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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1015

Filed: 6 August 2019

Alamance County, No. 16 CRS 51749

STATE OF NORTH CAROLINA

v.

MICHAEL ROBERT HYMAN

Appeal by defendant from judgment entered 22 March 2018 by Judge Andrew Taube Heath in Alamance County Superior Court. Heard in the Court of Appeals 27 March 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.*

ZACHARY, Judge.

Defendant Michael Robert Hyman appeals from a judgment revoking his probation and activating his suspended sentence. Defendant argues that the trial court revoked his probation after its expiration without making the statutorily required finding of good cause. We disagree and accordingly affirm the trial court's judgment; however, we remand for correction of a clerical error appearing therein.

**I. Background**

On 25 August 2016, Defendant pleaded guilty to two counts of attempted common law robbery committed on 9 April 2016. Per the plea arrangement, Defendant would receive a seven to eighteen month term of imprisonment for the first count of attempted robbery. For the second count, Defendant would “receive a suspended sentence . . . of 11 to 23 months,” the terms of which “shall be in the court[']s discretion.” On 25 August 2016, the trial court entered judgment against Defendant and sentenced him to seven to eighteen months in the custody of the North Carolina Division of Adult Correction for the first count of attempted robbery. For the second count, the trial court imposed a suspended sentence of eleven to twenty-three months, with twelve months of supervised probation to commence upon Defendant’s release from incarceration. According to Defendant’s supervising officer, Defendant reported for probation sometime around 12 March 2017.

A regular condition of probation for all probationers is to “[c]ommit no criminal offense in any jurisdiction.” N.C. Gen. Stat. § 15A-1343(b)(1) (2017). This condition is one of only three revocation-worthy probation violations. *Id.* § 15A-1344(a).

On 26 April 2017, Defendant’s probation officer completed a violation report alleging that Defendant had incurred new criminal charges for misdemeanor simple assault and felony larceny from the person. The report was filed with the Alamance

STATE V. HYMAN

*Opinion of the Court*

County Clerk of Superior Court on “31 April 2017.”<sup>1</sup> On 29 August 2017, Defendant’s probation officer completed a second violation report alleging that on or about 7 August 2017, Defendant again violated N.C. Gen. Stat. § 15A-1343(b)(1) by committing misdemeanor larceny. That report was filed with the clerk of superior court on 5 September 2017.

This matter came on for hearing before the Honorable Andrew Taube Heath on 22 March 2018 in Alamance County Superior Court. At the beginning of the hearing, the State announced its plan to proceed solely with the second allegation of the violation report filed on 31 April 2017 alleging that Defendant had committed felony larceny from the person. On 12 May 2017, the State dismissed the first allegation listed on the report.

Testimony at the hearing revealed that on 5 April 2017, Defendant approached two homeless men, Roger Profit and Terry Wall, who were asleep on a church porch. Defendant convinced Profit to pull out his wallet, then grabbed the wallet and ran away. Profit and Wall chased Defendant, but they could not catch him. On 26 April

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<sup>1</sup> We note that there are only thirty days in the month of April. It is not apparent in the record on appeal or in the parties’ briefs that anyone involved in this case recognized the erroneous file stamp. Jurisdiction in a criminal case must be established beyond a reasonable doubt, *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 835 (1993), and the *absence* of a file stamp on a probation violation report is a fatal jurisdictional flaw requiring the appellate court to arrest judgment and vacate the conviction. *State v. Moore*, 148 N.C. App. 568, 570-71, 559 S.E.2d 565, 566-67 (2002). However, we believe that the *erroneous* date on the clerk’s file stamp is more akin to a clerical error and should not, based on the facts of this case, be a fatal jurisdictional flaw. *See State v. Kerrin*, 209 N.C. App. 72, 80, 703 S.E.2d 816, 821 (2011) (defining clerical error as “an error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination” (brackets omitted)).

2017, because of the probation violation, Defendant's probation officer issued an "Authority to Arrest" order for Defendant. Defendant was arrested two days later.

After finding that Defendant willfully violated the terms of his probation, the trial court revoked Defendant's probation and activated his suspended sentence. Defendant gave notice of appeal in open court.

## **II. Discussion**

Defendant argues on appeal that the trial court erred in revoking his probation after it had expired without making a finding of good cause as required by N.C. Gen. Stat. § 15A-1344(f)(3). In addition, Defendant seeks remand of the judgment for correction of a clerical error. For the reasons explained below, we hold that the trial court did not err in revoking Defendant's probation. However, we remand the judgment for correction of the clerical error.

This Court reviews whether a trial court possessed jurisdiction to revoke probation *de novo*. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008). Even though Defendant has served the sentence activated upon the revocation of his probation, this appeal is not moot because a willful probation violation may serve as an aggravating factor in future sentencing. *State v. Black*, 197 N.C. App. 373, 375-77, 677 S.E.2d 199, 201-02 (2009); N.C. Gen. Stat. § 15A-1340.16(d)(12a).

### **A. Authority and Jurisdiction to Revoke Probation**

A trial court may only revoke a defendant's 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)." N.C. Gen. Stat. § 15A-1344(a). First, section 1343(b)(1), as explained above, requires as a condition to probation that a probationer "[c]ommit no criminal offense in any jurisdiction." *Id.* § 15A-1343(b)(1). A trial court may also revoke supervised probation if the probationer "abscond[s] by willfully avoiding supervision or by willfully making [his] whereabouts unknown to the supervising probation officer." *Id.* § 15A-1343(b)(3a). Finally, section 15A-1344 provides that when a probationer "under supervision for a felony conviction has violated a condition of probation *other than* G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a)," the court may impose up to ninety days of active confinement. *Id.* § 15A-1344(d2) (emphasis added). After receiving two periods of confinement under this provision, the trial court may then revoke the defendant's probation. *Id.*

Unless waived by the probationer, a 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.* § 15A-1345(e). The State must provide to the probationer "notice of the hearing and its purpose, including a statement of the violations alleged" at least twenty-four hours before the hearing, unless waived by the probationer. *Id.* Evidence must be disclosed to the probationer,

and the probationer has the right to counsel, as well as the right to appear, to speak on his behalf, to present evidence, and to cross-examine witnesses. *Id.*

“[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). If a trial court revokes probation before expiration of the probationary period, then section 15A-1344(f) does not apply. *State v. Knox*, 239 N.C. App. 430, 433, 768 S.E.2d 381, 383 (2015). “The burden of perfecting the trial court’s jurisdiction for a probation revocation hearing after [a] defendant’s period of probation has expired lies squarely with the State.” *State v. Harwood*, 243 N.C. App. 425, 428, 777 S.E.2d 116, 118 (2015).

The trial court’s 25 August 2016 judgment provided that Defendant’s twelve-month probationary period would begin “when the defendant [was] released from incarceration.” Neither party presented evidence at the violation hearing of the date that Defendant’s prison term ended, nor is there any evidence of that fact in the record. However, Defendant’s probation officer testified that Defendant reported for his probation “around March 12th of 2017.” The trial court held Defendant’s probation hearing on 22 March 2018. Assuming that Defendant reported for supervision on the date of his release from prison, the 22 March 2018 revocation hearing occurred more than twelve months after his probationary period expired.

Therefore, the trial court revoked Defendant's probation after his probationary period expired, and was required to comply with N.C. Gen. Stat. § 15A-1344(f).

B. N.C. Gen. Stat. § 15A-1344(f): Finding of Good Cause Shown and Stated

Defendant argues that the trial court failed to make any finding that “for good cause shown and stated that the probation should be extended, modified, or revoked,” as required by N.C. Gen. Stat. § 15A-1344(f)(3). We disagree.

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.

*Id.* § 15A-1344(f)(1)-(3).

In the instant case, both parties agree that the trial court satisfied the first two conditions. As a result, the question presented is whether the trial court satisfied the third condition: a finding of “good cause shown and stated.”

STATE V. HYMAN

*Opinion of the Court*

We are bound by this Court’s recent holdings in *State v. Morgan*, \_\_\_ N.C. App. \_\_\_, 814 S.E.2d 843 (2018), *appeal docketed*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (filed May 22, 2018),<sup>2</sup> and *State v. Regan*, 253 N.C. App. 351, 800 S.E.2d 436 (2017). *In re 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.”). This Court held in *Regan* that section 15A-1344(f)

does not require that the trial court make any specific findings. It simply provides that the trial court can alter probation after expiration of the period of probation has expired if “the [trial] court finds for good cause shown and stated that the probation should be extended, modified, or revoked.”

*Regan*, 253 N.C. App. at 357, 800 S.E.2d at 440 (quoting N.C. Gen. Stat. § 15A-1344(f)(3)).

In *Regan*, “[t]he trial court complied with N.C. Gen. Stat. § 15A-1344(f)(3) by finding good cause to revoke [the] [d]efendant’s probation” where the trial judge announced from the bench, “I find the [d]efendant’s in willful violation of the terms and conditions of her probation.” *Id.* at 358, 800 S.E.2d at 440. Additionally, the trial court’s judgment included a checked box indicating that “each violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate

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<sup>2</sup> The North Carolina Supreme Court heard *State v. Morgan* on 8 April 2019. As of the filing of this opinion, the Supreme Court’s decision in that case is still pending.



the suspended sentence.” *Id.* (brackets omitted). This Court held that “[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 [the] [d]efendant’s probation.” *Id.* at 358, 800 S.E.2d at 440-41.

Similarly, in *Morgan*, the State alleged, and the trial court found, that the defendant violated his probation by committing a new criminal offense and absconding, and consequently revoked his probation. *Morgan*, \_\_\_ N.C. App. at \_\_\_, 814 S.E.2d at 848. Relying upon *Regan*, the *Morgan* Court concluded that “‘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’ [the] defendant’s probation.” *Id.* at \_\_\_, 814 S.E.2d at 848 (brackets omitted) (quoting *Regan*, 253 N.C. App. at 358, 800 S.E.2d at 440-41).

In the present case, after hearing testimony, the trial court stated in open court that

[b]ased on the evidence that’s been presented, statements from both sides, I find and conclude that there is sufficient evidence to reasonably satisfy the Court that the alleged violation did occur. Those findings and conclusions are based on the testimony of Mr. Wall, Mr. Profit. I find their testimony to be credible in terms of the major events of the evening in question.

I find that . . . [D]efendant violated the condition of commit no criminal offense. The [D]efendant violated the condition willfully and without justification or excuse prior to the expiration of probationary period.

That this violation is in and of itself a sufficient basis to justify revocation of probation and activation of the suspended sentence.

Therefore, probation is revoked and the sentence is activated.

Significantly, the trial court explicitly found that Defendant “violated the condition of commit no criminal offense,” which “is in and of itself a sufficient basis to justify revocation of probation.” *See* N.C. Gen. Stat. § 15A-1344(a). The trial court checked the box on the judgment indicating his finding that the “violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence.” Thus, both the transcript of the proceedings and the judgment “reflect that the trial court considered the evidence and found good cause to revoke Defendant’s probation.” *Regan*, 253 N.C. App. at 358, 800 S.E.2d at 441. Accordingly, the trial court made proper findings of fact to revoke Defendant’s probation after the expiration of Defendant’s probationary period.

C. Clerical Error

Defendant also requests that this Court remand this matter for correction of a clerical error in the judgment revoking his probation.

A clerical error is “an error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination.” *State v. Taylor*, 156 N.C. App. 172, 177, 576 S.E.2d 114,

117-18 (2003). “When, on appeal, a clerical error is discovered in the trial court’s judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.” *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (quotation marks omitted).

Here, the State announced in open court that it was only proceeding on the allegation in paragraph 2 of the violation report filed on 31 April 2017 alleging that Defendant committed felony larceny from the person. At the hearing, the State presented evidence concerning that sole incident. However, in the judgment, the trial court indicated that Defendant violated paragraphs 1 and 2 of the 31 April 2017 violation report as well as paragraph 1 of the 5 September 2017 violation report. This is clearly erroneous; the judgment should reflect only the violation for which Defendant’s probation was actually revoked. Accordingly, we remand the judgment for correction of this clerical error, to ensure that the record “speak[s] the truth.” *Id.*

### **III. Conclusion**

The trial court made the proper findings of fact to support revocation of Defendant’s probation and to activate his suspended sentence. However, we remand the judgment to allow the trial court to correct a clerical error appearing therein.

**AFFIRMED; REMANDED FOR CORRECTION OF A CLERICAL ERROR.**

Judges STROUD and INMAN concur.

Report per Rule 30(e).