NO. COA12-233
NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2012

IN THE MATTER OF:

D.W-S.

Wayne County
No. 11 JB 40

Appeal by juvenile from order entered 27 October 2011 by Judge Les Turner in Wayne County District Court. Heard in the Court of Appeals 30 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Lora C. Cubbage, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender John F. Carella, for juvenile-appellant.

HUNTER, JR., Robert N., Judge.

Daniel,[1] a fifteen-year-old male, appeals from an order entered 27 October 2011, finding him in violation of a juvenile probation order filed 9 June 2011. Daniel contends the trial court erred in two respects. First, he asserts the court violated his constitutional right to confront adverse witnesses

[1] A pseudonym is used to conceal the minor child's identity and for ease of reading.

by admitting certain testimonial hearsay evidence over his objection. Second, he objects to the post-hearing issuance of a second supplemental order signed by Judge Turner on 4 November 2011. For the following reasons, we affirm.

I. Factual and Procedural History

On 12 May 2011, Daniel was adjudicated delinquent in Wayne County District Court for simple misdemeanor possession and injury to personal property, and was subsequently placed on probation pursuant to a Level 1 disposition order entered 9 June 2011. The terms of Daniel's probation required that he "[r]emain on good behavior and not violate any laws." On 14 September 2011, juvenile court counselor Alan Suggs filed a motion for review with the district court, alleging Daniel had violated the terms of his probation by failing to remain on good behavior while being held in a juvenile detention center between the dates of 9 August 2011 and 13 September 2011. Daniel denied the allegations, and the matter came before the Wayne County District Court for disposition on 27 October 2011.[2] At the hearing, Mr. Suggs was the sole witness. He stated that he had been Daniel's court counselor for approximately three to four months. Mr. Suggs testified that Daniel had originally been

[2] At the time of this hearing, Daniel was a resident of Wayne County.

placed in a therapeutic foster home in Jacksonville, North Carolina but had repeatedly abandoned that placement, resulting in Daniel being detained in the New Hanover Regional Detention Center. Although Mr. Suggs had not personally visited or observed Daniel while he was staying at the detention center, he testified that he had received a twelve-page fax from the center, detailing multiple instances of Daniel's poor behavior. Mr. Suggs stated the fax came attached to a cover sheet indicating it had been transmitted from the New Hanover Juvenile Detention Center, and contained a list of daily behavior reports prepared by the center's staff. Mr. Suggs further testified that the basis for his motion for review was Daniel's failure to exhibit good behavior while detained, as evidenced by these reports.

Daniel's counsel objected to Mr. Suggs' testimony regarding the incidents contained in the behavior report, claimed they constituted testimonial hearsay, and argued that Daniel had a constitutional right to cross examine the center employees responsible for the reports' contents. The trial court overruled the objection, and Mr. Suggs proceeded to testify as to the information contained in the behavior reports. Mr. Suggs also indicated that Daniel had been adjudicated delinquent in

New Hanover County for assaulting a detention center staff member. Mr. Suggs testified it was his understanding that the assault case was being transferred to Wayne County for disposition. However, the paperwork concerning this adjudication had not yet been received by the Wayne County Clerk of Court at the time of the hearing.

On cross-examination, Mr. Suggs reiterated he did not know who had written the behavior reports, nor did he have any first-hand knowledge of the behaviors described in the reports. Daniel's counsel then renewed his hearsay and confrontation objections and moved to strike Mr. Suggs' testimony. The court again overruled the objections. The court did not admit the documents themselves, and Daniel presented no evidence. At the conclusion of the hearing, the district court concluded Daniel had violated the terms of his probation. The court initially proposed continuing disposition until the paperwork concerning the assault charge from New Hanover County was received by the court. In the following exchange, Daniel's counsel objected to the proposed continuance:

> THE COURT: Okay. Continue disposition pending the paperwork from New Hanover. The juvenile is to remain in detention pending disposition on that adjudication, and the Court reserves its ruling and continues disposition in this probation matter as

> well. Do you wish to reserve your appeal until the disposition is entered?
>
> [DANIEL'S COUNSEL]: Your Honor, I would actually object to a continuation of disposition. We're here. We've done it. There's no need to continue disposition as to what else is pending out there. If he was, in fact, convicted of something, His Honor could find additional evidence of that and use that if he would like to. There's no reason that I can see that we continue disposition except for just a reason to hold him in custody, or – he's already been in custody forever, it seems like. And I understand the Court was obliging (inaudible) to a certain degree. But my client has given me instructions, so I would say the Court needs to enter disposition today.

In response to this objection, the court engaged in a conversation with Mr. Suggs and Daniel's counsel regarding an appropriate placement. The court then said the following:

> All right. Madam Clerk, the Court, entering a new disposition, 28 days in detention on the probation violation. The regular terms and conditions of probation. Special conditions that I've ordered previously will go into the new disposition.
>
> . . .
>
> As soon as – Madam Clerk, as soon as we can get, with Mr. Suggs' assistance, get the paperwork in from New Hanover County, hopefully we can do disposition, even if it's a special setting for disposition, prior to the expiration of the 28 days. We'll see about that. They might be able to do a disposition sort of like we'll bring in

> a secured custody hearing in that the holidays are coming, and I'm aware that some of the court officials, including myself, might not be in place.
>
> All right. Out of sheer desperation – not a desire to sanction you, out of sheer desperation – you think you have the answers, and I'm scared, though, your thoughts are going to get you killed in some way or hurt – I'm granting your request.

The court then entered a Level 2 disposition order, which included 28 days of confinement, and continued the pre-existing terms of Daniel's probation. Daniel's counsel gave oral notice of appeal in open court.

After entry of the 27 October 2011 disposition order, the court received the case file concerning Daniel's assault adjudication from New Hanover County on 1 November 2011. The file contained an adjudication order for assault on a government official, part of a behavior report from the detention center, and a three-page list of alleged rule violations. Upon receipt of this file, Judge Turner entered a second written order entitled "Order (Probation Violation)." This order contained findings of fact predicated not only on Mr. Suggs' testimony at the 27 October 2011 hearing, but also based on materials contained solely in the New Hanover County file. The order was dated 27 October 2011 and signed 4 November 2011 by Judge

Turner, and did not change the disposition result entered at the time of the hearing.

II. Jurisdiction

Daniel gave oral notice of appeal on 27 October 2011, at the conclusion of the disposition hearing. Therefore, we have jurisdiction over his appeal. *See* N.C. Gen. Stat. § 7B-2602 (2011) (stating appeal shall be to this Court if a "proper party" gives oral notice of appeal from a final juvenile order in open court at the time the order is entered); N.C. Gen. Stat. § 7B-2604 (stating the affected juvenile is a proper party).

III. Analysis

A. Denial of Right to Confrontation

Daniel first argues the district court erred by admitting Mr. Suggs' testimony regarding the contents of the faxed documents. Daniel claims that since Mr. Suggs had no personal knowledge of Daniel's behavior while in the New Hanover detention center, his testimony constituted hearsay. As a result, Daniel argues the district court violated his right to confrontation by denying him the opportunity to cross-examine those employees of the detention center responsible for the report's contents.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham,* 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). "Under *de novo* review we consider the matter anew and freely substitute our own judgment for that of the lower court." *State v. Foye*, __ N.C. App. __, __, 725 S.E.2d 73, 77 (2012) (citation omitted).

During a criminal prosecution, the Confrontation Clause of the Sixth Amendment bars admission of testimonial hearsay "unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *See State v. Locklear,* 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citing *Crawford v. Washington,* 541 U.S. 36, 68 (2004)). However, the United States Supreme Court has noted that adult "[p]robation revocation . . . is not a stage of a criminal prosecution. . . ." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). Accordingly, our Supreme Court has held the protections of the Sixth Amendment are inapplicable to adult probation revocation proceedings. *See State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973).

However, adult probationers are still entitled to constitutional due process, which includes a diminished right of confrontation. *See Gagnon*, 411 U.S. at 786. Accordingly, the

North Carolina General Statutes, tracking the language of *Gagnon*, provide that an adult probationer "may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." N.C. Gen. Stat. § 15A-1345(e) (2011).

Our courts have long recognized that juvenile delinquency proceedings are not criminal prosecutions. *See In re Clapp*, 137 N.C. App. 14, 20, 526 S.E.2d 689, 694 (2000). Rather, "[j]uvenile proceedings are designed to foster individualized disposition of juvenile offenders under the protection of the courts and are something less than a full blown determination of criminality." *Id.* (quotation omitted). "While juvenile proceedings in this State are not criminal prosecutions, a juvenile cited under a petition to appear for an inquiry into her alleged delinquency is entitled to the constitutional safeguards of due process and fairness." *In re N.B.*, 167 N.C. App. 305, 308, 605 S.E.2d 488, 490 (2004). "Generally, a juvenile in an adjudication hearing has all rights afforded adult offenders." *In re D.K.*, 200 N.C. App. 785, 786, 684 S.E.2d 522, 524 (2009)(quotation omitted). Accordingly, Article 24 of the juvenile code mandates that:

> [i]n [an] adjudicatory hearing, the court shall protect the following rights of the

> juvenile and the juvenile's parent, guardian, or custodian to assure due process of law: (1) The right to written notice of the facts alleged in the petition; (2) The right to counsel; *(3) The right to confront and cross-examine witnesses;* (4) The privilege against self-incrimination; (5) The right of discovery; and (6) All rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury.

N.C. Gen. Stat. § 7B-2405 (2011) (emphasis added).

However, we have consistently held that juvenile probation revocation proceedings are dispositional, and are thus subject to the statutory provisions governing juvenile dispositions, not adjudications. *See In re V.M.*, __ N.C. App. __, __, 712 S.E.2d 213, 215 (2011) (citing *In re D.J.M.*, 181 N.C. App. 126, 130–31, 638 S.E.2d 610, 613 (2007); *In re O'Neal*, 160 N.C. App. 409, 412–13, 585 S.E.2d 478, 480–81 (2003)). Therefore, a juvenile probation revocation proceeding is "a form of 'dispositional' hearing with procedural safeguards that *differ significantly* from those imposed on allegations that a juvenile committed a statutory or common law criminal offense." *In re D.J.M.*, 181 N.C. App. at 131, 638 S.E.2d at 613 (emphasis in original). Accordingly, juvenile probation revocation hearings are "informal, and the court may consider written reports or other evidence concerning the needs of the juvenile." *See* N.C. Gen.

Stat. § 7B-2501(a) (2011). This includes hearsay evidence deemed to be "relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." ***Id.***

Daniel urges this Court to hold that juveniles retain an undiminished Sixth Amendment right of confrontation in *juvenile* probation revocation proceedings, or, in the alternative, that the right to confrontation during juvenile probation revocation "survives as an essential component of constitutional due process" under the rationale of ***Gagnon.*** The State contends *Gagnon* is inapplicable to juvenile probation proceedings, and Daniel has "no constitutional right to confront witnesses in a probation violation or motion for review hearing."

While we note the major differences between adult and juvenile probation revocation proceedings, we do not go so far as to adopt the State's argument that the limited constitutional right to confrontation provided adult probationers is necessarily and in every case inapplicable to juvenile probation proceedings. However, even if we were to accept Daniel's argument that *Gagnon* applies in the juvenile probation revocation context, we are not persuaded Daniel suffered any prejudice as a result of the trial court admitting Mr. Suggs' testimony.

In criminal prosecutions, "[a] violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b) (2011). The State bears the burden of demonstrating that any error was harmless. *Id.* Even employing this high burden to the juvenile case *sub judice*, we find any alleged error harmless beyond a reasonable doubt.

At the 27 October 2011 hearing, the court heard not only Mr. Suggs' testimony regarding behavior reports from the detention center, but also heard testimony from Mr. Suggs that Daniel had been adjudicated delinquent in connection with an assault on a staff member of the detention center. Mr. Suggs' testimony on the matter, which Daniel does not challenge on appeal, and against which no objection was lodged, was as follows:

> [MR. SUGGS]: There's one in here on the actual charge that is pending. I thought it was supposed to be on for court today for assault on a staff.
> [THE STATE]: (Inaudible) it says he committed an assault on a staff member?
> [MR. SUGGS]: Yes, ma'am.
> [THE STATE]: And that will be – that will be in another county; is that right?
> [MR. SUGGS]: Yes, ma'am. He's been adjudicated there already.
> [THE STATE]: Do you know what that

> adjudication was?
> [MR. SUGGS]: Assault on a government official.
> [THE STATE]: I'm sorry. I meant, I guess, the disposition. Do you know what that disposition was?
> [MR. SUGGS]: It was supposedly transferred here to Wayne County.

It is clear from the record that Mr. Suggs had knowledge of this adjudication and its pending transfer for disposition, separate and distinct from the events giving rise to the assault adjudication, the details of which were contained in the behavior reports. In addition, Daniel's counsel at least twice implicitly acknowledged the assault adjudication, first when objecting to the court's suggestion that disposition be continued until the file from New Hanover County was received:

> Your Honor, I would actually object to a continuation of disposition. We're here. We've done it. There's no need to continue disposition as to what else is pending out there. If he was, in fact, convicted of something, His Honor could find additional evidence of that and use that if he would like to.

Daniel's counsel again acknowledged the assault adjudication at the conclusion of the hearing:

> I would request the Court, although I'm not on the court-appointed list and I was going to talk to see Judge Jones about maybe getting back on the list exclusively, but I would request that he remain one of my clients ***when the new charges get in***, that I

> can continue to be his attorney even if I have to do it pro bono. (emphasis added)

The district court's 27 October 2011 order contained only one finding of fact: that "the allegations in the motion for review" had been proven by the greater weight of the evidence. Mr. Suggs' motion for review alleged that Daniel had violated his probation by "[f]ailing to remain on good behavior while in detention" between the dates of 9 August 2011 and 13 September 2011. The order's only conclusion of law notes that "[t]he juvenile has violated the conditions of probation." Thus, the existence of the 4 October 2011 adjudication stemming from the assault on a detention center staff member, in and of itself, was sufficient grounds for the court to find Daniel had violated the terms of his probation. Therefore, any alleged error on the part of the district court is harmless beyond a reasonable doubt.

B. Second Order Signed 4 November 2011

We next turn to the issue of the second written order, signed by Judge Turner on 4 November 2011, eight days after entry of the original Level 2 Disposition Order on 27 October 2011. Daniel's objection to this order may be distilled as follows: 1) Daniel argues this second order contains findings of fact wholly unsupported by the evidence before the district

court at the 27 October 2011 hearing; and 2) Daniel contends several of the order's findings and conclusions misstate the nature and quality of, and basis for, Mr. Suggs' testimony. Daniel argues these errors compel this Court to strike the second order in its entirety. We disagree.

The juvenile code requires that a "dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The court shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition[.]" N.C. Gen. Stat. § 7B-2512 (2011). "In reviewing a trial judge's findings of fact, we are strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal . . . " *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quotation omitted). However, findings of fact must be grounded in evidence contained in the record. *See Matter of Hull*, 89 N.C. App. 138, 140, 365 S.E.2d 221, 222 (1988).

After entry of the 27 October 2011 disposition order, Judge Turner signed a second written order on 4 November 2011 entitled

"Order (Probation Violation)." Paragraph 7 of the order's findings of fact reads:

> The Court takes judicial notice that the Juvenile was adjudicated delinquent in New Hanover District Court for the offense of Assault on a Government Official or Employee, in violation of N.C. Gen. Stat. § 14-33(c)(4) on October 4, 2011 for the assault on the Detention Center staff member of September 2, 2011 referenced hereinabove; disposition on said adjudication is being transferred to the Juvenile's county of residence, to wit: Wayne County, North Carolina, but said disposition has not been entered as of the date hereof.

Thus, the language of this second order makes clear that it is not a disposition on Daniel's New Hanover assault adjudication, but rather a supplemental order concerning the hearing held 27 October 2011. However, this second order contains several findings of fact that appear to be based solely on information contained in the New Hanover County file regarding Daniel's assault adjudication. Specifically, findings of fact 6(a)-(e) provide detailed accounts of alleged incidents of Daniel's poor behavior while detained. These accounts have no basis in Mr. Suggs' testimony, and appear to be based solely on documents contained in the New Hanover County file received by the court on 1 November 2011. Daniel argues, correctly, that

these findings of fact are not grounded in evidence presented at the hearing.

The State contends that Daniel, by and through his counsel, consented to a post-hearing admission of the contents of the New Hanover County file into evidence. Specifically, the State points to the following statement made by Daniel's counsel in connection with his objection to a continuance:

> There's no need to continue disposition as to what else is pending out there. If he was, in fact, convicted of something, His Honor could find additional evidence of that and use that if he would like to.

The court ultimately decided not to continue disposition until receipt of the New Hanover County file, and added:

> As soon as – Madam Clerk, as soon as we can get, with Mr. Suggs' assistance, get the paperwork in from New Hanover County, hopefully we can do disposition, even if it's a special setting for disposition, prior to the expiration of the 28 days. We'll see about that. They might be able to do a disposition sort of like we'll bring in a secured custody hearing in that the holidays are coming, and I'm aware that some of the court officials, including myself, might not be in place.

When viewed in context, the statements of both the court and Daniel's counsel indicate that all parties contemplated the immediate entry of a dispositional order resolving the probation violation, with the court merely taking judicial notice of the

assault adjudication. A later dispositional hearing was to be held after receipt of the file. The transcript does not suggest that Daniel consented to retroactive admission of the New Hanover County file's contents into evidence upon receipt by the court. Therefore, we agree with Daniel that the findings of fact contained in paragraph 6 of the second order are not supported by evidence which was properly before the district court at the time the first dispositional order was entered.[3]

Daniel also claims findings 3, 5, 8, and 9 of the second order misstate the quality of and basis for Mr. Suggs' testimony, in that they seem to suggest Mr. Suggs had *personal conversations* with the detention center's staff. For example, finding eight of the court's order refers to the "testimony of the Juvenile Court Counselor as to conversations said Court Counselor had with certain unknown staff . . . ." To the extent this finding suggests Mr. Suggs had personally spoken with detention center staff, we agree with Daniel, since no evidence to that effect was elicited during Mr. Suggs' testimony.[4]

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[3] We do not agree with Daniel that finding 7 of the order is similarly unsupported by evidence. Finding 7 merely takes judicial notice of the assault adjudication and pending transfer of that case to Wayne County, facts of which the court was made aware at the hearing.

[4] We do not agree with Daniel that conclusions of law 13, 14, and 15 of the order are unsupported by the court's findings. These

However, "[w]here there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions." *Black Horse Run Prop. Owners Ass'n v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987). Daniel argues that without the objected-to portions of the second order, the district court's conclusion that Daniel violated the terms of his probation is not supported by the greater weight of the evidence. After review of the 4 November 2011 order, we disagree. Striking finding 6, as well as the arguably improper portions of findings 3, 5, 8, and 9, does not render the district court's ultimate conclusions of law unsupported by other findings of fact within the second order.

Even assuming that grounds were present for this Court to vacate the entirety of the 4 November 2011 order, the ultimate result in Daniel's probation violation case would not change. The 4 November 2011 order did not augment or change the disposition entered by the court on 27 October 2011 in any way; it merely provided detailed findings and conclusions supporting the original disposition. Aside from his confrontation argument

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paragraphs only note that Mr. Suggs "communicated directly" with the center's staff.

discussed above, Daniel does not challenge the validity of the 27 October 2011 order. Therefore, any error with respect to this second order is harmless. Accordingly, the entry of disposition on 27 October 2011 is

Affirmed.

Judges ERVIN and MCCULLOUGH concur.

Report per Rule 30(e).