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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0899

William Charles Hyche

v.

State of Alabama

Appeal from Tuscaloosa Circuit Court
(CC-10-1054.70; CC-12-850.70; CC-12-1008.70)

McCOOL, Judge.

William Charles Hyche appeals the circuit court's order revoking his probation and ordering him to serve the balance of his sentences. For the reasons set forth herein, we reverse and remand.

Facts and Procedural History

On May 3, 2012, Hyche pleaded guilty to two counts of first-degree unlawful manufacture of a controlled substance, a violation of § 13A-12-218, Ala. Code 1975; one count of unlawful possession of a controlled substance, a violation of § 13A-12-212, Ala. Code 1975; and one count of unlawful possession of a short-barreled shotgun, a violation of § 13A-11-63, Ala. Code 1975. The circuit court sentenced Hyche to 15 years' imprisonment for each of the unlawful-manufacture-of-a-controlled-substance convictions, 15 years' imprisonment for the unlawful-possession-of-a-controlled-substance conviction, and 2 years' imprisonment for the unlawful-possession-of-a-short-barreled-shotgun conviction. The circuit court ordered that Hyche's sentences run concurrently and split the sentences for Hyche to serve three years' imprisonment, followed by a four-year probationary term.

On March 9, 2018, Hyche's probation officer filed a "motion for writ of arrest of ACES probationer" alleging that Hyche had violated the terms of his probation by failing "to report for monthly reporting on 3/1/18 ... or color code drug screen on 2/28/18 & 3/6/18." (C. 34.) On March 29, 2018, the

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circuit court entered an order that states: "It appearing to the Court that [Hyche] has absconded and has failed to comply with the terms and conditions of the imposed probationary sentence, it is, therefore, ORDERED and ADJUDGED that an Alias Writ of Arrest be issued for [Hyche]." (Capitalization in original.) (C. 34.)

On October 3, 2018, Hyche was arrested. That same day, the circuit court entered an "advisement order," which indicates that Hyche appeared in open court on October 3, 2018, and was notified that he was charged with failure to report and failure to submit to drug screens. (C. 55.) The advisement order also indicates that a revocation hearing would be scheduled for a later date. On January 15, 2019, Hyche filed a "motion for special setting" in which he noted that, at that time, he had "been continuously confined for more than 100 days" and requested that the circuit court schedule a revocation hearing. (C. 56.) The circuit court subsequently scheduled a revocation hearing for February 26, 2019.

On February 26, 2019, the circuit court entered an order that states:

"Based upon the Probation Office's A.C.E.S. violation report for absconding ... and this Court's order of March 29, 2018, acting on that report, the Court orders that the Defendant's probation is hereby REVOKED and the balance of the Defendant's sentence is to be served in ADOC. Jail credit pending revocation. The following cases are concurrent: CC-2010-1054, CC-2012-850 and CC-2012-1008."

(C. 60.) Hyche filed a timely notice of appeal.

On July 9, 2019, this Court issued an order in which the Court noted that the record did not contain a transcript of the revocation hearing and ordered the circuit clerk to supplement the record with the transcript. On July 10, 2019, the circuit clerk supplemented the record with a letter from the court reporter, who stated that she had reviewed her records and had "determined there is no court reporter's transcript of the above-styled proceedings [held] on February 26, 2019." (Supp. C. 23.)

Analysis

On appeal, Hyche's counsel, who did not represent Hyche during the revocation proceedings, argues that because there is no transcript of a revocation hearing, it is unclear whether the circuit court actually conducted a revocation hearing. In addition, Hyche's counsel argues that, even if

the circuit court conducted a revocation hearing, the court's order revoking Hyche's probation is deficient in that the order does not set forth the evidence upon which the circuit court relied in revoking Hyche's probation. Thus, Hyche argues, the circuit court's order revoking his probation is due to be reversed, and the case is due to be remanded for further proceedings. Hyche is correct.

Rule 27.6(a), Ala. R. Crim. P., and § 15-22-54(e), Ala. Code 1975, require a hearing as a prerequisite to the revocation of probation. Singleton v. State, 114 So. 3d 868, 870 (Ala. Crim. App. 2012); Davis v. State, 816 So. 2d 1075, 1077 n.2 (Ala. Crim. App. 2001). Pursuant to Rule 27.5(b), Ala. R. Crim. P., a probationer may waive his or her right to a revocation hearing. However, absent such a waiver, "the failure to conduct a revocation hearing ... is a jurisdictional defect." Durry v. State, 977 So. 2d 539, 541 (Ala. Crim. App. 2007).

Here, the circuit court scheduled a revocation hearing for February 26, 2019. However, as noted, there is no transcript of a revocation hearing, and the circuit court's February 26, 2019, order revoking Hyche's probation does not

indicate that a revocation hearing occurred on that date. To the contrary, it appears from the circuit court's order that the court did not revoke Hyche's probation based upon evidence it received at a hearing but, rather, revoked Hyche's probation based solely on the allegations filed by Hyche's probation officer. In addition, the case-action summary does not indicate that a revocation hearing occurred, and, notably, the State does not contend that a revocation hearing occurred. In fact, the State also seems uncertain as to whether a revocation hearing occurred. See State's brief, at 11 (acknowledging that Hyche "may be entitled to [a revocation hearing], assuming one has not already been held"). Thus, given the record and the briefs provided to this Court, it is impossible for this Court to determine whether the circuit court conducted a revocation hearing.¹ Regardless, even if we were to assume, which we do not, that the circuit court conducted a revocation hearing, there is no transcript of the hearing for this Court to review, and the circuit court's

¹As noted, a probationer may waive his or her right to a revocation hearing. Durry, supra. However, there is no indication in the record that Hyche waived the revocation hearing in this case, and, notably, the State does not contend that Hyche waived the revocation hearing.

order does not set forth what evidence, if any, the circuit court relied upon in revoking Hyche's probation. See Rule 27.6(f), Ala. R. Crim. P. (requiring the judge presiding over a revocation hearing to make a written statement, or to state orally for the record, the evidence it relied upon in revoking probation and the reasons for revoking probation); and McCoo v. State, 921 So. 2d 450, 462 (Ala. 2005) (holding that a court presiding over a revocation hearing must "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").

In Ware v. State, 24 So. 3d 556 (Ala. Crim. App. 2009), the appellant raised the same argument Hyche raises here, i.e., that the order revoking his probation was due to be reversed because, he said, it was unclear whether the circuit court had conducted a revocation hearing and because the circuit court's order did not set forth the evidence upon which the circuit court relied in revoking the appellant's probation. In addressing that argument, this Court stated:

"Although the record on appeal indicates that the circuit court conducted a probation-revocation

hearing, the record on appeal does not include a transcript of the probation-revocation hearing. We note that after the instant case had been submitted to this Court for decision, we issued an order to the circuit court to clarify the meaning of its ... order and, if the probation-revocation hearing was indeed transcribed, to supplement the record with a copy of a transcript of that hearing. In response to this Court's order, the circuit court indicated that Ware's probation-revocation hearing was not transcribed by a court reporter.

"In Williams v. State, 982 So. 2d 615 (Ala. Crim. App. 2007), this Court addressed a similar situation involving the lack of a transcript in the record on appeal. In Williams, the defendant argued on appeal that "the lack of a colloquy and/or transcript indicating that [he] knowingly 'confessed' the violation of the terms of his probation demands a remand for further findings." 982 So. 2d at 616 (quoting Williams's brief). The case-action summary in Williams indicated that the circuit court had conducted a probation-revocation hearing before revoking the defendant's probation. However, the record on appeal did not include a transcript of the revocation hearing. The defendant moved to supplement the record on appeal with a transcript of the revocation hearing. The circuit court denied the motion to supplement because no transcript of the probation-revocation hearing existed. This court reversed the circuit court's revocation order, stating:

"In this case, the revocation hearing was not transcribed. Also, the written revocation order does not include any facts regarding the voluntariness of the [defendant]'s admission. Therefore, we cannot properly review the [defendant]'s claim regarding the voluntariness of his admission. Accordingly, we must reverse the circuit court's judgment revoking the

[defendant]'s probation and remand this case for the circuit court to conduct a new revocation hearing.'

"Williams v. State, 982 So. 2d at 616-17.

"In the instant case, the case-action-summary sheet indicates that, contrary to Ware's assertion on appeal, the circuit court conducted a probation-revocation hearing; however, that hearing was not transcribed by a court reporter. The circuit court's ... order gives no indication whether Ware admitted at the hearing to violating the terms of his probation. Moreover, the circuit court's order does not state the evidence relied on by the court to revoke Ware's probation as required under Rule 27.6(f), Ala. R. Crim. P.

"In McCoo v. State, 921 So. 2d 450, 462 (Ala. 2005), the Alabama Supreme Court held that this court could

"'examine the record and conclude that "oral findings, if recorded or transcribed, can satisfy the requirements of Morrissey [v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)] 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." [United States v.] Copeland, 20 F.3d [412, 414 (11th Cir. 1994)].'

"The Court, however, noted that its holding did not 'diminish 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.' McCoo, 921 So. 2d at 462. While

this court is permitted to examine the record to determine whether a circuit court's findings, either oral or transcribed, create a sufficient record to advise of the reasons for the revocation and the evidence relied on, see McCoo, supra, we are unable to do so in this case because no transcript of the probation-revocation hearing exists for this court to review.

"Given that no transcript exists of the probation-revocation hearing and that we are unable to ascertain from the circuit court's order the evidence the court relied on in revoking Ware's probation, this Court cannot fulfill its duty to review the correctness of the circuit court's actions. Accordingly, we reverse the circuit court's judgment and remand this case for that court to set aside the ... probation-revocation order and to conduct a new probation-revocation hearing that is properly recorded and transcribed for this Court's review. The circuit court should also enter written findings in accordance with Rule 27.6(f), Ala. R. Crim. P., and Armstrong v. State, 294 Ala. 100, 312 So. 2d 620 (1975). In the event Ware is dissatisfied following his new probation-revocation hearing, he should file a new appeal to this Court."

Ware, 24 So. 3d at 557-58.

As noted, in this case, as in Ware, there is no transcript of a revocation hearing, and, even if the circuit court conducted a revocation hearing, the circuit court's order does not set forth what evidence, if any, the circuit court relied upon in revoking Hyche's probation. Therefore, "this Court cannot fulfill its duty to review the correctness of the circuit court's actions." Ware, 24 So. 3d at 558.

Thus, in accord with Ware, we reverse the order revoking Hyche's probation and remand the case for the circuit court to conduct a new (or initial) revocation hearing. The circuit court should ensure that the hearing is recorded and transcribed for this Court's review and should ensure that any subsequent order revoking Hyche's probation complies with Rule 27.6(f) by setting forth the reasons for revocation and the evidence upon which the circuit court relied in revoking Hyche's probation. Ware, supra. In addition,

"[i]n conducting the revocation hearing, we caution the circuit court to comply with the due process requirements set forth in Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); Armstrong v. State, 294 Ala. 100, 312 So. 2d 620 (1975); McCoo v. State, 921 So. 2d 450 (Ala. 2005); and Rule 27, Ala. R. Crim. P."

Lee v. State, 936 So. 2d 551, 554 (Ala. Crim. App. 2005). "In the event [Hyche] is dissatisfied following his new probation-revocation hearing, he should file a new appeal to this Court." Ware, 24 So. 3d at 558.

REVERSED AND REMANDED.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur.