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NO. COA09-1146

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v.

Brunswick County  
No. 04CRS4209; 04CRS4211

ROBERT RAMON OWENS,  
Defendant.

Appeal by defendant from judgments entered on 6 April 2009 by Judge Ola M. Lewis in Superior Court, Brunswick County. Heard in the Court of Appeals 10 February 2010.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Floyd M. Lewis, for the State.*

*J. Edward Yeager, Jr., for defendant-appellant.*

STROUD, Judge.

Robert Ramon Owens ("defendant") appeals from the trial court's order revoking his probation and activating his suspended sentences. We remand to the trial court for correction of a clerical error.

On 6 July 2004, defendant was indicted on two counts of taking indecent liberties with a child. On 8 December 2004, defendant pled guilty to both counts, and the trial court sentenced defendant to two consecutive terms of 19 to 23 months imprisonment, to begin at the expiration of an active sentence imposed in another case. The trial court then suspended these sentences, and placed

defendant on supervised probation for a period of 36 months. Defendant was specifically ordered as part of his probation to comply with the conditions set forth in the "Sex Offender Control Program."

On 3 March 2008, probation officer Jamie Williamson filed two probation violation reports dated 27 February 2008 for each offense. These reports alleged that defendant had violated his probation by (1) failing to report for scheduled office visits; (2) failing to be home for a scheduled home visit; and (3) failing to comply with the sex offender treatment program. A probation violation hearing was held on 2 June 2008 at the Criminal Session of Superior Court, Brunswick County. Defendant admitted the violations but denied they were willful. At the conclusion of the hearing, the trial court reserved judgment on the probation violations and directed defense counsel to determine if there were housing alternatives available for defendant. On 5 January 2009, probation officer Williamson filed a second set of violation reports dated 31 December 2008. The reports alleged that defendant had violated probation by (1) accessing the Internet at the local library; (2) making email contact with the victim of the original charges; (3) failing to enroll in the sex offender treatment class; and (4) being in possession of a book with "sexually stimulating material." A probation violation hearing was held on 6 April 2009. At the conclusion of this hearing, the trial court found that defendant was in willful violation of his probation, revoked his

probation, and activated the two consecutive sentences of 19 to 23 months. Defendant appealed.

In his first three assignments of error, defendant contends that because portions of the 6 April 2009 hearing transcript were labeled "inaudible," he was deprived of "his right to effective appellate review[,] " and, therefore, his probation revocation should be vacated and his case remanded for a new probation revocation hearing. After a review of the hearing transcript, it appears that there was no court reporter present at defendant's 6 April 2009 probation revocation hearing, but the proceeding was recorded and transcribed at a later date. The 6 April 2009 hearing transcript notes at the beginning that "only the Court's microphone was working[,] " and most of the comments from the other participants were inaudible. However, from the transcript portions that were audible and were transcribed, we can discern that the trial court made a ruling regarding defendant's probation:

The State: This matter's for Robert Owens [inaudible]. This is a continuation of his June the 2nd 2008 probation hearing. [Inaudible].

The Court: All right. Anything else from the State of North Carolina?

The State: [Inaudible].

The Court: Yeah, I mean—I know that I told you basically I would reserve judgment until this hearing date. So, I just need to know if there's anything else from the State?

The State: [Inaudible].

The Court: Okay. All right. Madam Clerk, in the matter of [defendant], the Court is

going to find that there was a hearing, date of hearing June 2nd, 2008, wherein the defendant admitted that he was in violation; however, he denied the willfulness thereof. The Court heard testimony of Mr. Jamie Williamson. The Court reserved Judgment that day based on the evidence presented at that hearing.

The Court finds that [defendant] is in willful violation of the terms and conditions of his supervised probation. The Court, over the defendant's objection, activates the suspended sentence. The Court is going to order full psychological evaluation as well as sex offender treatment, mental health treatment, [indecipherable] programs available to defendant. He's to receive credit for all time served.

Okay.

Unknown Male: Your Honor?

The Court: Yes, sir.

Unknown Male: [Inaudible] the court file.

The Court: Okay.

Unknown Male: There was a specific order [inaudible]. We would recommend that [inaudible].

The Court: Okay. Madam Clerk, as previously recommended by the Court, the specific sex offender program ----

Unknown Male: [Inaudible].

The Court: That's okay.

Unknown Male: [Inaudible].

The Court: Mental, sure.

Unknown Male: [Inaudible].

The Court: Well, I just--here it is. Here it is. I just found it.

Unknown Male: It's called the Social Skills [inaudible] Treatment Program [inaudible].

The Court:           Okay. Thank you, sir.

Therefore, the substantive testimony and evidence regarding defendant's probation violation was presented at the 2 June 2008 hearing, and the record includes a complete transcript from that hearing. At the 2 June 2008 hearing, the trial court reserved ruling until 6 April 2009, and the transcript from that hearing includes all of the substantive testimony from defendant's probation officer regarding defendant's alleged violations of the terms of his probation and the trial court's comments regarding why she reserved judgment. It is apparent, even from the "inaudible" portions of the transcript above, that the State did not present any additional witnesses at the 6 April 2009 hearing, as there is no "inaudible" portion for a witness noted, but only comments from counsel and an "unknown male."

We have previously held that "[t]here is a presumption of regularity in a trial. 'In order to overcome that presumption it is necessary for matters constituting material and reversible error to be made to appear in the case on appeal.'" *State v. Neely*, 26 N.C. App. 707, 708, 217 S.E.2d 94, 96, (quoting *State v. Sanders*, 280 N.C. 67, 72, 185 S.E.2d 137 (1971)), *cert. denied and appeal dismissed*, 288 N.C. 512, 219 S.E.2d 347 (1975). "Absent some specific, affirmative showing by the defendant that error was committed, we will uphold the conviction because of the presumption of regularity in a trial." *Id.* at 709, 217 S.E.2d at 97. Here, defendant contends that due to the condition of the transcript for

the probation revocation hearing held on 6 April 2009, he was unable to conduct an effective appellate review for his defense. However, from this portion of the 6 April 2009 transcript, it is clear that the hearing was a continuation of defendant's 2 June 2008 probation revocation hearing, as the trial court stated: "there was a hearing, date of hearing June 2nd, 2008, wherein the defendant admitted that he was in violation; however, he denied the willfulness thereof. The Court heard testimony of Mr. Jamie Williamson. The Court reserved Judgment that day . . . ." The trial court then found that defendant's violation was willful, revoked his probation, and activated his sentence. Therefore, the trial court based its revocation of defendant's probation, and activation of his sentence on evidence presented at the 2 June 2008 hearing, including the 27 February 2008 probation violation reports. Defendant makes no argument that the 2 June 2008 transcript and 27 February 2008 probation violation reports were unavailable for his review and this evidence was included in the record on appeal. Given that this evidence was available to defendant and the portion of the trial court's ruling in the 6 April 2009 transcript included above, we have a sufficient record to conduct an effective appellate review and defendant has not shown any prejudice from the inaudible portions of the transcript. Accordingly, we hold that defendant has failed to make a specific affirmative showing that error was committed in the inaudible portions of the transcript sufficient to overcome the presumption of regularity in a trial. *Neely*, 26 N.C. App. at 708-09, 217

S.E.2d at 96-97 (due to "difficulties interpreting the audiograph recording" of the trial, the trial transcript did not contain the direct examination of defendant, two other witnesses, and the entire testimony of a fourth person but due to an absence of a "specific, affirmative showing by the defendant that error was committed," this Court upheld defendant's conviction because of "the presumption of regularity in a trial.").

Defendants' last three assignments of error relate to the trial court's written judgments revoking defendant's probation, in which the trial court indicated that revocation of defendant's probation and activation of his sentence was based on paragraphs 1-7 in the probation violation reports dated "12/31/2008." However, as stated above, the 6 April 2009 revocation hearing was a continuation of the 2 June 2008 revocation hearing, in which evidence regarding defendant's violations of his probation was presented, based upon probation revocation reports dated 27 February 2008, not "12/31/2008." Defendant argues this error in the trial court's written judgments amounts to reversible plain error. We have previously held that "[a] clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Lark*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 678 S.E.2d 693, 702 (2009), *disc. review denied*, 363 N.C. 808, 692 S.E.2d 111 (2010) (citations, quotation marks, and brackets omitted). Here, the trial court in its written judgments inadvertently entered that it had based its ruling on the 31

December 2008 probation violation reports. The transcript from the 6 April 2009 hearing, as noted above, clearly shows that the trial court based its ruling upon the evidence and testimony presented at the 2 June 2008 hearing, which included that probation revocation reports dated 27 February 2008. "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *Id.* (citation and quotation marks omitted). Accordingly, we remand to the trial court for correction of the clerical errors on the written judgments.

REMANDED.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).