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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-226

Filed: 4 October 2016

Cabarrus County, No. 09 CRS 3474

STATE OF NORTH CAROLINA

v.

MARVA DENYSE GILLIS, Defendant.

Appeal by defendant from judgment entered 28 October 2015 by Judge Martin B. McGee in Superior Court, Cabarrus County. Heard in the Court of Appeals 19 September 2016.

*Attorney General Roy A. Cooper III, by Assistant Attorney General Kathryn H. Shields, for the State.*

*Mary McCullers Reece for defendant-appellant.*

STROUD, Judge.

Defendant Marva Denyse Gillis appeals from a judgment revoking her probation and activating her suspended sentence of 60 days in jail. Because the trial court erred in concluding that defendant's violation of the terms and conditions of her probation authorized the revocation of her probation, we reverse and remand for entry of an appropriate judgment consistent with the provisions of N.C. Gen. Stat. § 15A-1344.

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On or about 5 June 2013, a jury found defendant guilty of driving while impaired. The trial court sentenced defendant to a Level Four punishment that included a suspended term of 60 days in jail, an active term of 2 days in jail, and placed her on supervised probation for 12 months. Defendant appealed, and this Court found no error and the North Carolina Supreme Court denied defendant's subsequent petition for discretionary review. *State v. Gillis*, 234 N.C. App. 117, 761 S.E.2d 753 (unpublished), *disc. review denied*, 367 N.C. 784, 766 S.E.2d 630 (2014).

Defendant's term of probation began on 19 December 2014, when her appeal was final. Defendant's probation officer sent a letter to defendant at her only known address, a Post Office box, to inform her that she had to report to him on 2 February 2015 to begin the supervision of her case. Defendant never appeared to begin her period of probation, and her probation officer filed a violation report on 13 February 2015. In the report, defendant's probation officer alleged multiple violations, including: (1) that defendant did not obtain prior approval for or notify her probation officer of a change in address; and (2) defendant failed to remain within the jurisdiction of the court unless granted permission to leave from the court or her probation officer. The State contended defendant's second violation also constituted the willful absconding from supervision, justifying the revocation of her probation. After a hearing held from 26 to 28 October 2015, the trial court found defendant willfully violated the terms and conditions of her probation as alleged in the report

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and entered a judgment revoking her probation and activating her suspended sentence. Defendant gave oral notice of appeal at the conclusion of the hearing.

A hearing on a defendant's alleged probation violations "only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation and quotation marks omitted). The trial court's findings of probation violations "if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion." *Id.*

Defendant first argues that the trial court abused its discretion in concluding that she willfully violated the condition of her probation that she obtain prior approval from her probation officer and notify that officer of any change in address. We agree.

The only evidence presented at the hearing on this violation was that the probation officer mailed a letter to defendant's only known address telling her to report for supervision on 2 February 2015. The letter was not returned as undeliverable, but defendant did not report for supervision as directed in the letter. This evidence supports nothing more than a speculation that defendant changed her address without informing her probation officer. The State presented no evidence

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that defendant was at a new address or that she had abandoned the address to which the probation officer had sent the letter. Accordingly, no evidence supports the trial court's conclusion that respondent violated the condition of her probation that she obtain prior approval from her probation officer and notify that officer of any change in address, and the trial court abused its discretion in making that conclusion.

Defendant also argues the court abused its discretion in revoking her probation for absconding because absconding is not a valid condition of her probation. Again, we agree.

For probation violations occurring on or after 1 December 2011, a trial court may only revoke probation where the defendant: “(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 [confinement in response to violations] under N.C. Gen. Stat. § 15A-1344(d2).” *State v. Nolen*, 228 N.C. App. 203, 205, 743 S.E.2d 729, 730 (2013) (citing N.C. Gen. Stat. § 15A-1344(a) (2011)). For all other probation violations, a trial court may “alter the terms of probation pursuant to N.C. Gen. Stat. § 15A-1344(a) or impose a [period of confinement in response to violations] in accordance with N.C. Gen. Stat. 15A-1344(d2),” but the court may not revoke probation. *Id.* However, defendants on probation for offenses committed before 1 December 2011 may not have their probation revoked pursuant to a violation of the

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absconding provision set forth in section 15A-1343(b)(3a) because this condition was not in existence at the time those defendants committed their offenses. *Id.* at 205-06, 743 S.E.2d at 730-31.

Defendant was convicted in 2013 for a 2009 offense of driving while impaired. The absconding provision set forth in N.C. Gen. Stat. § 15A-1343(b)(3a) is thus not a condition of her probation. There is no evidence that defendant had served any prior confinements in response to previous violations of her probation or that she had committed a new criminal offense. The trial court thus erred in revoking defendant's probation.

Nevertheless, the allegation of absconding in the probation violation report also stated that defendant had not "reported in any form as directed." This allegation put defendant on notice that she had also violated the regular condition of probation that she "[r]eport as directed by the court or [her] probation officer to the officer at reasonable times and places and in a reasonable manner[.]" N.C. Gen. Stat. § 15A-1343(b)(3) (2015); *see also State v. Hubbard*, 198 N.C. App. 154, 158-59, 678 S.E.2d 390, 393-94 (2009). In the letter sent to her only known address, defendant was directed to report to her probation officer on 2 February 2015 to begin her term of supervision. Defendant did not report as directed and thus violated this condition of her probation, which was found by the trial court. Accordingly, we reverse the trial court's judgment revoking defendant's probation and remand this matter for entry of

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an appropriate judgment consistent with the provisions of N.C. Gen. Stat. § 15A-1344 (2011).

REVERSED AND REMANDED.

Judges TYSON and INMAN concur.

Report per Rule 30(e).