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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1315

Filed: 6 September 2016

Forsyth County, Nos. 14CRS168; 15CRS478

STATE OF NORTH CAROLINA

v.

KRYSTAL SCHIMMELPFENNING, Defendant.

Appeal by defendant from judgments entered 29 June 2015 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 10 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General W. Thomas Royer, for the State.

Mary McCullers Reece for defendant.

ELMORE, Judge.

Krystal Schimmelpfenning (defendant) appeals from judgments revoking her probation and activating her suspended sentences. After careful review, we vacate and remand for further proceedings.

I. Background

On 11 October 2012, in Guilford County file number 12CRS81952, defendant entered an *Alford* plea to common law robbery (Case 1). The trial court sentenced

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defendant to a suspended term of twelve to twenty-four months' imprisonment and placed her on supervised probation for eighteen months. Later, on 12 November 2013, defendant was charged in Guilford County file number 13CRS96900 under N.C. Gen. Stat. § 90-108(a)(10) with attempting to obtain possession of a controlled substance by fraud (Case 2). Defendant's probation officer filed a probation violation report on 23 December 2013 alleging defendant had violated the terms of her probation by (1) not making payments on court-ordered fines and fees; (2) not making payments on supervision fees; and (3) committing the new criminal offense of attempting to obtain a controlled substance by fraud or forgery on 12 November 2013, as charged in Guilford County file number 13CRS96900.

On 29 May 2014, defendant entered a guilty plea in Case 2. The trial court sentenced defendant to a suspended term of six to seventeen months' imprisonment and placed her on supervised probation for twenty-four months.

Subsequently, on 4 August 2014, the Honorable Andy Cromer held a hearing in Forsyth County Superior Court on the 23 December 2013 probation violation report in Case 1. At the hearing, defendant admitted to the willful violation of probation and disclosed that the pending charge in the third alleged violation was now a conviction. The probation officer testified and recommended that defendant spend five weekends in prison. As a result, the trial court stated, "I find there is a willful violation, the third one is that there is a conviction as [o]pposed to a pending charge.

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These five weekends have to be served within two months.” The trial court entered an order modifying defendant’s probation in Case 1, extending it for a period of twelve months and ordering defendant to spend five weekends in prison.

On 31 December 2014, defendant’s probation officer filed violation reports in Case 1 and Case 2. The violation report in Case 1 alleged that defendant had violated her probation by (1) not making payments on court-ordered fines and fees; (2) not making payments on supervision fees; (3) committing new criminal offenses as shown by her pending traffic charges of speeding, two instances of driving while her license was revoked, and having an expired registration tag in Forsyth County file numbers 14CR735767, 740320–21, and 742206; and (4) committing new criminal offenses as shown by her 29 May 2014 conviction for “OBTAIN CS BY FRAUD/FORGERY (F) 13CRS096900 OUT OF GUILFORD COUNTY,”¹ and her pending charge for aiding and abetting larceny in Forsyth County file number 14CR59729.

The violation report in Case 2 alleged that defendant had violated her probation by (1) not making payments on court-ordered fines and fees; (2) committing new criminal offenses as shown by her pending traffic charges of speeding, two

¹ In the 31 December 2014 probation violation report and at the 29 June 2015 hearing, the probation officer alleged defendant had committed the new criminal offense of *obtaining* a controlled substance by fraud or forgery in file number 13CRS96900. The record before us, however, contains the judgment entered in file number 13CRS96900 upon defendant’s conviction for *attempting* to obtain a controlled substance by fraud. Both defendant and the State agree that it is defendant’s conviction for attempting to obtain a controlled substance by fraud that the State alleged constituted a new criminal offense. Throughout this opinion, we refer to this offense as stated in the charge and conviction.

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instances of driving while her license was revoked, and having an expired registration tag in Forsyth County file numbers 14CR735767, 740320–21, and 742206; and (3) committing new criminal offenses in that defendant has a pending charge for aiding and abetting larceny in Forsyth County file number 14CR59729.

On 29 June 2015, the Honorable David L. Hall in Forsyth County Superior Court held a hearing on the 31 December 2014 probation violation reports filed in Case 1 and Case 2. The State elected to proceed only on the alleged violations that defendant “failed to make payments on fines and fees and supervision fees . . . [and] has a new conviction out of Guilford County.” Defendant noted that the aiding and abetting charge had been dismissed, and admitted being in willful violation of the terms of her probation as alleged by the State above.

Regarding Case 1, the probation officer testified that defendant failed to make payments on the \$598 filing fees and the \$960 supervision fees, and “she has the new conviction of [attempting to] obtain[] a controlled substance by fraud or forgery, 13CRS096900 out of Guilford County . . . on May 29th of 2014.” Regarding Case 2, the probation officer testified that defendant “owed \$724.50 and, of course, still had the same new conviction.”² The trial court then stated the following, without prefacing which case it was referring to: “I find that the defendant is in willful violation without lawful excuse, that justice, including consistency, require that her

² The “same new conviction” was the conviction underlying defendant’s probation in Case 2.

sanction be—that her probation be revoked and her sentence be activated.”

The trial court entered judgments revoking her probation in Case 1 and Case 2, checking the box which stated that defendant violated the condition that she “not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a), as set out above.” The trial court activated defendant’s suspended sentences of twelve to twenty-four months’ imprisonment and six to seventeen months’ imprisonment, respectively, and ordered that the sentences shall run concurrently. Defendant appeals.

II. Analysis

Defendant argues that the trial court exceeded its authority in revoking her probation in Case 1 based on committing a “new criminal offense” because another trial court had previously modified her probation based on the same criminal offense. Next, defendant argues that the trial court erred in revoking her probation in Case 2 because she had not committed a new criminal offense, absconded, or violated a condition of probation after serving two prior periods of confinement in response to a violation (CRVs). In the alternative, defendant claims that she received ineffective assistance of counsel (IAC). The State only responds to defendant’s IAC claim and concedes that remand is necessary.

While a trial court’s finding of a probation violation, “if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion[.]”

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State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation omitted), whether the trial court exceeded its statutory authority under N.C. Gen. Stat. § 15A-1344 (2015) presents a question of law, which we review *de novo*. *State v. Pace*, ___ N.C. App. ___, ___, 770 S.E.2d 677, 682 (Mar. 17, 2015) (COA14-802).

A. Case 1

We first address defendant’s argument that the trial court erred in revoking her probation in Case 1 for committing a “new criminal offense” when another trial court had already modified her probation based on the same criminal offense.

The Justice Reinvestment Act of 2011 placed limits on a trial court’s authority to revoke probation for violations occurring on or after 1 December 2011. *State v. Nolen*, 228 N.C. App. 203, 204–05, 743 S.E.2d 729, 730 (2013) (citation omitted). A trial court may only revoke probation when the probationer “(1) commits a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two prior periods of CRV under N.C. Gen. Stat. § 15A-1344(d2).” *Id.* at 205, 743 S.E.2d at 730 (citing N.C. Gen. Stat. § 15A-1344(a) (2011)).

Here, the trial court found that defendant violated the terms and conditions of her probation as alleged in the 31 December 2014 probation violation report and revoked defendant’s probation. That report alleged that defendant failed to pay fees and fines, and that defendant had committed six new criminal offenses: four traffic

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offenses, attempting to obtain a controlled substance by fraud or forgery, and aiding and abetting larceny. The State elected to proceed only on the allegations that defendant had failed to pay fees and fines, and had committed the new criminal offense of attempting to obtain a controlled substance by fraud or forgery. The “new criminal offense,” however, is the same offense that another trial court had already responded to by modifying defendant’s probation in August 2014 and is, therefore, not a new criminal offense that could be used to revoke defendant’s probation.

In *State v. Bridges*, 189 N.C. App. 524, 525, 658 S.E.2d 527, 528 (2008), the defendant made a motion for a continuance at his probation violation hearing. The State consented to the continuance on the condition that the defendant pay \$500 toward restitution. *Id.* The trial court modified the conditions of the defendant’s probation to require him to pay \$500 within ten days. *Id.* at 526, 658 S.E.2d at 528. Later, at the continued revocation hearing, the trial court found that the defendant violated the terms of his probation as alleged in the violation report, and it activated his suspended sentence. *Id.* The defendant appealed, arguing that once the trial court “elected to modify his probation, it could not subsequently revoke his probation for violations that occurred prior to the modification.” *Id.* This Court noted that at the first hearing, the trial court modified the conditions of the defendant’s probation “for good cause [and] without charge of violation[.]” clearly choosing not to adjudicate the allegations in the violation report. *Id.* Accordingly, we stated, “Because the

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modification order entered on 15 February 2007 was not based upon an adjudication of the violations alleged in the 30 January 2007 violation report, we hold that the trial court retained jurisdiction on 13 March 2007 to proceed with the revocation hearing.” *Id.* at 526–27, 658 S.E.2d at 528.

In contrast, here at the 4 August 2014 hearing, the trial court specifically found that “there is a willful violation, . . . a conviction[,]” and, as a result, it chose to modify defendant’s probation. At the 29 June 2015 hearing, another trial court again found that defendant was convicted of the same criminal offense, and it chose to revoke defendant’s probation. While N.C. Gen. Stat. § 15A-1344(a) grants a trial court the authority to alter or revoke a defendant’s probation based on specified violations, nothing in that statute authorizes more than one trial court to do both based on the same alleged violation. The trial court erred at the 29 June 2015 hearing in revoking defendant’s probation in Case 1 for committing a new criminal offense when another trial court had already modified defendant’s probation based on the same criminal offense.

B. Case 2

Defendant next argues that the trial court erred in revoking her probation in Case 2 because she had not committed a new criminal offense, absconded, or served any prior CRVs.

At the 29 June 2015 hearing, the trial court found that defendant violated the

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terms and conditions of her probation as alleged in the 31 December 2014 probation violation report for Case 2. As stated above, regarding Case 2, the State elected to proceed only on the alleged violation that defendant had failed to make payments on fines, fees, and supervision fees. As N.C. Gen. Stat. § 15A-1344(a) does not authorize a trial court to revoke a defendant's probation for nonpayment of fines and fees, the trial court erred in revoking defendant's probation in Case 2. *See Nolen*, 228 N.C. App. at 205, 743 S.E.2d at 730. Because we hold that the trial court erred in revoking defendant's probation in Case 1 and Case 2, we need not address her remaining arguments on appeal.

III. Conclusion

The trial court erred in revoking defendant's probation in Case 1 and Case 2. We vacate the trial court's 29 June 2015 judgments, and we remand to the trial court for entry of appropriate judgments for defendant's admitted probation violations of failure to pay fees and fines as ordered by the trial court, consistent with the provisions of N.C. Gen. Stat. § 15A-1344.

VACATED AND REMANDED.

Judges DAVIS and DIETZ concur.

Report per Rule 30(e).