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NO. COA06-603

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v.

JEFFREY LEE BADDERS

Lee County  
Nos. 05 CRS 54070, 54487  
05 CRS 54488

Appeal by defendant from judgments entered 15 December 2005 by Judge Franklin F. Lanier in Lee County Superior Court. Heard in the Court of Appeals 26 February 2007.

*Attorney General Roy Cooper, by Special Deputy Attorney General Judith Robb Bullock, for the State.*

*Brian Michael Aus, for defendant-appellant.*

ELMORE, Judge.

Defendant appeals from judgments entered upon revocation of his probation. Because defendant was denied proper notice of the violations with which he was charged, as required by N.C. Gen. Stat. § 15A-1345(e) (2006), we reverse.

On 15 December 2005, defendant pled guilty to larceny of a motor vehicle as well as two counts each of felonious breaking and entering and larceny. The trial judge announced judgment in open court, imposing an active prison sentence of nine to eleven months for larceny of a motor vehicle, to run concurrently with a sentence

defendant was then serving. He consolidated defendant's remaining offenses, imposed two consecutive suspended sentences of ten to twelve months, and placed defendant on sixty months of supervised probation. In announcing the conditions of probation, the judge ordered defendant "to report to the Lee County Probation Office within 24 hours of his release from the North Carolina Department of Correction[.]"

After a recess, the trial judge brought defendant back into court to address allegations by defendant's probation intake officer. Defense counsel addressed the court as follows:

[COUNSEL]: What are we here for, Your Honor?

THE COURT: Saddle up, and see where the horse goes, [counsel].

[COUNSEL]: Your Honor, if there is some sort of probation violation, I think he ought to be entitled to some sort of notice for his violation -.

THE COURT: Fixing to get it just as I am.

The State then elicited testimony from Lee County Probation Officer Jamie McElreath, who averred that defendant refused to get off the telephone to speak with her when she went to his holding cell to complete the necessary paperwork for his probation. When told by the jailer that McElreath needed to speak to him, defendant replied that "probation could go to hell, he was not getting off the damn phone." McElreath reported defendant's conduct to the court.

Before calling defendant as a witness, defense counsel again placed his lack of notice on the record as follows:

[COUNSEL]: I want to make the record that I was asked to sit down and represent

[defendant] with no notice of anything that had taken place other than speaking with [the prosecutor] previously in the hall, and we started this hearing.

THE COURT: All right. Note that. And the record [should] reflect that it happened only five minutes prior to him being brought back into the courtroom.

[COUNSEL]: Of course, again, [defendant] was not served with any notice of any probation violation or any infraction or any - or anything.

THE COURT: All right.

Following defendant's testimony, the trial court asked defense counsel if he wished to call other witnesses from the jail. Counsel responded, "I don't know who was present." The court replied, "I take that is a no then."

In his argument against revocation, counsel again noted the lack of notice of the charge violation as follows:

I'm not sure what he's cited for at this point, but just trying to formulate whatever he's here for, if that's his violation, which we don't know, . . . then that's his explanation.

The trial court found that "defendant willfully refused to cooperate with the directive to talk with the probation department representative . . . so he could be processed for supervised probation." Based on this refusal and the abusive language directed at McElreath, the court revoked defendant's probation and activated his consecutive suspended sentences. Defendant gave notice of appeal in open court.

On appeal, defendant claims that the trial court violated N.C. Gen. Stat. § 15A-1345(e) by failing to provide him with at least

twenty-four hours written notice of the charged probation violations. In its brief to this Court, the State concedes the complete lack of notice to defendant and acknowledges that N.C. Gen. Stat. § 15A-1345 "guarantees full due process before there can be a revocation of probation."

Under N.C. Gen. Stat. § 15A-1343(c), "[a] defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released." N.C. Gen. Stat. § 15A-1343(c) (2006); *see also State v. Seek*, 152 N.C. App. 237, 239, 566 S.E.2d 750, 751 (2002) (noting that the subsection's "provision requiring written notice of any modifications made in the terms of probation is mandatory"). Subsection 15A-1345(e) prescribes certain procedural requirements for a revocation hearing, as follows:

Before revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation. . . . *The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. The notice, unless waived by the probationer, must be given at least 24 hours before the hearing.*

N.C. Gen. Stat. § 15A-1345(e) (2005) (emphasis added). A defendant is also entitled to testify and to "present relevant information" at the hearing. *Id.*

Our courts "recognize the principle that a defendant on probation or a defendant under a suspended sentence, before any sentence of imprisonment is put into effect and activated, shall be given notice in writing of the hearing in apt time and an

opportunity to be heard." *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 479-80 (1967) (citing *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967)). Here, defendant was not given written notice of the conditions of his probation, notice of the violations with which he was charged, or at least twenty-four hours to prepare for the revocation hearing. He was brought from his holding cell into court for the hearing five minutes after the alleged incident with McElreath. Both defendant's forced appearance at the hearing and his counsel's repeated protests of the absence of notice preclude any finding that defendant waived his procedural rights under N.C. Gen. Stat. § 15A-1345(e). Compare *State v. Cunningham*, 63 N.C. App. 470, 475, 305 S.E.2d 193, 196 (1983) (reversing revocation where "[t]he record does not show that defendant received notice or a statement of an alleged violation" found by the trial court), with *State v. Langley*, 3 N.C. App. 189, 191, 164 S.E.2d 529, 530 (1968) (finding waiver of notice "when a defendant voluntarily appears at the appointed time and place and participates in the hearing"). Accordingly, we reverse the judgments revoking defendant's probation and activating his suspended sentences.

Reversed.

Judges WYNN and GEER concur.

Report per Rule 30(e).