**Rel: August 14, 2020**

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# ALABAMA COURT OF CRIMINAL APPEALS

**OCTOBER TERM, 2019-2020**

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**CR-19-0450**

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**Thien C. Nguyen**

**v.**

**State of Alabama**

**Appeal from Madison Circuit Court**
**(CC-17-4714.70)**

COLE, Judge.

Thien C. Nguyen appeals the circuit court's decision to revoke his probation, arguing that he did not "receive or sign the order of probation until after the violations occurred" and that his revocation was based solely on hearsay.

Facts and Procedural History

On November 26, 2018, Nguyen was convicted of discharging a firearm into an occupied building and was sentenced to 10 years' imprisonment. The circuit court split Nguyen's sentence, ordered him to serve "time served," and imposed a five-year term of probation. (C. 8.)

On October 17, 2019, Nguyen's probation officer, Michael Glenzer, filed an "Officer's Report on Delinquent Probationer," alleging that Nguyen had violated the terms and conditions of his probation by committing three new criminal offenses--namely, three violations of the Sex Offender Registration and Community Notification Act ("SORNA"), § 15-20A-1 et seq., Ala. Code 1975.

On November 26, 2019, Nguyen, who was represented by counsel, appeared before the circuit court for an initial appearance. At that hearing, Nguyen was advised of the charges set out in the Officer's Report on Delinquent Probationer. Because Nguyen only "understand[s] some English" and because the Vietnamese translator who was hired to translate the proceedings for Nguyen was not present at the initial appearance, Nguyen's counsel denied the allegations "on

[Nguyen's] behalf." (R. 2.) The circuit court then set a date for Nguyen's probation-revocation hearing.

On January 29, 2020, the circuit court held Nguyen's probation-revocation hearing, at which Nguyen, Nguyen's counsel, and a translator were present. At the outset of the hearing, the circuit court again told Nguyen that he had been charged with violating the terms and conditions of his probation by committing three SORNA violations. Nguyen denied committing the SORNA violations. Thereafter, the State presented testimony from two witnesses: Michael Glenzer (Nguyen's probation officer) and Marina Garcia (a SORNA investigator with the Madison County Sheriff's Department).

Officer Glenzer testified that, he met with Nguyen after Nguyen was released from the Madison County Jail. According to Officer Glenzer, at that time, Nguyen completed an information packet and gave the packet to Officer Glenzer. In that packet, Nguyen provided an address and a place of employment. Officer Glenzer explained that Nguyen

> "came in with his neighbor that gave him a ride to the office. And I met with them out in the lobby area and very quickly it appeared he couldn't fully understand what I was saying. And the neighbor that brought him up there, he was not translating for him. He was doing him a favor by giving him a ride.

> "So I did the best I could. I had the Order of Probation in hand. I gave him a reporting calendar and kind of, for lack of a better word, I hit the high points of the rules.
>
> "....
>
> "Don't leave the state, don't do drugs, don't get arrested, report on the dates that are on the paper. When you report, make sure you pay. Something along the lines of that."

(R. 10-11.) Officer Glenzer also said that he told Nguyen that he was "not to violate the law." (R. 11.) According to Officer Glenzer, Nguyen appeared to understand what he had told him during their first meeting. But, because Nguyen did not have a translator present, Officer Glenzer said that he did not "feel comfortable with [Nguyen] signing the formal court documents." (R. 12, 14.)

Officer Glenzer explained that, after their initial meeting, Nguyen reported on a "monthly basis" and "paid when he was supposed to." (R. 12.) Officer Glenzer also did routine home visits with Nguyen. Officer Glenzer testified that he filed a "probation violation" after Inv. Garcia charged Nguyen with the three SORNA violations.

Inv. Garcia, a SORNA investigator with the Madison County Sheriff's Office, testified that in 2005 Nguyen was convicted

of second-degree sexual abuse--a sex offense that required him to register as a sex offender. Inv. Garcia said that Nguyen had been coming into her office quarterly to register as a sex offender since 2012. When he reported, Nguyen provided her with information about where he was living and where he was employed. Inv. Garcia said that she had never had any issue communicating with Nguyen and that he understood that there are certain laws he must follow. In September 2019, Inv. Garcia charged Nguyen with three SORNA violations. She explained each violation as follows:

> "The first one being, I went to his home to check and make sure that he was actually residing on Helton Avenue in Hazel Green. And his landlord, she allowed me inside the home and she had a key to his bedroom which had a padlock on it. She unlocked it and showed me that he had his clothing there. But she said he had not been there in three weeks.
>
> "So I got a warrant for him not residing where he said he was residing. She didn't know where he had been in three weeks. So I obtained a second warrant for not giving me his new address.
>
> "And I asked her where was he employed at. When she advised me, I called the place of employment, Mee-Mee's Nail Salon. And I spoke to Mee-Mee herself or the lady that identified herself as Mee-Mee and she advised that, yes, he had been working there.
>
> "....

> "And his first employment he gave me was Nail Oasis at ... Highway 231/431.
>
> "Later on he has crossed that out and put a new name in and then he never changed it and he changed employment.
>
> "....
>
> "Without notifying me. It was--the employment was--it was at a bad address, meaning there was a daycare nearby."

(R. 18-19.)

Concerning Nguyen's SORNA violation for not living in the house he had registered as his residence, Inv. Garcia conceded that Nguyen did have a room at the house, that he had clothes in that room, and that he had furniture in that room. Inv. Garcia also admitted that she did not have any personal knowledge that Nguyen was no longer living at the house; rather, she explained, that she had only been told that by the "elderly lady that he rents a room from." (R. 21-22.)

At the conclusion of the hearing, Nguyen argued that the State had presented only hearsay evidence as to whether any SORNA violation occurred.

Thereafter, the circuit court found as follows:

> "[T]he law is that findings in these cases cannot be based solely on hearsay. Hearsay is admissible as long as there is something to verify the hearsay.

> And it doesn't really have to be a whole lot to verify the hearsay.
>
> "In this case, Investigator Garcia actually went out and went to the place where the man is supposed to be living and goes in and looks at his clothing. And, yes, she did get some information by hearsay that he hadn't been there for a long time. She is actually out there, I think that at least partially confirms that."

(R. 29.) Thus, the circuit court found that Nguyen had violated his probation by committing a SORNA violation when he did not tell Inv. Garcia that he had moved out of the house. The circuit court found in Nguyen's favor as to the other two alleged SORNA violations.

The circuit court memorialized its decision in a written order, finding that it was reasonably satisfied that Nguyen had violated his probation by committing a SORNA violation. The circuit court explained that, in reaching its decision, the court relied on the testimony of Inv. Garcia and Officer Glenzer, and ordered Nguyen to serve the remainder of his 10-year sentence.

On February 4, 2020, Nguyen filed a motion to reconsider, arguing, among other things, that the circuit court had revoked Nguyen's probation based solely on hearsay. The next

day, the circuit court denied Nguyen's motion. This appeal follows.

Discussion

On appeal, Nguyen argues that the circuit court's decision to revoke his probation was improper for two reasons: (1) "he was not advised of the rules of probation prior to the alleged delinquent acts" (Nguyen's brief, pp. 14-16); and (2) his probation was revoked "based on hearsay" (Nguyen's brief, pp. 10-14). The State does not address Nguyen's argument that he was not advised of the rules of probation before the alleged violation, but it concedes that Nguyen's probation revocation "should be reversed because the State provided no non-hearsay evidence that Nguyen violated the terms of his probation by committing a new offense under [SORNA] by failing to report a change of residence." (State's brief, p. 5.)

Nguyen's first argument--that the circuit court's decision to revoke his probation was improper because he was not advised of the conditions of probation before the alleged violations of probation--is without merit. It appears to be uncontroverted that Nguyen did not sign the "order of

probation," which expressly sets out the conditions of probation, until after he was arrested for allegedly committing the SORNA violations. But Nguyen was advised of the rules of probation before he was arrested for the SORNA violations.

To support his argument, Nguyen cites Byrd v. State, 675 So. 2d 83 (Ala. Crim. App. 1995), claiming that the oral explanation about the conditions of probation that Byrd received from the circuit court are similar to the oral explanation Officer Glenzer gave to Nguyen. We disagree.

In Byrd, the circuit court explained to Byrd the conditions of his probation as follows:

> "'The Court is going to suspend the sentence and you will be placed on a suspended sentence for a period of five years. And if you get into trouble again, and I don't mean a speeding ticket, something minor, I wouldn't revoke it. But if you're up here on any offense, it wouldn't bother me at all to revoke your suspended sentence and you are already sentenced to fifteen years.'"

675 So. 2d at 84. Thereafter, Byrd was arrested for disorderly conduct when "he was driving around in the parking lot of a grocery store at a high rate of speed and appeared to be upset with his wife." Id. "Byrd did not appear to be intoxicated,

but was visibly upset and was speaking in a threatening manner." Id. The circuit court revoked Byrd's probation for committing disorderly conduct. This Court reversed the circuit court's decision because the oral explanation of the conditions of probation used "qualifying language that leaves some doubt as to exactly what conduct would result in a probation revocation." Id. In other words, because the circuit court expressly told Byrd that there were some violations of the law that would not result in the revocation of his probation, Boyd was left only to guess what criminal conduct would result in the revocation his probation.

Here, unlike in Byrd, there was no such uncertainty. As set out above, when Officer Glenzer advised Nguyen of the conditions of his probation, he told Nguyen that he was not to violate the law. Because Officer Glenzer did not use any "qualifying language" that would create any uncertainty about what criminal conduct would result in a probation revocation, Nguyen "cannot be heard to complain that he was not properly notified that his commission of additional criminal offenses could result in the revocation of his probation." Smoke v. State, 812 So. 2d 387, 390 (Ala. Crim. App. 2001).

Even after Byrd, probationers are subject to the "implicit-condition" rule established in Pettway v. State, 628 So. 2d 1066 (Ala. Crim. App. 1993), that in every order of probation is the implicit condition that the probationer shall not commit another offense. See Smoke, 812 So. 2d at 390 (citing Byrd and Pettway for the proposition that in every probationary sentence is the "implicit condition" that the defendant will not commit another criminal offense while on probation).

Recently, this Court explained that,

> "'"beyond any expressed condition of probation, there exists the implied condition that the probationer live and remain at liberty without violating the law. Moore v. State, 494 So. 2d 198 (Ala. Cr. App. 1986); Ellard v. State, 474 So. 2d 743 (Ala. Cr. App. 1984), aff'd, 474 So. 2d 758 (Ala. 1985)."'
>
> "McKinnon v. State, 883 So. 2d 253, 254 (Ala. Crim. App. 2003) (quoting Weaver v. State, 515 So. 2d 79, 82 (Ala. Crim. App. 1987)). In other words, a circuit court may revoke a defendant's probation when it is shown that he has committed a new offense, regardless of whether the defendant received written notice that not committing a new offense was a condition of his probation. See Croshon v. State, 966 So. 2d 293, 295 (Ala. Crim. App. 2007) (holding that the 'revocation of Croshon's probation was proper because, even though Croshon had not yet been given the express terms of his probation, refraining from committing further

> criminal offenses is an implied condition of every probationary sentence'); see also Wilcox v. State, 395 So. 2d 1054, 1056 (Ala. 1981)."

Walker v. State, 294 So. 3d 825, 830 (Ala. Crim. App. 2019).

Because Nguyen was expressly advised that the conditions of his probation included the requirement that he not violate the law and because compliance with the law is an implicit condition in every probationary sentence, Nguyen's failure to sign the written rules of probation until after he was arrested for committing the SORNA violations did not preclude the trial court from revoking Nguyen's probation. Thus, Nguyen is not entitled to any relief on this claim.

Although Nguyen's improper notice argument is without merit, his second argument regarding the revocation of his probation based solely on hearsay does entitle him to relief. Although a probation-revocation proceeding "'"is not a criminal prosecution,"'" and in such proceedings "'"the court is not bound by strict rules of evidence,"'" Ex parte J.J.D, 778 So. 2d 240, 242 (Ala. 2000) (quoting Martin v. State, 241 So. 2d 339, 341 (Ala. Crim. App. 1970), quoting in turn, State v. Duncan, 154 S.E.2d 53 (1967)),

> "[i]t is well settled that hearsay evidence may not form the sole basis for revoking an individual's

> probation. See Clayton v. State, 669 So. 2d 220, 222 (Ala. Cr. App. 1995); Chasteen v. State, 652 So. 2d 319, 320 (Ala. Cr. App. 1994); and Mallette v. State, 572 So. 2d 1316, 1317 (Ala. Cr. App. 1990). 'The use of hearsay as the sole means of proving a violation of a condition of probation denies a probationer the right to confront and to cross-examine the persons originating information that forms the basis of the revocation.' Clayton, 669 So. 2d at 222."

Goodgain v. State, 755 So. 2d 591, 592 (Ala. Crim. App. 1999).

Recently, this Court, relying on the Alabama Supreme Court's decisions in Sams v. State, 48 So. 3d 665 (Ala. 2010) and Ex parte Dunn, 163 So. 3d 1003) (Ala. 2014), explained what our caselaw means when it says that hearsay evidence may not form the sole basis for revoking someone's probation:

> "In sum, Sams and Dunn establish that hearsay is admissible at a probation-revocation hearing to show that a defendant committed a new offense and that the circuit court can rely on hearsay to revoke a defendant's probation. But those cases warn that hearsay cannot serve as the sole basis for revoking a defendant's probation, and instruct that, although the State does not have to prove every element of the alleged new offense with nonhearsay evidence, the State must present sufficient nonhearsay evidence connecting the defendant to the commission of the alleged new offense."

Walker, 294 So. 3d at 832.

Here, the circuit court found that Nguyen had violated the terms and conditions of his probation by committing a

SORNA violation when he moved out of the house he had registered as his residence without reporting it to local law enforcement, a violation of § 15-20A-10(c)(1), Ala. Code 1975. To find that Nguyen had violated his probation by committing a SORNA violation under § 15-20A-10(c)(1), the circuit court had to be reasonably satisfied that

> "(1) [Nguyen] was an adult sex offender;
>
> "(2) [Nguyen] failed to appear in person immediately upon transferring or terminating a residence ... to notify local law enforcement in each county in which he transferred or terminated any residence ...; (AND)
>
> "(3) [Nguyen] did so knowingly."

Alabama Pattern Jury Instructions: Criminal, Alabama Sex Offender Registration and Community Notification Act, Failing to Notify upon Transferring or Terminating Residence, Employment, or School (Adult) (adopted September 8, 2015) (currently found at https://judicial.alabama.gov/docs/library/docs/15-20A-10(c)(1).pdf).

Although the State presented non-hearsay evidence that Nguyen was an adult sex offender and non-hearsay evidence that he had not notified local law enforcement that he had

terminated his residence at the house he had registered as his residence, the only evidence that the State presented indicating that Nguyen had actually terminated his residence at the house was hearsay testimony that Nguyen's landlord told Inv. Garcia that Nguyen had moved out.

The State concedes on appeal that its evidence was insufficient to revoke Nguyen's probation. The State agreed with Nguyen that it

> "did not produce non-hearsay evidence to sufficiently prove that Nguyen violated the terms of his probation. Investigator Garcia's testimony was the only evidence adduced, and her personal knowledge was only that Nguyen was absent from his residence when she conducted her residency check, for which neither the duration nor the specific time were accounted. This incident was the first and only time that Investigator Garcia visited Nguyen's listed residence to find him absent. ... Accordingly, the only evidence the circuit court could have used to revoke Nguyen's probation is the same that Investigator Garcia used to obtain a warrant: the hearsay statement made by Nguyen's landlord."

(State's brief, pp. 6-7.) See also Coach v. State, 44 So. 3d 549, 551 (Ala. Crim. App. 2009) (holding that the State failed to present sufficient non-hearsay evidence of a SORNA violation when the only evidence that the probationer changed residences was non-hearsay evidence that the defendant was not

at the proper residence on two occasions and hearsay evidence indicating that he had moved).

Because the State did not present sufficient non-hearsay evidence that Nguyen violated his probation by committing a SORNA violation, we must reverse the circuit court's order revoking Nguyen's probation and remand this case to the circuit court for further proceedings.

REVERSED AND REMANDED.

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