NO. COA07-1418

NORTH CAROLINA COURT OF APPEALS

Filed: 1 July 2008

STATE OF NORTH CAROLINA

v. Columbus County
No. 05 CRS 2530

EDWIN COLON

Appeal by defendant from judgments entered 19 March 2007 by Judge Jack A. Thompson in Columbus County Superior Court. Heard in the Court of Appeals 23 June 2008.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, and Kirby H. Smith, III, for defendant-appellant.

CALABRIA, Judge.

Edwin Colon ("defendant") appeals judgments entered upon revocation of his probation. Because the trial court failed to enter written findings of fact consistent with its findings announced in open court, we remand for entry of the requisite findings.

On 31 July 2006, defendant entered an *Alford* plea to the multiple offenses designated as file numbers 05 CRS 2530, 2531, and 2532. In 05 CRS 2530, he pled guilty to assault by strangulation, assault with a deadly weapon with intent to kill, assault on a

child under twelve years of age, assault with a deadly weapon, and communicating threats. In 05 CRS 2531, defendant pled guilty to assault with a deadly weapon, assault on a female, assault by pointing a gun, and communicating threats. In 05 CRS 2532, he pled guilty to assault with a deadly weapon, assault on a child under twelve years of age, and communicating threats. The offenses arose from an incident on 5 April 2005, during which defendant confronted his girlfriend, Andrian Moore, and accused her of having an affair with another man. Defendant assaulted and threatened Moore and her two sons, who were nine and three years old. He placed a handgun in the nine-year-old's mouth and threatened to shoot him if he did not acknowledge his mother's affair. Defendant also held a knife to the three-year-old and threatened to "cut his stomach open" if Moore did not tell him the truth. Throughout the nine-hour ordeal, he exhibited mood swings and erratic behavior, identifying himself as "Lucifer" and threatening to kill himself. Defendant had a history of mental health problems and had stopped taking his medication in the week prior to the incident. Moore told police that "he had never acted like that before." After a series of forensic psychiatric evaluations, defendant was found competent to stand trial on 17 March 2006.

Pursuant to a plea agreement, defendant's offenses were consolidated into five judgments and the trial court imposed consecutive, suspended sentences in the North Carolina Department of Correction totaling 150 days plus 37 to 55 months, as follows:

(1) In 05 CRS 2530-52, a sentence of 8 to 10 months for assault by strangulation;

> (2) In 05 CRS 2530-53, a sentence of 21 to 35 months for assault with a deadly weapon with intent to kill;
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> (3) In 05 CRS 2530-54, a 75-day sentence for assault on a child under 12, assault with a deadly weapon, and communicating threats;
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> (4) In 05 CRS 2531-52, an 8- to 10-month sentence for assault by strangulation; and
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> (5) In 05 CRS 2531-53, a 75-day sentence for assault with a deadly weapon, assault on a female, assault by pointing a gun, and communicating threats in 05 CRS 2531, and for assault with a deadly weapon, assault on a child under 12, and communicating threats in 05 CRS 2532.

As a condition of suspending his sentences, defendant agreed, *inter alia*, "to reside with his parents and . . . only change his place of residence with approval of his Probation Officer" and "to accept monitoring and supervision of his prescription medication intake by Assisted Care, Inc." The State dismissed three counts of second-degree kidnapping in exchange for his plea.

The trial court placed defendant on supervised probation for 36 months. In addition to the conditions set forth in his plea agreement, the court ordered as a special condition of his probation that defendant "[n]ot use, possess or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician . . .; not knowingly associate with any known . . . users, possessors or sellers of any illegal drugs or controlled substances, and not knowingly be present at . . . any place where illegal drugs or controlled substances are sold, kept or used." These conditions were incorporated by

reference into each of the five judgments entered by the court on 31 July 2006.

On 1 February 2007, defendant's probation officer filed a violation report in 05 CRS 2531-52, alleging that defendant (1) tested positive for cocaine use on 28 September and 21 October 2006, and submitted an adulterated urine sample on 7 September 2006, and (2) "changed his place of residence without obtaining prior approval from his probation officer." On 19 March 2007, the probation officer filed violation reports in 05 CRS 2530-52, 05 CRS 2530-53, 05 CRS 2530-54, and 05 CRS 2531-53, alleging both of the violations found in the report filed in 05 CRS 2531-52 on 1 February 2007, as well as the additional charge that defendant admitted on 24 October 2006 "that he had been around the use of illegal drugs." A grand jury indicted defendant on 7 March 2007 for a second-degree kidnapping allegedly committed on 19 January 2007.

At the beginning of the revocation hearing, defendant's counsel advised the court that he admitted two of the charged violations but denied "failing to notify the probation officer that he moved." Probation Officer David Carter ("Carter") testified that he began supervising defendant when Officer Bess Coleman ("Coleman") went on medical leave subsequent to the filing of the initial violation report on 1 February 2007. Carter learned from "narratives" prepared by Coleman on 24 October 2006 and 7 November 2006 that defendant moved from his parents' home at 1066 Percussion Road in Lake Waccamaw, North Carolina to a residence at 553 Old

Northeast Road in Hallsboro, North Carolina without Coleman's approval. When Carter served defendant with the additional violation reports on 17 March 2007, defendant claimed "that he had not *per se* moved. That he would go stay a few days and come back, but his belongings were still at his residence on Percussion Road. That he might stay a weekend or a few days." On cross-examination, Carter conceded that he did not know whether defendant had attempted to contact Coleman during her medical leave. Defendant offered no evidence.

After hearing the parties' proffer, the trial court accepted defendant's guilty plea under the kidnapping indictment to the lesser included offense of false imprisonment. The prosecutor informed the court that defendant approached a district court bailiff in a public restroom on the night of 19 January 2007, "started waiving his hands and cursing at [the bailiff,]" and blocked his exit. Defendant became "very agitated and angry" and told the bailiff that "he was not leaving" and that defendant had been "done wrong up there at the jail." Defendant kept the bailiff in the restroom for approximately five minutes. The bailiff described defendant as "not in his right mind" and smelling of alcohol during the incident.

The trial court revoked defendant's probation and activated his sentences in 05 CRS 2530-52, 05 CRS 2530-53, and 05 CRS 2530-54, but modified the 75-day sentence in 05 CRS 2520-54 to run concurrently with the sentence in 05 CRS 2530-53. In 05 CRS 2531-52 and 05 CRS 2531-53, the court modified defendant's probation.

In each case, the court announced a finding in open court "that the defendant has willfully and without lawful excuse violated the terms and conditions of probation as set forth in the violation report." The court also imposed a concurrent 30-day active sentence for false imprisonment. Defendant filed timely notice of appeal from the judgments entered upon revocation of his probation in 05 CRS 2530.

I. Findings of Fact

Defendant first claims that the trial court erred in revoking his probation without entering written findings of fact to support its decision, as required by N.C. Gen. Stat. § 15A-1345(e) (2007). We agree.

The judgments entered by the court lack written findings consistent with the findings announced in open court. The judgments neither specify defendant's violations nor identify them as willful and without lawful excuse. It appears that the trial court committed a clerical error by inadvertently failing to complete the second page of the judgment forms. Accordingly, we remand to the court for entry of the requisite findings. *State v. Sanders*, 19 N.C. App. 751, 753, 200 S.E.2d 221, 222 (1973); *State v. Williamson,* 61 N.C. App. 531, 533-34, 301 S.E.2d 423, 425 (1983) (due process requires revocation of probation be supported by a written judgment with findings of fact).

We reject defendant's additional suggestion that the conditions he was alleged to have violated applied only to his probation in 05 CRS 2530-53. As noted above, each of the judgments

entered on 31 July 2006 explicitly incorporated the conditions of probation imposed in 05 CRS 2530-53 by reference.

II. Plain Error

Defendant next asserts that the trial court committed "plain error" and violated his right to due process in revoking his probation, because he was served with four of the five violation reports on Saturday, 17 March 2007, "48 hours or less prior to the hearing" on 19 March 2007. We disagree.

Defendant concedes that he received the twenty-four hours' written notice of the hearing and the charged violations mandated by N.C. Gen. Stat. § 15A-1345(e) (2007). Furthermore, defendant appeared with counsel at the revocation hearing and did not object to the lack of additional notice. Defendant thus waived any separate, constitutional issue as to the adequacy of the notice provided. *See State v. Langley*, 3 N.C. App. 189, 191, 164 S.E.2d 529, 530 (1968) (finding waiver of notice "[w]hen a defendant voluntarily appears at the appointed time and place and participates in the hearing"); *see also State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856 ("Constitutional questions that are not raised and passed upon in the trial court will not ordinarily be considered on appeal."), *cert. denied*, 534 U.S. 965, 151 L. Ed. 2d 286 (2001). We note that "plain error" review under N.C.R. App. P. 10(c)(4) is limited to evidentiary issues and jury instructions. *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). This assignment of error is overruled.

III. Hearsay

In his remaining argument, defendant claims that the court committed plain error by revoking his probation based solely on "inadmissible hearsay evidence" provided by Officer Carter in recounting Officer Coleman's written narratives of defendant's violations. Defendant acknowledges that the formal rules of evidence do not apply at a probation revocation hearing, *see* N.C. Gen. Stat. § 15A-1345(e), but asserts that the court's consideration of Coleman's written reports "depriv[ed him] of his 6th [A]mendment right under the United States Constitution to confront and cross-examine an adverse witnes[s] against him." We disagree.

"The constitutional right of an accused to be confronted by the witnesses against him is a personal privilege which he may waive expressly or by a failure to assert it in apt time . . . ." *State v. Calhoun*, __ N.C. App. __, __, 657 S.E.2d 424, 426 (Mar. 4, 2008) (No. COA07-580) (quoting *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985) (emphasis omitted)). Defendant offered no objection, constitutional or otherwise, to any portion of the State's evidence at the revocation hearing. Nor does he assert a constitutional violation in the assignment of error which corresponds to his briefed argument. Notwithstanding his invocation of plain error, "[d]efendant, having failed to object at trial on constitutional grounds, has therefore waived review of the issue by this Court." *Id.*

To the extent defendant challenges the evidentiary support for the found violations, we note that a probation revocation hearing is an "informal or summary" proceeding that does not require proof beyond a reasonable doubt or application of the formal rules of evidence. *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 479 (1967); *State v. Hill*, 132 N.C. App. 209, 211, 510 S.E.2d 413, 414 (1999). "All that is required is that the evidence be sufficient to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation." *State v. White*, 129 N.C. App. 52, 58, 496 S.E.2d 842, 846 (1998) (citation omitted), *aff'd in part, review dismissed in part*, 350 N.C. 302, 512 S.E.2d 424 (1999). "The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion." *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (quoting *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960)). Moreover, "[i]f both competent and incompetent evidence is admitted, 'it is presumed that the trial court ignores the incompetent evidence and considers only that which is competent[,] and that the findings of fact of the court are in no way influenced by hearing the incompetent evidence.'" *State v. Coleman*, 64 N.C. App. 384, 385, 307 S.E.2d 207, 207-08 (1983) (quoting *State v. Baines*, 40 N.C. App. 545, 548-49, 253 S.E.2d 300, 302 (1979) (alteration in original))

Defendant admitted two of the three charged violations, and offered no evidence to rebut the State's proffer as to the third,

including the verified violation reports filed by his probation officer. We have held that a verified violation report constitutes competent evidence sufficient to support a finding of a violation in this context. *See White*, 129 N.C. App. at 58, 496 S.E.2d at 846; *State v. Dement*, 42 N.C. App. 254, 255, 255 S.E.2d 793, 794 (1979) ("Sufficient evidence was presented in the verified and uncontradicted violation report served upon the defendant to support the trial court's findings and conclusions."). Furthermore, defendant's statements to Officer Carter describing his part-time change of residence fell within an exception to the hearsay rule as a statement against interest. N.C.R. Evid. 804(a)(1), (b)(3). Assuming, *arguendo*, that the trial court could not rely on Officer Coleman's written "narratives" to find defendant in violation of his probation, *see Hewett*, 270 N.C. at 356, 154 S.E.2d at 482, we find ample competent evidence to support such a finding. This assignment of error is overruled.

The record on appeal includes additional assignments of error not addressed in defendant's appellate brief. Pursuant to N.C.R. App. P. 28(b)(6), we deem these assignments of error abandoned.

As set forth above, we remand to the trial court for entry of appropriate findings of fact in accordance with *Sanders*, 19 N.C. App. at 753, 200 S.E.2d at 222.

Remanded.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).