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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

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Ex parte Crystal Joetta Wayne

PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF CRIMINAL APPEALS

(In re: Crystal Joetta Wayne

v.

State of Alabama)

(Madison Circuit Court, CC-13-2404.70;  
Court of Criminal Appeals, CR-17-0619)

MENDHEIM, Justice.

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Crystal Joetta Wayne petitioned this Court for a writ of certiorari to review the Court of Criminal Appeals' decision affirming, by an unpublished memorandum, the Madison Circuit Court's revocation of Wayne's probation. See Wayne v. State (No. CR-17-0619, August 24, 2018), \_\_\_ So. 3d \_\_\_ (Ala. Crim. App. 2018) (table). We granted certiorari review to consider whether Wayne's due-process rights were violated in the revocation of her probation. Specifically, we granted certiorari review to consider whether Wayne received adequate notice of the State's charge that Wayne had violated her probation by absconding. For the following reasons, we reverse the Court of Criminal Appeals' judgment.

#### Facts and Procedural History

On March 15, 2017, Wayne was convicted of second-degree manufacturing of a controlled substance, see § 13A-12-217, Ala. Code 1975, a Class B felony. The Madison Circuit Court ("the circuit court") sentenced Wayne to 60 months' imprisonment, which sentence was split, and she was ordered to serve 18 months' imprisonment, followed by 36 months' supervised probation. The circuit court further ordered Wayne to pay \$4,799 in various fees and costs.

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On July 31, 2017, Wayne's probation officer filed a delinquency report alleging that Wayne had violated the terms and conditions of her probation by failing to report to her probation officer as directed, by failing to pay supervision fees, by failing to pay court-ordered moneys, and by failing to report to the court referral officer ("CRO").

On December 14, 2017, the circuit court conducted an initial-appearance hearing. During the hearing, the circuit court informed Wayne that she was being charged with violating the terms and conditions of her probation "by failing to report, failing to pay monthly supervision fees, failing to pay other court-ordered fines and monies and failing to successfully complete the Court Referral Program." Wayne denied having violated the terms and conditions of her probation. Accordingly, the circuit court set the matter for a probation-revocation hearing scheduled for March 21, 2018. The circuit court specifically instructed Wayne "that if you want to go any direction other than to prison, you have to report between now and the time we come back."

On March 21, 2018, the circuit court conducted the probation-revocation hearing. Wayne did not appear at the

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hearing, and, over the objection of Wayne's trial counsel, the circuit court conducted the probation-revocation hearing without her being present. At the conclusion of the probation-revocation hearing, the circuit court stated that it "is reasonably satisfied that [Wayne] has violated her probation with regard to the failing-to-report charge and with regard to failing to successfully complete the Court Referral Program." The circuit court stated:

"With regard to the failure to report, [Wayne] did not -- has not reported since May 5[, 2017]. When we had her in court on December 14[, 2017], I emphasized and kind of lecture people when I order them to resume reporting. The people that have failure-to-report charges as part of their probation violations, I really heavily emphasize if you don't go and report now you're going to prison. And she didn't get that message at all because she continued to not report. The length of time that this person did not report, especially after the court's warning amounts to absconding.

"That is left to the judge to decide when at some point failure to report moves to the level of absconding and in this particular case, the court finds that this is absconding."

On the same day, the circuit court entered an order revoking Wayne's probationary status on the basis that the court was "reasonably satisfied ... that [Wayne] violated the rules of probation, specifically: Charge No. 5, 'Failure to Report --

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Absconding'[, and] Charge No. 13, 'Failure to Report to CRO.'" Wayne was ordered to serve the balance of her 60-month sentence.

On March 26, 2018, Wayne filed a motion to alter, amend, or vacate the circuit court's order revoking her probation. Among other things, Wayne argued that she had not received notice that she was being charged with absconding. Wayne argued that the failure to provide notice violated her due-process rights. On March 27, 2018, the circuit court denied Wayne's postjudgment motion.

Wayne appealed to the Court of Criminal Appeals, which affirmed the circuit court's March 21, 2018, order revoking Wayne's probation, by an unpublished memorandum. Wayne, supra. The Court of Criminal Appeals did not consider Wayne's argument that her due-process rights had been violated by the failure to provide notice that she was being charged with absconding.

#### Standard of Review

"Absent a clear abuse of discretion, a reviewing court will not disturb a trial court's conclusions in a probation-revocation proceeding, including the determination whether to revoke, modify, or continue the probation. See, e.g., Ex parte J.J.D., 778 So. 2d 240 (Ala. 2000) (holding that a trial court's

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order in a probation-revocation proceeding will not be reversed absent a clear abuse of discretion); and Moore v. State, 432 So. 2d 552, 553 (Ala. Crim. App. 1983), quoting Wright v. State, 349 So. 2d 124, 125 (Ala. Crim. App. 1977) (holding that "[o]nly a gross abuse of discretion will justify the reviewing court in disturbing the trial court's conclusions"). A trial court abuses its discretion only when its decision is based on an erroneous conclusion of law or where the record contains no evidence on which it rationally could have based its decision. See State v. Jude, 686 So. 2d 528 (Ala. Crim. App.), cert. quashed, 686 So. 2d 536 (Ala. 1996), citing Dowdy v. Gilbert Eng'g Co., 372 So. 2d 11 (Ala. 1979)."

Holden v. State, 820 So. 2d 158, 160 (Ala. Crim. App. 2001).

#### Discussion

The circuit court determined that Wayne had violated the terms and conditions of her probation by failing to report to her probation officer, which, the circuit court determined, rose to the level of absconding, and by failing to report to the CRO. Section 15-22-54(e), 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 .... 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:

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"(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. ... The court shall not revoke probation unless the defendant has previously received a total of three periods of confinement under this subsection. For purposes of revocation, the court may take judicial notice of the three total periods of confinement under this subsection. A defendant shall only receive three total periods of confinement under this subsection."

(Emphasis added.) Under the plain language of § 15-25-54(e)(1), a circuit court may revoke a probationer's 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 the 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)]." Cf. Anthony v. State, [Ms. CR-17-0587, Aug. 10, 2018] \_\_\_ So. 3d \_\_\_ (Ala. Crim. App. 2018) (upholding the revocation of a probationer's probation that

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was based on the probationer's violation of the terms and conditions of his probation, not on an arrest for or conviction of a new offense or absconding).

In the present case, the circuit court revoked Wayne's probation, rather than imposing "a period of confinement of no more than 45 consecutive days." During the probation-revocation hearing, the circuit court stated that it had determined that Wayne had absconded, and the circuit court's order revoking Wayne's probation likewise indicates that it concluded that Wayne had absconded. Accordingly, because the circuit court revoked Wayne's probation and did not sentence her to a period of confinement of no more than 45 days, we must conclude that the circuit court's basis for revoking Wayne's probation is that Wayne absconded.<sup>1</sup>

Wayne argues before this Court that she was deprived of her guaranteed minimal protection of due process because she was not given written notice that she was being charged with absconding. In Stallworth v. State, 690 So. 2d 551, 552-53

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<sup>1</sup>Nothing in the record indicates that Wayne has previously received a single period of confinement under § 15-22-54(e)(1). Section 15-22-54(e)(1) allows a court to take judicial notice of such periods of confinement; the State has not requested that we do so.

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(Ala. Crim. App. 1997), the Court of Criminal Appeals noted the following constitutional requirements a probationer must be afforded before probation can be revoked:

"The United States Supreme Court in Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), and Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), set forth the minimal constitutional requirements a probationer must be afforded before probation may be revoked. Those rights include: (1) written notice of the violation, (2) disclosure of the evidence against the probationer, (3) an opportunity to be heard in person and to present witnesses, (4) the right to confront and cross-examine adverse witnesses, (5) the right to a neutral and detached hearing body, and (6) a written statement by the factfinder of the evidence relied upon."

(Emphasis added.)

It is undisputed that Wayne was not provided written notice that she was being charged with absconding. As stated above, the July 31, 2017, delinquency report indicated that Wayne had violated the terms and conditions of her probation by failing to report to her probation officer as directed, by failing to pay supervision fees, by failing to pay court-ordered moneys, and by failing to report to the CRO; the delinquency report does not mention absconding. At the December 14, 2017, initial-appearance hearing, the circuit court informed Wayne that she was being charged with violating

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the terms of her probation by "failing to report, failing to pay monthly supervision fees, failing to pay other court-ordered fines and monies and failing to successfully complete the Court Referral Program"; absconding was not mentioned at the initial-appearance hearing.

Wayne relies upon Gholston v. State, 507 So. 2d 1054 (Ala. Crim. App. 1987), in arguing that her due-process rights were violated. In Gholston, a probationer was convicted in 1985 of assault in the third degree, but was allowed to continue on probation. The probationer was arrested in 1986 for assault in the third degree, a violation of his probation. In addition to his arrest for assault in the third degree in 1986, the probationer had also violated the terms of his probation by drinking alcoholic beverages and by failing to pay court costs. A revocation hearing was scheduled, and, before the hearing, the probationer received written notice that the charges against him were: "(1) assault in the third degree, (2) a violation of a special condition of probation (drinking alcoholic beverages) and (3) failure to pay court costs." The probationer received no notice that the 1985 conviction was also a charge against him. During the

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revocation hearing, the State presented evidence concerning the three charges of which the probationer had been given notice. However, the State also presented evidence of the 1985 conviction. The trial court revoked the probationer's probation on the basis of the probationer's 1985 conviction, the charge of which the probationer had not been given notice.

On appeal in Gholston, the probationer argued, as Wayne does in the present case, that his constitutional rights had been violated insofar as he had not been given notice of the State's charge against him based on the 1985 conviction. After setting forth the minimal constitutional requirements identified in Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973), which are set forth above, the Court of Criminal Appeals stated:

"The first two requirements are that the probationer is to receive written notice of the claimed violations of probation and disclosure of evidence against him. 'Notice of violations of probation is given the probationer so that he may have adequate time to prepare to refute the charges against him. Spann v. State, 426 So. 2d 492 (Ala. Crim. App. 1982).' Sheffield v. State, 445 So. 2d 989, 991 (Ala. Crim. App. 1984). ...

"....

"The probation revocation notification did not disclose that the state was relying on the [1985

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conviction]. Therefore, the [probationer] did not receive any written notice that this evidence was to be used against him as mandated by the United States Supreme Court in [Morrissey v.] Brewer, [408 U.S. 471 (1972)], and [Gagnon v.] Scarpelli, [411 U.S. 778 (1973)], and by our Supreme Court in Armstrong [v. State], 294 Ala. 100, 312 So. 2d 620 (1975)]. Because the requirement for minimal due process was not met, we must hold that [the probationer's] constitutional rights were violated and we are constrained to reverse [the probationer's] probation revocation."

Gholston, 507 So. 2d at 1055-56.

Gholston demonstrates that a probationer's constitutional rights are violated when the probationer is not given written notice of the charges against him or her. It is undisputed that Wayne was not given written notice that the charge of absconding would be used as a probation violation; the State concedes this fact. However, the State argues that "Wayne had notice that her probation violation included absconding because her actions are, by definition, absconding." State's brief, at p. 8. The State, relying upon the definition of "absconding" set forth in Legendre v. State, 242 So. 3d 1028, 1029-30 (Ala. Crim. App. 2017), goes on to argue that Wayne's conduct meets the definition of "absconding." However, the issue before this Court is not whether Wayne in fact absconded. Instead, the issue is whether Wayne was given

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written notice that she was being charged with absconding as a probation violation. 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, supra, a probationer has a constitutional right to written notice of the charges against him or her; implied notice does not pass constitutional muster.

#### Conclusion

Wayne's constitutional right to receive written notice of the charges against her was violated insofar as she did not receive notice that absconding was being alleged as a probation violation, and the circuit court exceeded its discretion in revoking her probation on the basis that she had absconded. Accordingly, we reverse the Court of Criminal Appeals' judgment and remand the cause for further proceedings consistent with this opinion.

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REVERSED AND REMANDED.

Parker, C.J., and Bolin, Wise, Bryan, Sellers, Stewart,  
and Mitchell, JJ., concur.

Shaw, J., concurs in the result.