala. 2019),

"Under the plain language of § 15-24-54(e)(1), a circuit court may revoke probation only when it is determined that the probationer has been arrested for or convicted of a 'new offense' or when the probationer has absconded. Otherwise, a circuit court does not have discretion to revoke a probationer's probation for a mere violation of the

terms and conditions of the probation 'unless the defendant has previously received a total of three periods of confinement under [§ 15-22-54(e) (1)].'¹

The plain language of § 15-22-54(e) (1), Ala. Code 1975, does not support the State's argument on appeal. Section 15-22-54(e) (1) states that "when a defendant under supervision for a felony conviction has violated a condition of probation, other than arrest or conviction of a new offense or absconding, the court may impose a period of confinement of no more than 45 consecutive days. (Emphasis added.) Therefore, a violation of probation and not, as the State suggests, an allegation of a probation violation, is required to remove the case from the "dunk" sanction.

In this case, Jacobs was charged with violating two conditions of his probation. The first violation alleged in the delinquency report was that Jacobs had committed a new criminal offense of theft of property in the first degree. The second alleged violation was his failure to complete the ACES program. Following a hearing, the circuit court found in Jacobs's favor and found insufficient evidence to support the

¹The record indicates that Jacobs had received one dunk at the time his probation was revoked.

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first alleged violation. Accordingly, the circuit court revoked Jacobs's probation based solely on his failure to complete the ACES program. Therefore, under 15-22-54(e)(1), the circuit court could not impose a period of confinement in excess of 45 days.

We note that in denying Jacobs's motion to reconsider, the circuit court relied on this Court's opinion in Anthony v. State, [Ms. CR-17-0587, August 10, 2018] ___ So. 3d ___ (Ala. Crim. App. 2018), and denied the motion on the basis that "[t]he statute states that a defendant is not entitled to administrative status (45 day dunk) if he has been 'arrested for a new offense.'" (C. 25.) The circuit court's reliance on Anthony, however, is misplaced. In Anthony, supra, two delinquency reports were filed against the defendant. In the first, one probation officer alleged that the defendant committed a technical violation and recommended a "45-day dunk." In the second, supplemental report, another probation officer alleged that the defendant committed new criminal offenses and alleged additional technical violations; the officer recommended a full revocation of the defendant's probation. At a probation-revocation hearing, the defendant

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admitted to the technical violations alleged in the delinquency reports. Based on his admission, the circuit court revoked the defendant's probation and ordered him to serve the balance of his sentence in the custody of the Alabama Department of Corrections.

On appeal, the defendant challenged whether the circuit court erred by revoking his probation without conducting a probation-revocation hearing with regard to two new criminal charges alleged in a supplemental delinquency report and whether the circuit court's written order failed to comply with Rule 27.6(f), Ala. R. Crim. P. Anthony, ___ So. 3d at ___. The defendant did not argue, as Jacobs does here, that the circuit court erred when it fully revoked his probation based solely on a technical violation when he was entitled to a "dunk" under § 15-22-54(e)(1). Such an issue must be properly raised before the circuit court and argued before this Court to be considered on appeal. This issue is not one of the recognized exceptions to the preservation requirement, and we decline to create an exception to the preservation requirement for this issue. See Singleton v. State, 114 So. 3d 868, 870 (Ala. Crim. App. 2012) (recognizing four exceptions to

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the preservation requirement). Simply put, we did not hold in Anthony that § 15-22-54(e)(1) permitted a trial court to revoke a defendant's probation based solely on technical violations, because that issue was never raised in Anthony.

The circuit court's full revocation of Jacobs's probation and imposition of the remainder of the sentence violated § 15-22-54(e)(1), Ala. Code 1975, because the court found Jacobs committed only a technical violation. Accordingly, the circuit court's order of October 10, 2018, revoking Jacobs's probation and imposing the balance of his 10-year sentence is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Windom, P.J., and McCool, J., concur. Cole, J., concurs in the result. Minor, J., concurs in part and concurs in the result with opinion.

MINOR, Judge, concurring in part and concurring in the result.

I concur in the main opinion to the extent it holds that § 15-22-54(e)(1), Ala. Code 1975, did not permit the trial court to revoke Robert Lee Jacobs's probation based solely on technical violations under the circumstances presented here.²

To the State's point regarding Jacobs's alleged arrest and whether that allegation removes Jacobs from the "dunk" requirement of § 15-22-54(e)(1), Ala. Code 1975, it does not appear that the State notified Jacobs that it was seeking the revocation of his probation based on that alleged arrest. Rather, that charge was that Jacobs had committed the new offense of purse snatching--an offense for which the circuit court found insufficient evidence. Although this Court generally may affirm a circuit court's judgment for any reason, there are due-process limits to the affirm-for-any-reason rule. Given the Supreme Court's recent opinion in Ex parte Wayne, [Ms. 1171213, April 26, 2019] ___ So. 3d ___ (Ala. 2019),³ I question whether this Court could properly

²I agree with the main opinion's holding that this issue is not one of the exceptions to the preservation requirement and that a defendant must preserve this issue for appeal.

³In Ex parte Wayne, the Alabama Supreme Court held that the defendant's probation could not be fully revoked based on

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affirm the revocation of probation on a basis not expressly presented by the State below as a ground for revoking probation.

As for the circuit court's reliance on this Court's decision in Anthony v. State, [Ms. CR-17-0587, Aug. 10, 2018] ___ So. 3d ___ (Ala. Crim. App. 2018), that reliance is understandable. Anthony states plainly: "Although Anthony did not admit to committing the new criminal offenses, his admission to the technical violations was sufficient for the circuit court to revoke Anthony's probation." ___ So. 3d at ___ (emphasis added).

In a footnote, this Court in Anthony left open the possibility that § 15-22-54(e)(1) limits a circuit court's authority to revoke a defendant's probation based solely on technical violations. But this Court also appeared to dismiss the notion that § 15-22-54(e)(1) imposes such a limitation as

absconding unless the defendant had written notice that absconding would be used as a probation violation. ___ So. 3d at ___ ("The State argues that Wayne had implied notice that the charge of absconding would be used as a probation violation because Wayne, being aware of her own actions, absconded. The State's argument is not convincing. As stated in Stallworth [v. State], 690 So. 2d 551 (Ala. Crim. App. 1997)], a probationer has a constitutional right to written notice of the charges against him or her; implied notice does not pass constitutional muster.").

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based on "obiter dicta." ___ So. 3d at ___ n.1. Today's opinion clarifies that a probationer whose probation is improperly revoked under § 15-22-54(e)(1) needs to properly preserve the issue for this Court to review it.