

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-847

Filed: 6 September 2016

Buncombe County, Nos. 13 CRS 57281, 14 CRS 80662

STATE OF NORTH CAROLINA

v.

JEFFREY BERNARD BROWN, Defendant.

Appeal by Defendant from judgment entered 5 February 2015 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 11 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Carole Biggers, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for Defendant-Appellant.

INMAN, Judge.

On 25 August 2014, Jeffrey Bernard Brown (“Defendant”) pled guilty, pursuant to a plea arrangement, to two counts of larceny from a merchant. Defendant received a suspended sentence of nine to 20 months and was placed on supervised probation for a term of 18 months. On 5 February 2015, following a hearing, the trial court found that Defendant had violated the terms of his probation and activated Defendant’s sentence.

Defendant argues that the trial court abused its discretion in revoking his probation because the evidence before the trial court did not support a finding that Defendant absconded. We agree and reverse and remand for rehearing.

I. Background

Defendant was placed on probation on 25 August 2014 and met with the Buncombe County probation intake department the following day. He told the intake department that he would be living at a homeless shelter in Henderson County. The intake department submitted a transmittal request for Henderson County to supervise Defendant. A Henderson County probation officer went to the homeless shelter several times but could not locate Defendant or verify that he lived there. Henderson County thus rejected the case and it was sent back to Buncombe County, where Officer Dedi Hannah (“Officer Hannah”) was assigned to Defendant’s case.

Officer Hannah called Defendant several times and left phone messages. Defendant eventually called her back, but Officer Hannah testified that Defendant “was very arrogant” on the phone with her. Defendant scheduled an appointment to meet with Officer Hannah, and she warned him on the phone that “if he did not come in for that appointment then [she] was going to abscond him for making himself unavailable.” Defendant did not attend the appointment or call to reschedule. Officer Hannah then filed a probation violation report against Defendant, alleging, *inter alia*, as follows:

STATE V. BROWN

Opinion of the Court

1. Regular Condition of Probation: “Not to abscond, by willfully avoiding supervision or by willfully making the supervisee’s whereabouts unknown to the supervising probation officer” in that, DEFENDANT HAS ABSCONDED HIS PROBATION SUPERVISION AS EVIDENT BY DEFENDANT NOT LIVING IN HENDERSON COUNTY AT THE RESCUE MISSION AS DEFENDANT STATED FOR THE HENDERSON COUNTY TRANSFER. NO ONE AT THE MISSION HAD SEEN THE DEFENDANT; WAS NOT AND HAD NOT BEEN STAYING THERE AS DEFENDANT STATED. DEFENDANT HAS ALSO NOT REPORTED TO HIS APPOINTMENTS AS INSTRUCTED; DEFENDANT IS MAKING HIMSELF UNAVAILABLE FOR PROBATION SUPERVISION.

Defendant was thereafter arrested on a warrant issued as a result of the report. Defendant called Officer Hannah after his arrest to “make it right.”¹ He met with Officer Hannah at her office, where he told her that he could not stay at the homeless shelter because he could not meet the shelter’s 6:00 p.m. curfew due to his employment with a restaurant that had only evening shifts available. He told her that he had been staying with a friend in Henderson County and gave her his friend’s address. Henderson County probation began supervising him.

The case came on for hearing on 5 February 2015. The trial judge announced at the end of the hearing that “based on the evidence I’ve heard I’m reasonably satisfied the defendant has violated the conditions of his supervised probation in

¹ The record does not reflect that Defendant was released on bond, but we assume so because he met with Officer Hannah at her office after he was arrested.

regard to each of th[e] six allegations and including absconding[,]” and activated Defendant’s sentence. The trial court issued a written judgment checking the box indicating that “[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence.” The trial court did not check the box indicating that it could revoke probation “for the willful violation of the condition(s) that he/she not . . . abscond from supervision” Defendant gave oral notice of appeal.

II. Analysis

Defendant argues that the trial court abused its discretion by revoking Defendant’s probation. We agree.

This Court reviews a trial court’s revocation of a defendant’s probation for abuse of discretion. *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008). N.C. Gen. Stat. § 15A-1343(b)(1)-(3a) (2015), part of the Justice Reinvestment Act (“JRA”), provides the following pertinent regular conditions of probation:

(b) . . . [A] defendant must:

- (1) Commit no criminal offense in any jurisdiction.
- (2) Remain within the jurisdiction of the court unless granted written permission to leave by the court or his probation officer.
- (3) Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable

STATE V. BROWN

Opinion of the Court

times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.

- (3a) Not abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation.

N.C. Gen. Stat. § 15A-1344(a) (2015) provides that a trial court can “only revoke probation for a violation of a condition of probation under G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a), except as provided in G.S. 15A-1344(d2).”² This restriction departs from prior law allowing trial courts broad discretion to revoke probation for a wide variety of reasons and narrows the meaning of the term “abscond” for probation violation purposes.

The enactment of the JRA brought two significant changes to North Carolina's probation system. First, for probation violations occurring on or after 1 December 2011, the JRA limited trial courts' authority to revoke probation to those circumstances in which 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 [(confinement in response to violations)] under N.C. Gen. Stat. § 15A-1344(d2). See N.C. Gen. Stat. § 15A-1344(a).

² N.C. Gen. Stat. § 15A-1344(d2) allows the trial court to impose “a period of confinement of 90 consecutive days” in prison for felony probation violations, and provides that unless the defendant has committed another criminal offense or violated the statutory absconding provision, “[t]he court may not revoke probation unless the defendant has previously received a total of two periods of confinement under this subsection.” In this case, Defendant did not commit another criminal offense and had not previously received two periods of confinement, so the only possible basis to revoke his probation was statutory absconding.

STATE V. BROWN

Opinion of the Court

For all other probation violations, the JRA authorizes courts to alter the terms of probation pursuant to N.C. Gen. Stat. § 15A-1344(a) or impose a CRV in accordance with N.C. Gen. Stat. § 15A-1344(d2), but not to revoke probation. *Id.*

Second, “the JRA made the following a regular condition of probation: Not to abscond, by willfully avoiding supervision or by willfully making the defendant’s whereabouts unknown to the supervising probation officer.”

State v. Nolen, 228 N.C. App. 203, 205, 743 S.E.2d 729, 730 (2013) (quoting *State v. Hunnicutt*, 226 N.C. App. 348, 354, 740 S.E.2d 906, 910 (2013)).³ The JRA’s introduction of the term “abscond” into North Carolina’s probation statutes for the first time has caused some confusion for probation officers and courts that persists years after it was enacted. This is because, prior to the JRA, “the term ‘abscond’ has frequently been used when referring to violations of the longstanding statutory probation conditions to ‘remain within the jurisdiction of the court’ or to report as directed to the officer.” *Hunnicutt*, 226 N.C. App. at 355, 740 S.E.2d at 911 (internal quotation marks omitted). Violation of those longstanding conditions are enumerated in the JRA but are excluded from the types of violations that can support revocation.

Defendant argues that the language in the violation report purporting to concern the requirement “ ‘[n]ot to abscond’ ” actually tracks the language in N.C.

³ Prior to the enactment of the JRA, a defendant’s probation could be revoked by a trial court for a violation of any valid condition of the defendant’s probation, within the trial court’s discretion. *State v. Freeman*, 47 N.C. App. 171, 175, 266 S.E.2d 723, 725 (1980).

STATE V. BROWN

Opinion of the Court

Gen. Stat. § 15A-1343(b)(2) (remain within the jurisdiction) and § 15A-1343(b)(3) (report to the probation officer), but not § 15A-1343(b)(3a) (statutory absconding). Defendant thus argues the language does not set forth that Defendant willfully absconded as defined in the statute, so the trial court was not authorized to revoke his probation. Defendant cites *State v. Williams*, __ N.C. App. __, 776 S.E.2d 741 (2015) to support his argument. This Court held in *Williams* that to revoke a defendant's probation for absconding, the trial court must specifically find that the defendant violated the statutory absconding provision in the JRA, and held that simply tracking the language of the statute is insufficient. *Id.* at __, 776 S.E.2d at 745.

In *Williams*, a probation officer went to the address the defendant had provided for supervision as a condition of his probation, but the defendant was not there and a woman informed her that the defendant had gone “ ‘back and forth’ ” between New Jersey and that address, but had “ ‘never really lived at [the] address[.]’ ” *Id.* at __, 776 S.E.2d at 742. The defendant also failed to show up to four different scheduled meetings with the probation officer. *Id.* at __, 776 S.E.2d at 742. The probation officer issued a violation report alleging that the defendant had violated seven conditions of his probation, including absconding. *Id.* at __, 776 S.E.2d at 742. The violation report alleged the following regarding absconding:

1. Regular Condition of Probation: “Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising

STATE V. BROWN

Opinion of the Court

probation officer” in that, THE DEFENDANT IS NOT REPORTING AS INSTRUCTED OR PROVIDING THE PROBATION OFFICER WITH A VALID ADDRESS AT THIS TIME. THE DEFENDANT IS ALSO LEAVING THE STATE WITHOUT PERMISSION. DUE TO THE DEFENDANT KNOWINGLY AVOIDING THE PROBATION OFFICER AND NOT MAKING HIS TRUE WHEREABOUTS KNOWN THE DEFENDANT HAS ABSCONDED SUPERVISION.”

Id. at ___, 776 S.E.2d at 743. The report tracked, verbatim, the language in the statutory absconding provision, N.C. Gen. Stat. § 15A-1343(b)(3a), but it did not cite the statute. ___ N.C. App. at ___, 776 S.E.2d at 743.

The trial court in *Williams* found that the defendant had violated all seven conditions listed in the violation report. *Id.* at ___, 776 S.E.2d at 742. On the written judgment, the trial court checked the box indicating that “[e]ach violation is, in and of itself, a sufficient basis upon which [the trial court] should revoke probation and activate the suspended sentence.” *Id.* at ___, 776 S.E.2d at 744. The trial court neglected, however, to check the box indicating that probation was revoked for absconding as defined in Section 15A-1343(b)(3a). ___ N.C. App. at ___, 776 S.E.2d at 744. This Court reversed the trial court, explaining that although the trial court checked the box indicating that each violation was sufficient to support revocation of probation, “only the first alleged violation in the report, absconding, could potentially constitute an offense for which [the d]efendant’s probation could be revoked.” *Id.* at ___, 776 S.E.2d at 744. The Court held that the report’s allegations did not support a finding that the defendant had violated N.C. Gen. Stat. § 15A-1343(b)(3a), the

STATE V. BROWN

Opinion of the Court

statutory absconding provision. ___ N.C. App. at ___, 776 S.E.2d at 745. Rather, the Court held that the violation report paragraph alleging absconding simply referred to other statutory violations, including failing to report for appointments and leaving the jurisdiction without permission. *Id.* at ___, 776 S.E.2d at 745. The Court further held that “the evidence in this case does not support finding a violation of N.C. Gen. Stat. § 15A-1343(b)(3a).” *Id.* at ___, 776 S.E.2d at 746. The Court concluded that because a trial court could only revoke probation if the defendant committed a criminal offense or absconded as defined by the statute, the trial court was without authority to revoke the defendant’s probation. *Id.* at ___, 776 S.E.2d at 746.

Here, as in *Williams*, Defendant was not living at the address he had provided and missed a meeting with a probation officer. The probation officer filed a violation report alleging violations of six different conditions of probation, including absconding. Here, the paragraph in the probation violation report related to absconding states:

1. Regular Condition of Probation: “Not to abscond, by willfully avoiding supervision or by willfully making the supervisee’s whereabouts unknown to the supervising probation officer” in that, DEFENDANT HAS ABSCONDED HIS PROBATION SUPERVISION AS EVIDENT BY DEFENDANT NOT LIVING IN HENDERSON COUNTY AT THE RESCUE MISSION AS DEFENDANT STATED FOR THE HENDERSON COUNTY TRANSFER. NO ONE AT THE MISSION HAD SEEN THE DEFENDANT; WAS NOT AND HAD NOT BEEN STAYING THERE AS DEFENDANT STATED. DEFENDANT HAS ALSO

STATE V. BROWN

Opinion of the Court

NOT REPORTED TO HIS APPOINTMENTS AS INSTRUCTED; DEFENDANT IS MAKING HIMSELF UNAVAILABLE FOR PROBATION SUPERVISION.

The language refers to Defendant (1) not residing at the address he had provided to the Buncombe and Henderson County probation departments, (2) not reporting for the appointment made with his probation officer once he was located, and (3) not calling the officer to reschedule the appointment. The written judgment in this case, like the written judgment in *Williams*, lacked a specific finding that Defendant violated N.C. Gen. Stat. § 15A-1343(b)(3a). Despite the lack of a specific finding in the written judgment, it is apparent that the trial court revoked Defendant's probation because it found he had absconded, particularly because at the hearing the trial judge stated that Defendant "violated the conditions of his supervised probation in regard to each of th[e] six allegations and *including absconding*." (Emphasis added.)

We are bound by the decision in *Williams*. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Therefore, like the Court in *Williams*, we must hold that the language of the violation report, which is fundamentally identical to the language in the violation report in *Williams*, is not sufficient to support a finding that Defendant absconded under N.C.

Gen. Stat. §15A-1343(b)(3a). *See Williams*, __ N.C. App. at __, 776 S.E.2d at 745; *see also Nolen*, 228 N.C. App. at 206, 743 S.E.2d at 731 (“Although the probation officer used the term ‘absconding’ to describe [the] Defendant’s non-compliance with the regular condition of probation under N.C. Gen. Stat. § 15A-1343(b)(2) (requiring the defendant to ‘[r]emain within the jurisdiction of the Court unless granted written permission to leave’), the trial court’s limited revoking authority under the JRA does not include this section 15A-1343(b)(2) condition.”).

Although our precedent requires us to hold that the trial court was without authority to revoke Defendant’s probation, it could have imposed a 90-day period of confinement for a probation violation other than committing a criminal offense or absconding. N.C. Gen. Stat. § 15A-1344(d2); *Williams*, __ N.C. App. at __, 776 S.E.2d at 745.

III. Conclusion

For the foregoing reasons, we hold that the trial court abused its discretion in revoking Defendant’s probation and activating his sentence. The order of the trial court is

REVERSED and REMANDED.

Judges STEPHENS and HUNTER, JR. concur.

Report per Rule 30(e).