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NO. COA10-83

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

STATE OF NORTH CAROLINA

v.

Cabarrus County
Nos. 06 CRS 6937, 06 CRS 6940

MARTIN LEE REID, JR.

Appeal by defendant from judgments entered 24 September 2009 by Judge Tanya T. Wallace in Cabarrus County Superior Court. Heard in the Court of Appeals 1 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Rufus C. Allen, for the State.

Mary March Exum for defendant-appellant.

BRYANT, Judge.

In revoking a defendant's probation, "[t]he evidence need only be such that reasonably satisfies the trial judge in the exercise of his sound discretion that the defendant has violated a valid condition on which the sentence was suspended." *State v. Belcher*, 173 N.C. App. 620, 624, 619 S.E.2d 567, 570 (2005) (citation and original brackets omitted). Because the trial court found that defendant was required to report on a regular basis to his probation officer and that he violated this condition by failing to report in May, June, or July 2009, we affirm.

Facts

On 18 September 2006, defendant pled guilty to possession with intent to sell or deliver marijuana and possession of a firearm by a felon. The trial court sentenced defendant to 8 to 10 months imprisonment for the possession with intent to sell or deliver marijuana, and 20 to 24 months imprisonment for possession of a firearm by a felon, to be served consecutively. The trial court suspended both sentences and placed defendant on thirty-six (36) months supervised probation. As regular conditions of probation, defendant was ordered to comply with the following provisions:

(1) Commit no criminal offense in any jurisdiction. (2) Possess no firearm, explosive device or other deadly weapon listed in G.S. 14-269 . . . If the defendant is on supervised probation, the defendant shall also: (6) Report as directed by the Court or the probation officer to the officer at reasonable times and places and in a reasonable manner (8) At a time to be designated by the probation officer, visit with the probation officer [at] a facility maintained by the Division of Prisons. . . . If the defendant is to serve an active sentence as a condition of probation of special probation, the defendant shall also: . . . (10) Report to a probation officer in the State of North Carolina within seventy-two (72) hours of the defendant's discharge from the active term of imprisonment.

On 7 August 2009, Officer Brenner filed violation reports dated 3 April 2009 and 21 July 2009. The violation report dated 3 April 2009 alleged the following:

1. . . . DEFENDANT WAS ARRESTED BY CMP[.] OFFENSE DATE WAS 3/27/09[.] CHARGE WAS ASSAULT WITH DANGEROUS WEAPON WITH INTENT TO KILL[.] WEAPON WAS HAND GUN. CHARGES ARE STILL PENDING IN MECKLENBURG COUNTY.

2. . . . DEFENDANT WAS ARRESTED BY CMP FOR [Assault with a deadly weapon] WITH INTENT TO KILL[.] OFFENSE DATE WAS 3/27/09[.] ALSO HE WAS CHARGED WITH ROBBERY WITH A DANGEROUS WEAPON AND CONSP[IRACY] TO COMMIT ROBBERY CHARGES ARE STILL PENDING IN MECKLENBURG COUNTY.

The violation report dated 21 July 2009 alleged:

1. . . . DEFENDANT FAILED TO REPORT WITH 72 HOURS OF BEING RELEASED. DEFENDANT WAS RELEASED FROM MECKLENBURG COUNTY JAIL ON 5/9/09 AND FAILED TO REPORT TO HIS PPO. DEFENDANT FAILED TO REPORT FOR MONTHLY OFFICE APPOINTMENTS FOR THE MONTHS OF MAY , JUNE , AND JULY OF 2009.

The matter was heard on 24 September 2009. Defendant, through his counsel, denied the violations. Probation Officer Brenner testified that defendant was sentenced to thirty-six (36) months supervised probation on 18 September 2006. On 27 March 2009, defendant was arrested by the Charlotte Mecklenburg Police Department and charged with robbery with a dangerous weapon, conspiracy to commit robbery, and assault with a deadly weapon with intent to kill. Upon his release from the Mecklenburg County jail on 9 May 2009, defendant failed to report to his probation officer within seventy-two hours. Further, defendant did not report to his probation officer during the months of May, June, or July 2009. Defendant did not present any evidence.

After hearing arguments from counsel, the trial court stated the following:

The Court will find that [defendant] has violated the terms and conditions of his supervised probation, as best I can tell solely since March, for new felony charges in Mecklenburg County of robbery with a dangerous weapon, which is still pending, and with

possession of a firearm which has been alleged pursuant to that charge, and the Court specifically finds that after being told to report initially and throughout his probationary sentence, he failed to make any effort whatsoever in May, June or July to the probation officer to actually come in and report until sometime after August the 18th, when the probation officer visited his home.

The trial court concluded that defendant's probation violations were willful and knowing. The trial court ordered that defendant's probation be revoked and the suspended sentences activated but run concurrently. Defendant gave notice of appeal in open court.

On appeal, defendant argues the trial court erred in revoking defendant's probation (I) in violation of N.C. Gen. Stat. § 15A-1343(b) and (II) based on insufficient evidence.¹

I

Defendant first argues that the trial court erred in revoking his probation for pending charges and for violating a probation condition not set forth in the judgment. We disagree.

"[A] grant of probation is a privilege afforded by the court and not a right to which a felon is entitled." *State v. Coltrane*, 58 N.C. App. 210, 212, 292 S.E.2d 736, 737 (1982), *rev'd on other grounds*, 307 N.C. 511, 299 S.E.2d 199 (1983).

¹ We note that the brief for the State fails to include a subject index and table of authorities as required for all filings presented to this Court that are not less than ten pages. N.C. R. App. P. 26(g) and 28(c). This is not a jurisdictional violation, and, as it does not impede our ability to review, it does not rise to the level of "substantial failure" or "gross violation." See *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp., Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008). However, as stated in prior opinions, compliance with the Rules of Appellate Procedure is mandatory. *Id.*

A probation revocation hearing "is not governed by the rules of a criminal trial[,] and therefore "a jury is not required . . . nor must the proof of violation be beyond a reasonable doubt." *State v. Freeman*, 47 N.C. App. 171, 175, 266 S.E.2d 723, 725, *disc. review denied*, 301 N.C. 99, 273 S.E.2d 304 (1980). Instead, the trial court's decision at a probation revocation hearing "takes account of the law and the particular circumstances of the case, and 'is directed by the reason and conscience of the judge to a just result.'" *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967) (quoting *Langnes v. Green*, 282 U.S. 531, 541, 51 S. Ct. 243, 75 L. Ed. 520, 526 (1931)). "The evidence need [only] be such that reasonably satisfies the trial judge in the exercise of his sound discretion that the defendant has violated a valid condition on which the sentence was suspended." *Freeman*, 47 N.C. App. at 175, 266 S.E.2d at 725.

Belcher, 173 N.C. App. at 624, 619 S.E.2d at 570. Under North Carolina General Statutes, section 15A-1343(b), "[a]s [a] regular condition[] of probation, a defendant must: . . . (3) Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner" N.C. Gen. Stat. § 15A-1343(b) (2009). Under § 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) (2009). "[T]he State's burden of proof during probation revocation hearings is to present evidence that reasonably satisfies the trial court in its discretion that defendant has violated a valid condition of probation." *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987). "The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of

manifest abuse of discretion." *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citing *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960)).

"[W]hen a criminal charge is pending in a court of competent jurisdiction, which charge is the sole basis for activating a previously suspended sentence, such sentence should not be activated unless there is a conviction on the pending charge or there is a plea of guilty entered thereto." *Guffey*, 253 N.C. at 45, 116 S.E.2d at 150.

If there are pending criminal charges against the probationer in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against the probationer for violation of the terms of this probation, the probation period shall be tolled until all pending criminal charges are resolved. The probationer shall remain subject to the conditions of probation . . . during the tolled period. If the probationer is acquitted or if the new charge is dismissed, the time spent on probation during the tolled period shall be credited against the period of probation.

N.C. Gen. Stat. § 15A-1344(g) (2009).

Here, the trial court found that defendant violated the terms and conditions of his supervised probation by being charged with three felonies after being arrested by the Charlotte Mecklenburg Police Department during his probationary period on 27 March 2009 and failing to report as directed to his probation officer within 72 hours of his release from jail on 9 May 2009, and thereafter failing to report in June and July 2009.

We note that the charges stemming from defendant's arrest in Mecklenburg County on 27 March 2009 were still pending at the time

of the probation revocation hearing on 24 September 2009. Further, the superior court was presented only with the bare fact that defendant had been charged: there was no evidence presented as to the underlying allegations. *Compare State v. Monroe*, 83 N.C. App. 143, 349 S.E.2d 315 (1986) (where the trial court heard evidence of the circumstances in which the defendant violated his probation by obtaining property by worthless check in violation of N.C.G.S. 14-106). Pursuant to our Supreme Court's holding in *Guffey*, the bare fact that defendant was charged with felonies cannot serve as the sole basis for revoking defendant's probation. 253 N.C. 43, 116 S.E.2d 148.

The State argues that the pending charges were not the sole basis for revoking defendant's probation. We agree. Under the regular conditions of probation set forth in the judgments suspending defendant's sentences and imposing an intermediate punishment, defendant was ordered to comply with the following provision: "If the defendant is on supervised probation, the defendant shall also: (6) Report as directed by the Court or the probation officer to the officer at reasonable times and places and in a reasonable manner" At the revocation hearing, Officer Brenner testified that defendant had to see him on "a regular basis," but defendant failed to see him during May, June, or July 2009. When Officer Brenner made an appointment and met with defendant at defendant's residence on 18 August 2009, he asked why defendant had not reported to the probation office. Officer Brenner testified that defendant responded with an expletive and

stated that Officer Brenner was the probation officer; it was his responsibility to keep up with defendant. At the conclusion of the probation revocation hearing, the trial court found "that after being told to report initially and throughout his probationary sentence, [defendant] failed to make any effort whatsoever in May, June or July to the probation officer to actually come in and report until sometime after August the 18th, when the probation officer visited his home." We hold that the trial court did not err in concluding that defendant violated a condition of his probation by failing to report to his probation officer for three months. See *Belcher*, 173 N.C. App. at 624, 619 S.E.2d at 570 ("The evidence need only be such that reasonably satisfies the trial judge in the exercise of his sound discretion that the defendant has violated a valid condition on which the sentence was suspended."). The trial court in its judgment noted that "[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence." Therefore, the trial court did not abuse its discretion in revoking defendant's probation. Defendant's argument is overruled.

II

Next, defendant argues that the trial court had insufficient evidence to revoke defendant's probationary status. For the reasons stated in section I, we need not address defendant's argument.

Affirmed.

Judges STEELMAN and BEASLEY concur.

Report per Rule 30(e).