IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-428

Filed: 17 April 2018

McDowell County, No. 13 CRS 50520

STATE OF NORTH CAROLINA

v.

BILLY DEAN MORGAN

Appeal by defendant by petition for writ of certiorari from judgments entered 9 September 2016 by Judge Jeffrey P. Hunt in McDowell County Superior Court. Heard in the Court of Appeals 2 October 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Brenda Eaddy, for the State.*

*The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.*

CALABRIA, Judge.

Billy Dean Morgan ("defendant") appeals by petition for writ of certiorari from judgments (1) revoking his probation and activating his suspended sentences; and (2) imposing costs and attorneys' fees. After careful review, we affirm the revocation of defendant's probation. However, since defendant was not given notice and an opportunity to be heard as to the final amount of attorneys' fees that would be entered against him, we vacate the civil judgment entered pursuant to N.C. Gen. Stat. § 7A-455 (2017) and remand to the trial court.

## I. Background

On 28 August 2013, defendant pleaded no contest in McDowell County Superior Court to two counts of assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to two consecutive terms of 29-47 months in the custody of the North Carolina Division of Adult Correction. Pursuant to the terms of defendant's plea agreement, the trial court suspended his active sentences and placed him on 36 months of supervised probation.

On 12 May 2016, defendant's supervising officer ("Officer Poteat") filed reports alleging that defendant had willfully violated his probation by (1) failing to report as directed; (2) failing to pay his court and (3) supervision fees; and (4) committing a new criminal offense by incurring misdemeanor charges on 17 February 2016 for violating a domestic violence protective order ("DVPO"). An arrest warrant for a felony probation violation was issued that day. On 23 May 2016, Officer Poteat filed additional violation reports alleging that defendant had willfully absconded supervision. On 17 June 2016, defendant was arrested for violating his probation.

After defendant's probation expired on 28 August 2016, the trial court held a probation violation hearing on 9 September 2016. At the beginning of the hearing, defendant admitted the allegations in the State's violation reports. When Officer Poteat subsequently testified for the State, he explained that defendant was

admitted to Grace Hospital's mental health ward on 29 March 2016. After defendant failed to make himself available for supervision following his release from the hospital on 19 April 2016, Officer Poteat filed violation reports for absconding. In addition, Officer Poteat testified that defendant had been convicted of the DVPO violation "just two weeks ago."[1] Defendant's appointed attorney contended that his recent noncompliance with probation was related to his mental health concerns.

After hearing from both parties, the trial court revoked defendant's probation "for absconding and for the conviction" and activated his suspended sentences. Before concluding the hearing, the trial court stated that a civil judgment would be entered for defendant's costs and fees.

## II. Petition for Writ of Certiorari

On 16 September 2016, defendant filed a handwritten, *pro se* "Inmate Grievance/Request Form" with the McDowell County Jail stating, *inter alia*, that "[t]he Clerk of Supperior [sic] Court said this Notice of appeal must come to her. I wrote my appeal on Sep 10-16 why was this appeal gave back to me on 9-13-16." The record contains no other purported notice of appeal, and defendant's Inmate Grievance/Request Form is ineffective to serve that purpose. Defendant fails to "designate the judgment or order from which appeal is taken and the court to which

[1] Defendant's attorney confirmed that he had entered an Alford plea to the DVPO violation and was sentenced to time served.

appeal is taken[,]" and there is no evidence that the document was served upon the State. N.C.R. App. P. 3 (d)-(e); N.C.R. App. P. 4(b)-(c).

Despite his defective notice of appeal, on 30 May 2017, defendant filed a petition for writ of certiorari with this Court requesting review of the criminal and civil judgments entered by the trial court. Since it is evident from the Inmate Grievance/Request Form that defendant *intended* to appeal, in our discretion, we grant defendant's petition for writ of certiorari and proceed to the merits of his appeal. *See* N.C.R. App. P. 21(a)(1) (providing that "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action").

## III. Probation Revocation

"[O]ther than as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term." *State v. Moore*, 240 N.C. App. 461, 463, 771 S.E.2d 766, 767 (2015) (citing *State v. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980)). N.C. Gen. Stat. § 15A-1344(f) provides, in pertinent part:

> The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report

> with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

N.C. Gen. Stat. § 15A-1344(f)(1)-(3).

Following the enactment of the Justice Reinvestment Act of 2011 ("JRA"), trial courts may only revoke probation when a defendant (1) commits a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) willfully absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two periods of confinement in response to violations under N.C. Gen. Stat. § 15A-1344(d2). N.C. Gen. Stat. § 15A-1344(a).

> A hearing to revoke a defendant's probationary sentence 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. 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) (citations and quotation marks omitted).

On appeal, defendant first argues that the trial court erroneously revoked his probation after his 36-month probationary period expired on 28 August 2016, because the court failed to make any findings of "good cause" under N.C. Gen. Stat. § 15A-1344(f)(3). We disagree.

Defendant's argument is nearly identical to the one this Court rejected in *State v. Regan*, __ N.C. App. __, 800 S.E.2d 436 (2017). Relying on *State v. Love*, 156 N.C. App. 309, 576 S.E.2d 709 (2003), the *Regan* defendant challenged the trial court's failure to make written or oral findings of good cause under N.C. Gen. Stat. § 15A-1344(f) before revoking her probation. *Regan*, __ N.C. App. at __, 800 S.E.2d at 440. However, we determined that *Love* was inapposite, because it involved a different statute that requires the trial court to make "*specific findings* that longer or shorter periods of probation are necessary" before sentencing an offender to a period of probation beyond those expressly authorized by the statute. *Id.* (quoting N.C. Gen. Stat. § 15A-1343.2(d) (2003)). We observed that unlike the statute at issue in *Love,* N.C. Gen. Stat. § 15A-1344(f) "does not require that the trial court make any *specific findings*." *Id.* (emphasis added). Rather, the statute merely authorizes the trial court to "extend, modify, or revoke" probation after the defendant's probationary term has expired if the court finds "good cause shown and stated" for doing so. *Id.* (quoting N.C. Gen. Stat. § 15A-1344(f)(3)).

In *Regan*, we reasoned that "[t]he trial court complied with N.C. Gen. Stat. § 15A-1344(f)(3) by finding good cause to revoke" the defendant's probation because:

> Remaining in North Carolina was a condition of Defendant's probation. Defendant testified that she left the jurisdiction in 2011. Reporting for office meetings with her probation officer as directed was also a condition of Defendant's probation. The State presented competent evidence, the sworn affidavit of Officer Wiley, that Defendant failed to report as directed on 5 April 2011. Defendant testified that she did not return to North Carolina because "after talking to Ms. Woods, I mean, frankly, it scared the hell out of me, so I didn't come back."

*Id.* In open court, the trial court announced that it found the defendant "in willful violation of the terms and conditions of her probation." *Id.* The court's judgments included written findings that "[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence." *Id.* Accordingly, we concluded that "[b]oth the transcript of the probation violation hearing and the judgments entered reflect[ed] that the trial court considered the evidence and found good cause to revoke . . . probation." *Id.* at __, 800 S.E.2d at 440-41.

On appeal, defendant acknowledges *Regan*'s holding but nevertheless asserts that "the only reasonable and proper interpretation" of N.C. Gen. Stat. § 15A-1344(f)(3) "requires a trial court to make a specific finding of 'good cause shown and stated' in order to revoke probation . . . ." Yet, as defendant recognizes, we are bound

by this Court's prior published opinions. *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.").

Alternatively, defendant argues that the trial court failed to comply with N.C. Gen. Stat. § 15A-1344(f)(3)—"even under the looser interpretation" set forth in *Regan*—because the judgments do not include findings that "[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence." We disagree.

The *Regan* defendant was placed on probation prior to the enactment of the JRA, when "trial courts had authority to revoke probation for a violation of any probation condition." *State v. Moore*, __ N.C. __, __, 807 S.E.2d 550, 554 (2017). "After the JRA, by contrast, only violations of any of the three conditions specified in N.C.G.S. § 15A-1344(a) are revocation-eligible." *Id.* Accordingly, the finding in *Regan* would have been erroneous in the instant case, given that only two of defendant's violations could have supported revocation. Instead, the trial court's judgments include the more appropriate finding that "[t]he Court may revoke defendant's probation . . . for the willful violation of the condition(s) that he[ ] not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a) . . . ."

Since defendant had not previously served any periods of confinement pursuant to N.C. Gen. Stat. § 15A-1344(d2), the trial court could only revoke his probation if he committed a new criminal offense or willfully absconded. N.C. Gen. Stat. § 15A-1344(a). The State alleged and the trial court found violations of both of these conditions. Although defendant challenges both violations on appeal, his arguments are meritless. As previously explained, either violation would support revocation, and at the hearing, defendant admitted all of the State's allegations. After hearing from Officer Poteat and defendant's attorney, the trial court announced its decision to "revoke his probation for absconding and for the conviction." Consequently, "[b]oth the transcript of the probation violation hearing and the judgments entered reflect that the trial court considered the evidence and found good cause to revoke" defendant's probation. *Regan*, __ N.C. App. at __, 800 S.E.2d at 440-41. Therefore, the trial court did not abuse its discretion by revoking defendant's probation.

## IV. Costs and Attorneys' Fees

Defendant next argues that the trial court erred by entering a civil judgment for costs and attorneys' fees without providing him with notice and an opportunity to be heard as to the final amount of the attorneys' fees that may be imposed against him. We agree.

At sentencing, the trial court may enter a civil judgment against an indigent defendant for fees incurred by the defendant's court-appointed attorney. N.C. Gen. Stat. § 7A-455; *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005). "[C]ounsel's fees are calculated using rules adopted by the Office of Indigent Defense Services, but trial courts awarding counsel fees must take into account factors such as 'the nature of the case, the time, effort, and responsibility involved, and the fee usually charged in similar cases.' " *State v. Friend*, __ N.C. App. __, __, 809 S.E.2d 902, 906 (2018) (quoting N.C. Gen. Stat. § 7A-455(b)).

Before entering judgment pursuant to N.C. Gen. Stat. § 7A-455, the trial court must give the defendant "notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317. This exchange in open court not only allows the trial court to inform the defendant, on the record, of the purpose and extent of the civil judgment that will be entered against him, but also provides the defendant with his sole opportunity to comment on the court's award of attorneys' fees. *See id.*

Unlike other stages of a criminal proceeding, when the trial court considers entering a money judgment pursuant to N.C. Gen. Stat. § 7A-455, "the interests of the defendant and trial counsel are not necessarily aligned." *Friend*, __ N.C. App. at __, 809 S.E.2d at 907. "For example, a defendant may believe that the amount

of fees requested is unreasonable given the time, effort, or responsibility involved in defending the case. Counsel, unsurprisingly, might feel otherwise." *Id.* Therefore, to avoid injustice,

> trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

*Id.*

At the hearing in the instant case, the trial court discussed attorneys' fees with defendant's appointed attorney immediately after revoking his probation:

> THE COURT: . . . I will make all [defendant's] fees a civil judgment. Are you appointed?
> [DEFENSE COUNSEL]: I am appointed, Your Honor.
> THE COURT: Including your attorney's fees.
> [DEFENSE COUNSEL]: I have seven hours.
> THE COURT: Good luck.

Although this discussion occurred in open court in defendant's presence, the trial court did not ask defendant personally, rather than through counsel, "whether [he] wish[ed] to be heard on the issue." *Id.* And while this exchange reveals that the appointed attorney claimed seven hours of work related to defendant's representation, the record contains no evidence that defendant was notified of and given an opportunity to be heard regarding the *total amount of fees* that would be

entered against him. *Cf. Jacobs*, 172 N.C. App. at 235-36, 616 S.E.2d at 316-17 (vacating the judgment because although the trial court notified the defendant that he would be awarding attorneys' fees at the State-determined "rate of $65 an hour[,]" the defendant's appointed attorney "had not yet calculated his hours of work related to defendant's representation").

Accordingly, we vacate the civil judgment imposing costs and attorneys' fees and remand to the trial court. "On remand, the State may apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that defendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *Id.* at 236, 616 S.E.2d at 317; *see also Friend*, __ N.C. App. at __, 809 S.E.2d at 907 (emphasizing that *Friend* did "not announce a new rule of constitutional law" but merely "provide[d] further guidance on what trial courts should do to ensure that this Court can engage in meaningful appellate review when defendants raise this issue").

## V. Conclusion

We affirm the trial court's judgments revoking defendant's probation and activating his suspended sentences, since "[b]oth the transcript . . . and the judgments entered reflect that the trial court considered the evidence and found good cause to revoke" his probation based on violations of N.C. Gen. Stat. §§ 15A-1343(b)(1) and 15A-1343(b)(3a). *Regan*, __ N.C. App. at __, 800 S.E.2d at 440-41.

However, although the trial court asked the appointed attorney how many hours he claimed related to defendant's representation, defendant was not informed of the total amount of attorneys' fees that would be imposed, nor given an opportunity to personally address the court. Therefore, defendant was not given the requisite notice and opportunity to be heard on the issue. *Friend*, __ N.C. App. at __, 809 S.E.2d at 907. Accordingly, we vacate and remand the civil money judgment entered pursuant to N.C. Gen. Stat. § 7A-455.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judge DILLON concurs.

Chief Judge McGEE dissents by separate opinion.

McGEE, Chief Judge, dissenting.

There are three requirements that must be met before the trial court can enter an order revoking a defendant's probation after the term of the probationary period has ended:

> The court may . . . revoke probation after the expiration of the period of probation if all of the following apply:
>
> > (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
> >
> > (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
> >
> > (3) The court finds for good cause shown and stated that the probation should be . . . revoked.

N.C. Gen. Stat. § 15A-1344(f) (2017). These requirements are conditions precedent that must be met in order for the trial court to have jurisdiction to revoke a defendant's probation after the probationary period has ended. *State v. Krider*, COA17-272, 2018 WL 943444, at *2 (N.C. Ct. App. Feb. 20, 2018); *State v. Bryant*, 361 N.C. 100, 103–04, 637 S.E.2d 532, 535 (2006). It is the State's burden to establish the jurisdiction of the trial court in a probation revocation hearing. *State v. Peele*, __ N.C. App. __, __, 783 S.E.2d 28, 32-33 (2016).

In the present case, the first two conditions were clearly met. However, Defendant argues the trial court failed to "state," or make any finding of fact, that

"good cause" was shown for revoking Defendant's probation after Defendant's probationary term had already expired.

Defendant, the State, and this Court all recognize the relevance of this Court's opinion in *State v. Regan*, __ N.C. App. __, 800 S.E.2d 436 (2017), on the facts before us. The majority opinion correctly cites *In re Civil Penalty* for the proposition that "[w]here 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." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted). Stated differently, a regular panel of this Court is without the authority to overrule a prior opinion of this Court. *Id*. That this Court is without the authority to overrule a decision of our Supreme Court is self-evident. Therefore, when this Court is confronted by two conflicting opinions of regular panels of this Court, we have determined that we are bound by the decision reached by the panel that had the authority to make the relevant holding – i.e. the holding made by the earlier panel – and that we are not bound by the holding made in violation of *In re Civil Penalty* – i.e. the conflicting holding made by the later panel. *Boyd v. Robeson Cty.*, 169 N.C. App. 460, 470, 621 S.E.2d 1, 7 (2005). It is axiomatic that any holding of this Court that directly conflicts with a valid holding of our Supreme Court –regardless of when the

Supreme Court holding was made – must be disregarded in favor of our Supreme Court's precedent.

I. The Requirement for Findings of Fact

In order to reach its holding in *Regan*, this Court contrasted the language used in N.C. Gen. Stat. § 15A-1343.2(d) (2017) — that in order to sentence a defendant to a probationary term outside the statutorily defined limits, the trial court must make "specific findings" that such a deviation is necessary — with the language in N.C.G.S. § 15A-1344(f)(3) (2017) that prohibits revocation of a defendant's probation after the probationary term has ended unless "[t]he [trial] court finds for good cause shown and stated that the probation should be . . . revoked." *Id.*

In *Regan*, the Court held that the language of N.C.G.S. § 15A-1344(f)(3), unlike that in N.C.G.S. § 15A-1343.2(d), did not require any actual findings of fact, written or oral. *Regan*, __ N.C. App. at __, 800 S.E.2d at 440–41. Therefore, the *Regan* holding allows revocation pursuant to N.C.G.S. § 15A-1344(f) so long as a violation report was timely filed and the trial court makes a valid determination that the defendant violated a condition of probation for which revocation is an appropriate sanction:

> The trial court complied with N.C. Gen. Stat. § 15A-1344(f)(3) *by finding good cause to revoke Defendant's probation*. Remaining in North Carolina was a condition of Defendant's probation. Defendant testified that she

> left the jurisdiction in 2011. Reporting for office meetings with her probation officer as directed was also a condition of Defendant's probation. The State presented competent evidence, the sworn affidavit of Officer Wiley, that Defendant failed to report as directed on 5 April 2011. Defendant testified that she did not return to North Carolina because "after talking to Ms. Woods, I mean, frankly, it scared the hell out of me, so I didn't come back." From the bench, the trial court announced, "I find the Defendant's in willful violation of the terms and conditions of her probation."
>
> Each of the judgments . . . incorporates a corresponding violation report . . . and indicates the specific paragraphs of the violation report which the trial court found as the basis for the finding that Defendant willfully violated the terms of her probation. Each judgment also includes a box checked by the trial court 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." Both the transcript of the probation violation hearing and the judgments entered reflect that the trial court considered the evidence and found good cause to revoke Defendant's probation.

*Regan*, __ N.C. App. at __, 800 S.E.2d at 440–41 (emphasis added).[2]

However, I find the *Regan* interpretation of the relevant language in N.C.G.S. § 15A-1344(f)(3) to be in direct conflict with our Supreme Court's interpretation of relevantly identical language in an earlier version of N.C.G.S. § 15A-1344(f). In 2008, the General Assembly made the following changes to N.C.G.S. § 15A-1344(f):[3]

> (f) Extension, Modification, or Revocation after Period of

[2] As noted in the majority opinion, the probation violations in *Regan* were committed prior to enactment of the Justice Reinvestment Act.

[3] The stricken through portions were deleted and the underlined portions were added by this amendment.

> Probation. – The court may extend, modify, or revoke probation after the expiration of the period of probation ~~if:~~ if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written ~~motion~~ violation report with the clerk indicating its intent to conduct a ~~revocation hearing; and~~ hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the ~~State has made reasonable effort to notify the probationer and to conduct the hearing earlier.~~[4] probationer did violate one or more conditions of probation prior to the expiration period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

Act of July 8, 2008, sec. 4, 2008 N.C. Sess. Laws 129.

In *Bryant*, our Supreme Court undertook the following analysis of the prior version of N.C.G.S. § 15A-1344(f):

> Initially, we address the State's argument that no finding was required to be made by the trial court in this case.
>
> The General Assembly, in enacting the controlling statute, N.C.G.S. § 15A–1344(f), provided:
>
> > "The court may revoke probation after the expiration of the period of probation if: (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and (2) *The*

[4] Although the notice language was removed from N.C.G.S. § 15A-1344(f), Chapter 15A still requires that a defendant be given proper notice before a revocation hearing is held, *see, e.g.*, N.C. Gen. Stat. §§ 15A-1345(d) and (e) (2017).

> *court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier*."

N.C.G.S. § 15A–1344(f) (2005) (emphasis added). In analyzing this statute, we use accepted principles of statutory construction by applying the plain and definite meaning of the words therein, as the language of the statute is clear and unambiguous. The statute *unambiguously requires the trial court to make a judicial finding* that the State has made a reasonable effort to conduct the probation revocation hearing during the period of probation set out in the judgment and commitment.

The *plain language of this statute leaves no room for judicial construction*. In the absence of statutorily mandated factual findings, the trial court's jurisdiction to revoke probation after expiration of the probationary period is not preserved. The State's argument asks us to substitute the unsworn remarks of defendant's counsel for a judicial finding of fact. This we will not do, as the statute requires the *trial court to make findings of fact*. Even in light of the somewhat informal setting of a probation revocation hearing, to accept defense counsel's remarks as a finding of fact violates the plain and definite meaning of the statute.[5]

The State argues that the unsworn remarks of defendant's counsel, along with the scheduled hearing date noticed on defendant's probation violation report, satisfy the statutory requirement. In doing so, the State contends the parenthetical statement made by the Court of Appeals in *State v. Hall only requires evidence in the record, not an actual finding of fact*. 160 N.C. App. 593, 593–94, 586 S.E.2d 561, 561 (2003) (parenthetically

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[5] "*Black's Law Dictionary* defines a finding of fact as 'a determination by a judge, jury, or administrative agency of a fact supported by the evidence in the record, [usually] presented at the trial or hearing.' *Black's Law Dictionary* 664 (8th ed. 2004)." This footnote is footnote "2" in the original.

> stating "nor is there evidence in the record to support such findings"). Although this argument is creative, it is contrary to the explicit statutory requirement that "the court find . . . the State has made reasonable effort to notify the probationer and to conduct the hearing earlier." N.C.G.S. § 15A–1344(f). The statute makes no exception to this finding of fact requirement based upon the strength of the evidence in the record.

*Bryant*, 361 N.C. at 102–03, 637 S.E.2d at 534–35 (citations omitted) (some emphases added); *see also State v. Burns*, 171 N.C. App. 759, 763, 615 S.E.2d 347, 350 (2005).

Prior to *Regan*, this Court discussed the requirements of the current version of N.C.G.S. § 15A–1344(f) as follows:

> Pursuant to N.C.G.S. § 15A–1344(f), a trial court may extend, modify, or revoke a defendant's probation after the expiration of the probationary term only if several conditions are met, including findings by the trial court that prior to the expiration of the probation period a probation violation had occurred *and* a written probation violation report had been filed. *Also, the trial court must find good cause for the extension, modification, or revocation*. N.C.G.S. § 15A–1344(f).

*State v. Moore*, 240 N.C. App. 461, 463, 771 S.E.2d 766, 767 (2015) (second emphasis added); *see also State v. Sanders*, 240 N.C. App. 260, 263, 770 S.E.2d 749, 751 (2015). Our Supreme Court held in *Bryant* that the language "the court finds" was an unambiguously stated requirement that a specific "finding of fact" be made by the trial court, *not* simply a requirement that evidence before the trial court could support an unstated or implied "finding." *Bryant*, 361 N.C. at 103, 637 S.E.2d at

535; *see also State v. Daniels*, 185 N.C. App. 535, 536–37, 649 S.E.2d 400, 401 (2007) (citation omitted) ("In *State v. Bryant*, the Supreme Court held that N.C.G.S. § 15A–1344(f) '. . . unambiguously requires the trial court to make a judicial finding that the State has made a reasonable effort to conduct the probation revocation hearing during the period of probation set out in the judgment and commitment'"). I also note that this Court, in an unpublished opinion filed prior to *Regan*, recognized a finding of fact requirement for N.C.G.S. § 15A–1344(f)(3). *State v. Bailey*, 241 N.C. App. 173, 772 S.E.2d 875 (2015) (unpublished) (emphasis in original) (suggesting that N.C.G.S. § 15A–1344(f)(3) requires a finding of fact because it "allows the court to alter probation after the expiration of the probation period only if the court '*finds* for good cause shown *and stated* that the probation should be extended, modified or revoked'"). N.C. Gen. Stat. § 15A-1345(e) (2017) also supports the position that actual findings of fact are necessary in order to support the statutory requirements for revocation: "Before revoking . . . probation, the [trial] court must . . . hold a hearing to determine whether to revoke . . . probation and *must make findings to support the decision* and a summary record of the proceedings." *Id.* (emphasis added).

Our Supreme Court has also indicated that the language "the court finds good cause" mandates that the trial court actually make the relevant findings of fact. *State v. Coltrane*, 307 N.C. 511, 515–16, 299 S.E.2d 199, 202 (1983) (emphasis

added) (Reversing order revoking probation because "[u]nder N.C.G.S. 15A-1345(e), a defendant is entitled to 'present relevant information, and may confront and cross-examine adverse witnesses unless the [trial] court finds good cause for not allowing confrontation.' Defendant was allowed to confront neither [of the witnesses]. *No findings were made that there was good cause for not allowing confrontation*.").

The current version of N.C.G.S. § 15A–1344(f) requires that three things occur before the trial court may revoke a defendant's probation after expiration of the period of probation: (1) that a violation report is filed prior to expiration of the period of probation; (2) that the trial court "*finds* that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation[;]" and (3) that the trial court "*finds* for good cause shown and stated that the probation should be . . . revoked." *Id*. (emphasis added). The Court in *Bryant* clearly rejected any argument that we can presume a "finding" based upon the strength of the evidence in the record – the trial court *must* make the required finding of fact or it does not have the authority to revoke a defendant's probation pursuant to N.C.G.S. § 15A–1344(f). "The statute makes no exception to this finding of fact requirement based upon the strength of the evidence in the record." *Bryant*, 361 N.C. at 103, 637 S.E.2d at 535; *see also id.* at 103–04, 637 S.E.2d at 535 ("Like [*State v.*] *Camp*, [299 N.C. 524, 263 S.E.2d 592 (1980),] the trial court in the instant case was without jurisdiction to revoke defendant's probation and to activate

defendant's sentence because it failed to make findings sufficient to satisfy the requirements of the statute.").

I believe we are bound by our Supreme Court's holdings construing language in criminal statutes that requires the trial court to "find" or "find good cause" to mean the trial court is *required* to make findings of fact demonstrating it has made an independent determination, based on the evidence, that good cause existed for the mandated conclusion. Therefore, in the present case I would hold that the trial court was required to make a finding of fact that the State demonstrated "for good cause shown and stated that [Defendant's] probation should be . . . revoked." N.C.G.S. § 15A–1344(f)(3). Absent this finding, there is no record proof the trial court had jurisdiction to revoke Defendant's probation after the expiration of Defendant's period of probation. *Bryant*, 361 N.C. at 103–04, 637 S.E.2d at 535.

II. What Findings are Required Pursuant to N.C.G.S. § 15A–1344(f)(3)

Section (2) in the prior version of N.C.G.S. § 15A–1344(f), discussed in *Bryant* and other opinions cited above, was replaced in part by N.C.G.S. § 15A–1344(f)(3). Whereas the prior version required the State to present sufficient evidence indicating that it had given the defendant proper notice *and* had made a reasonable effort to conduct the revocation hearing earlier,[6] the current version of the statute

[6] The natural inference is that the State is expected to conduct the hearing before the end of the period of probation if possible, and as soon after expiration of the period of probation as is reasonable when it is not practicable to conduct the hearing before expiration of the defendant's period of probation.

does not require a *specific* showing by the State, or a related finding by the trial court, that the State could not have reasonably conducted the hearing at an earlier date. Instead, the current version of N.C.G.S. § 15A–1344(f) requires the State to prove (1) that it filed a violation report prior to the expiration of the period of probation; (2) that Defendant did, in fact, violate a condition of probation prior to the expiration of his period of probation; and (3) that there was "good cause" for the trial court to revoke Defendant's probation at that time – i.e., it is inferred that good cause existed to revoke Defendant's probation *even though* the period of probation had already ended. It is my belief that the General Assembly, through its 2008 amendment of N.C.G.S. § 15A–1344(f), intended to provide the trial court more discretion in making the determination of whether the State acted reasonably in holding a revocation hearing after the expiration of the period of probation. I do not believe the General Assembly intended to do away entirely with the State's burden to demonstrate that revocation of a defendant's probation after expiration of the period of probation was reasonable in light of the relevant facts of any particular case.

Therefore, I believe the General Assembly intended the relevant language "[t]he court finds for good cause shown and stated that the probation should be . . . revoked[,]" N.C.G.S. § 15A–1344(f)(3), to require the State to satisfy the trial court that there was "good cause" for the trial court to revoke the defendant's

probation *even though the period of probation had already ended* – and that the trial court make the appropriate associated findings of fact. If the timing of the revocation hearing is not included in the N.C.G.S. § 15A–1344(f)(3) analysis, at least two consequences arise that I do not believe were intended by the General Assembly. First, N.C.G.S. § 15A–1344(f)(3), in its entirety, becomes superfluous, in violation of the established rules of statutory construction.

> "[W]e are guided by the principle of statutory construction that a statute should not be interpreted in a manner which would render any of its words superfluous. We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because it is always presumed that the legislature acted with care and deliberation."

*State v. Haddock*, 191 N.C. App. 474, 482, 664 S.E.2d 339, 345 (2008) (quoting *State v. Coffey*, 336 N.C. 412, 417–18, 444 S.E.2d 431, 434 (1994)). In addition, "'[i]n construing ambiguous criminal statutes, we apply the rule of lenity, which requires us to strictly construe the statute'" in favor of the defendant. *Haddock*, 191 N.C. App. at 482, 664 S.E.2d at 345–46 (quoting *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007)). As I read *Regan*, that opinion appears to require only that there exist evidence to support N.C.G.S. §§ 15A–1344(f)(1) and (2). *Regan* appears to hold that, if the trial court finds that "the probationer did violate one or more conditions of probation prior to the expiration of the period of probation[,]" N.C.G.S. § 15A–1344(f)(2), then the "good cause shown" requirement of N.C.G.S. § 15A–

1344(f)(3) is automatically satisfied. If satisfaction of the requirements of N.C.G.S. § 15A–1344(f)(2) serve to also satisfy the requirements of N.C.G.S. § 15A–1344(f)(3), N.C.G.S. § 15A–1344(f)(3) has been rendered superfluous.

Second, the *Regan* interpretation would also seem to violate the rule of lenity, as it disposes of any burden of the State to demonstrate it acted reasonably in seeking to revoke the defendant's probation after expiration of the period of probation. If N.C.G.S. § 15A–1344(f) has been stripped of any requirement that the State demonstrate good cause for the trial court to revoke a defendant's probation, *taking into consideration that the period of probation had already expired*, the intended protections in N.C.G.S. § 15A–1344(f) have been almost completely stripped away. The Official Commentary to N.C.G.S. § 15A–1344 states:

> Subsection (f) provides that probation can be revoked and the probationer made to serve a period of active imprisonment even after the period of probation has expired if a violation occurred during the period *and if the court was unable to bring the probationer before it in order to revoke at that time*.

*Id*. (emphasis added).[7] As I understand the holding in *Regan*, so long as a violation report is filed before the expiration of a defendant's period of probation, the State could bring the defendant before the trial court for a revocation hearing *at any time*

[7] The language of this comment suggests that it has not been changed since the amendment of N.C.G.S. § 15A–1344(f), but I believe the rationale is still valid and that the addition of N.C.G.S. § 15A–1344(f)(3) was intended to convey the same intent – that the trial court's finding of "good cause shown and stated" incorporated the reasonableness of the State's actions together with the amount of time that has passed since the expiration of the period of probation.

– five, ten, fifteen years or more after the defendant's probationary term ended. The State would have *no* burden to demonstrate that it had acted reasonably in allowing years to pass before initiating the revocation hearing. Whether the long delay was due to the defendant's actions, or was solely the fault of the State, would be irrelevant in the trial court's analysis. A finding by the trial court that the defendant violated a term of his probation warranting revocation would be all that was required to activate the underlying sentence. The "good cause shown and stated" requirement of N.C.G.S. § 15A–1344(f)(3) would require nothing more than the finding required by N.C.G.S. § 15A-1344(f)(2). This interpretation of N.C.G.S. § 15A–1344(f) results in the elimination of any meaningful difference between the requirements for revocation at a hearing conducted *during* the defendant's period of probation and revocation *after* the expiration of the defendant's period of probation – so long as a violation report is filed prior to the end of defendant's period of probation, the arrest and hearing pursuant to N.C.G.S. § 15A-1345 may occur at any time without any additional burden on the State. If this were the intent of the General Assembly when it amended N.C.G.S. § 15A–1344(f) in 2008, it could have greatly simplified the statute by eliminating N.C.G.S. § 15A–1344(f) entirely, and simply have stated that the *only* conditions precedent to holding a probation revocation hearing are the filing of a violation report prior to the expiration of the period of probation and timely notice to the defendant of the hearing. The fact that

the General Assembly did not repeal N.C.G.S. § 15A–1344(f) in its entirety suggests its intent was not to eliminate the additional requirement that the trial court find as fact that activation of a defendant's sentence after the expiration of the period of probation was appropriate based on the particular fact before it.

Although I disagree with the interpretation of N.C.G.S. § 15A–1344(f)(3) set forth in *Regan*, with respect to both the findings of fact requirement and what must be shown in order to for the State to prove "good cause shown," I believe this Court only has the authority to disregard the holding in *Regan* concerning the necessity of findings of fact in support of the "good cause shown and stated" requirement of N.C.G.S. § 15A–1344(f)(3). Because I find no contrary precedent from our Supreme Court, nor any contrary precedent from this Court pre-dating *Regan*, I believe we are bound by the holding in that opinion regarding what is required to satisfy the "good cause shown" requirement in N.C.G.S. § 15A–1344(f)(3). Specifically, that a proper finding of fact that Defendant violated a condition of his probation for which revocation was an appropriate sanction is all that is needed to satisfy the "good cause shown" requirement. *Regan*, __ N.C. App. at __, 800 S.E.2d at 440–41. I address this issue because I believe it merits consideration by our Supreme Court.

I would vacate and remand with direction to the trial court to either make appropriate findings of fact as required by N.C.G.S. § 15A–1344(f)(3), or enter an

order denying revocation based upon the State's failure to prove all the jurisdictional requirements of N.C.G.S. § 15A–1344(f).