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# Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

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CR-21-0320

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G.A.F.

v.

State of Alabama

Appeal from Etowah Circuit Court  
(CC-20-350.70)

COLE, Judge.

G.A.F. appeals the Etowah Circuit Court's order revoking his probation and ordering him to serve 90 days' imprisonment. Because the circuit court failed to conduct a revocation hearing, we reverse and remand.

Facts and Procedural History

On December 17, 2020, G.A.F. was adjudicated a youthful offender for the underlying offense of unlawful possession or receipt of a controlled substance, a violation of §13A-12-212, Ala. Code 1975. (C. 4, 8.) G.A.F. was sentenced to 24 months' imprisonment; that sentence was suspended, and G.A.F. was placed on probation. (C. 8.) On September 9, 2021, G.A.F.'s probation officer filed a delinquency report that charged G.A.F. with absconding. The report asserted that G.A.F. had signed the rules of probation on February 5, 2021, but "[t]he last time he reported to the probation office was on May 18, 2021." (C. 8.) The report further alleged that a home visit to the address G.A.F. provided was performed on August 31, 2021, but that the individuals at the residence "were unaware who [G.A.F.] was." (C. 8.) In addition, the probation officer stated that she telephoned G.A.F. on September 2, 2021, "and instructed him to report by September 3, 2021," or a delinquency petition would be filed. G.A.F. told the officer that "he understood and he would report," but he did not. (C. 8.) According to the delinquency report, the officer spoke with G.A.F. again on September 7, 2021, and gave him a final chance to report, but G.A.F. still failed to report. The probation officer

subsequently performed another home visit to an alternate address and was again unsuccessful in locating G.A.F. (C. 8.)

G.A.F.'s probation-revocation hearing was scheduled for December 7, 2021. (C. 4.) The day of the scheduled hearing, the circuit court issued what appears to be a "form" order that included the following "boilerplate" language: "[A]fter hearing testimony on behalf of the Defendant to show cause why Defendant's Probation should not be revoked at this time, the Court finds that the Defendant has violated the conditions of probation as set forth in the delinquent charges, more specifically, the Court finds from substantial evidence and testimony that the Defendant has failed to comply with the terms and conditions of Probation." (C. 13.) The offense, absconding, was provided by handwritten notation along with the term of imprisonment G.A.F. was ordered to serve upon revocation -- "90 days in the Etowah County Detention Center," and G.A.F. was to be reinstated to probation after the completion of the 90-day sanction. (C. 5, 13.) G.A.F. was "credited with time served." (C. 5, 13.) G.A.F. filed a timely notice of appeal. On March 3, 2022, the court reporter filed a statement that "there was no hearing

on the record on the date requested for the appealed issue in this case; therefore, there will not be a typewritten transcript." (C. 29.)

### Analysis

G.A.F.'s contends on appeal that the circuit court failed to conduct a revocation hearing, violating his right to due process, as well as violating Rule 27.6(a), Ala. R. Crim. P., and §15-22-54(e), Ala. Code 1975, which require that a hearing be held to determine whether probation should be revoked. He also argues that there is no record of the proceedings below; therefore, he argues, this Court cannot adequately review the trial court's ruling. "The minimal due process to be accorded a probationer before his probation can be revoked includes written notice of the claimed violations of probation, disclosure to the probationer of the evidence against him, an opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and to cross-examine adverse witnesses, a neutral and detached hearing body such as a traditional parole board, and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. Rule 27.5 and 27.6, Ala. R. Crim. P.'" Singleton v. State, 114 So. 3d 868, 870 (Ala. Crim. App. 2012) (quoting Hollins v. State, 732 So. 2d 1056, 1057

(Ala. Crim. App. 1998)) (emphasis added). As this Court stated in Hyche v. State, 301 So. 3d 848, 853 (Ala. Crim. App. 2020),

"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)."

(Emphasis added.)

Although G.A.F. first complained about the circuit court's failure to hold a hearing in his notice of appeal and thus never obtained an adverse ruling as to this claim, G.A.F.'s argument that no hearing was conducted presents a recognized exception to the general requirement that error must be preserved in the trial court as a prerequisite to appellate review. This Court has recognized that the rules of preservation generally apply to probation-revocation proceedings, but one of the four established exceptions to the preservation requirement is that an individual is not required to preserve for appeal an argument that the trial court failed to comply with the requirement that "a revocation hearing actually be held." Allen v. State, 285 So. 3d 864, 866 (Ala. Crim. App. 2019). We have thus

considered G.A.F.'s argument and agree with G.A.F. that the circuit court's apparent failure to hold a probation-revocation hearing requires a remand of this case.

The State acknowledges that there is no record of G.A.F.'s revocation hearing, and, citing Whitlock v. State, 923 So. 2d 1147, 1149 (Ala. Crim. App. 2005), asks this Court to remand the case for the circuit court to either make findings of fact as to whether G.A.F. waived his right to a probation-revocation hearing or to hold a new revocation hearing on the record. However, unlike in Whitlock, there is no indication in this record that G.A.F. ever admitted violating the terms of his probation or that he waived his right to a hearing. Indeed, the circuit court's "boilerplate" order states that "evidence" was considered, not that G.A.F. admitted violating probation and waived his right to a hearing. Accordingly, we have no basis on which to remand the case for the circuit court to issue any findings regarding a waiver of G.A.F.'s right to a probation-revocation hearing.

Instead, as this Court held in Hyche, we must reverse the judgment and remand this cause for the circuit court to "conduct a new (or initial) revocation hearing." Id. at 852. In this case, the trial court's order

revoking G.A.F.'s probation states that a revocation hearing was held, but G.A.F. asserts that he was denied his right to a hearing. The trial court's order states that revocation was based upon "credible evidence," but the order revoking G.A.F.'s probation gave no details and listed no witnesses whose testimony the circuit court relied upon in reaching its decision. Even if a revocation hearing was held in this case,

"[g]iven 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 [G.A.F.'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."

Ware v. State, 24 So. 3d 556, 558 (Ala. Crim. App. 2009).

Before the new revocation hearing, G.A.F. is to be provided proper notice of the charges and the evidence that the State will be relying on to prove those charges to a reasonable satisfaction. G.A.F. is entitled to be represented by counsel. The probation-revocation hearing is to be properly recorded and transcribed for appellate review.<sup>1</sup> At the

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<sup>1</sup>G.A.F. may waive his right to a probation-revocation hearing and admit to a violation of probation, but the court must make a recorded

conclusion of the hearing, if the circuit court revokes G.A.F.'s probation, the circuit court should make findings, stating the grounds for revocation and the evidence relied upon. See McCoo v. State, 921 So. 2d 450, 462 (Ala. 2005) (holding that the circuit court 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 sum, "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.'" Hyche v. State, 301 So. 3d 848, 852-53 (Ala. Crim. App. 2020)(quoting Lee v. State, 936 So. 2d 551, 554 (Ala. Crim. App. 2005)). Finally, "[i]n the event [G.A.F.] is dissatisfied following his new probation-revocation hearing, he should file a new appeal to this Court."

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determination that the waiver is voluntary and that there is a factual basis for the admission in accordance with Rule 27.6(c), Ala. R. Crim. P.



Hyche, 301 So. 3d at 853 (quoting Ware v. State, 24 So. 3d 556, 558 (Ala. Crim. App. 2009)).

Conclusion

For the reasons stated, we reverse the circuit court's order revoking G.A.F.'s probation, and we remand this cause for the circuit court to hold a revocation hearing, unless G.A.F. waives his right to a revocation hearing in accordance with Rules 27.5(b) and 27.6(c), Ala. R. Crim. P., and such a waiver is clear from the record.

REVERSED AND REMANDED.

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