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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-874-2

Filed: 17 September 2019

Guilford County, Nos. 14CRS92098-99

STATE OF NORTH CAROLINA

v.

JOHN CHRISTOPHER DUFF, Defendant.

Appeal by Defendant from judgments entered 24 April 2018 by Judge Edwin G. Wilson, Jr. in Guilford County Superior Court. Originally heard in the Court of Appeals 13 February 2019. By opinion issued 2 April 2019, a unanimous panel of the Court of Appeals affirmed the trial court's decision to revoke Defendant's probation and remanded for correction of clerical errors. Upon discretionary review granted by the Supreme Court and by order dated 16 August 2019, the Supreme Court of North Carolina remanded the case to the Court of Appeals for reconsideration in light of the Supreme Court's decision in *State v. Morgan*, ___ N.C. ___, ___ S.E.2d ___ (2019) (150A18).

Attorney General Joshua H. Stein, by Assistant Attorney General Andrew L. Hayes, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for Defendant.

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INMAN, Judge.

John Christopher Duff (“Defendant”) first appealed to this Court from two judgments revoking his probation after the term of his probation had expired. Defendant also petitioned for a writ of certiorari to review those judgments and filed a motion for appropriate relief (“MAR”) challenging the jurisdiction of the trial court to revoke his probation after his probationary term had expired. In an opinion issued 2 April 2018, this Court allowed Defendant’s petition for writ of certiorari, denied his MAR on the merits, and affirmed the trial court’s judgments while remanding for correction of clerical errors in the judgment suspending Defendant’s sentence in 14CRS092099 and the judgments revoking probation. In doing so, we rejected Defendant’s argument that the trial court’s failure to make a finding of good cause shown and stated as provided by N.C. Gen. Stat. § 15A-1344(f)(3) (2019) required vacatur, relying on this Court’s prior decision in *State v. Morgan*, ___ N.C. App. ___, 814 S.E.2d 843 (2018) and *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Defendant thereafter filed a petition for discretionary review with our Supreme Court.

On 16 August 2019, the Supreme Court reversed *State v. Morgan* and held that “trial courts are required by subsection f(3) to make an *additional* finding of ‘good cause shown and stated’ to justify the revocation of probation even though the

defendant’s probationary term has expired.” *Morgan*, ___ N.C. at ___, ___ S.E.2d at _____. It also held that remand to make such a finding, as opposed to vacatur for lack of jurisdiction, is proper if the appellate court is “unable to say from [its] review of the record that no evidence exists that would allow the trial court on remand to make a finding of ‘good cause shown and stated’ under subsection (f)(3).” *Id.* at ___, ___ S.E.2d at _____.

Concurrent with the issuance of its decision in *Morgan*, the Supreme Court allowed Defendant’s petition for discretionary review of this case “for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of *State v. Morgan*.”

Following careful review on remand in light of the Supreme Court’s decision in *Morgan*, we remand this case to the superior court “for a finding of whether good cause exists to revoke defendant’s probation despite the expiration of his probationary period and—assuming good cause exists—to make a finding in conformity with [N.C. Gen. Stat.] § 15A-1344(f)(3).” *Id.* at ___, ___ S.E.2d at _____. We also remand for correction of the clerical error previously identified by this Court.

I. FACTUAL AND PROCEDURAL BACKGROUND

A full recitation of the underlying factual and procedural history of this case can be found in this Court’s prior decision in *State v. Duff*, No. COA18-874, ___ N.C.

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App. ___, 825 S.E.2d 277, 2019 WL 1467728 (N.C. Ct. App. April 2, 2019) (unpublished). A brief discussion of facts pertinent to our decision today follows:

Defendant, who suffers from longstanding mental health issues, pled guilty to two counts of felony breaking and entering in file numbers 14CRS092098-99. The trial court imposed suspended sentences in both cases for 36 months of supervised probation and required Defendant to receive mental health treatment, among other conditions. Defendant then violated the terms of probation in both cases, and his probation was modified. After the modification and 33 months into Defendant's probationary terms, his probation officer filed additional violation reports, but a hearing on those alleged violations did not occur until over a month after Defendant's probation ended.

At the revocation hearing, Defendant admitted to the violations alleged in the violation reports but requested that the trial court extend and modify his probation to allow him to participate in Guilford County's combined drug treatment and mental health court. Defendant's counsel acknowledged, in making that request, that Defendant had been unsuccessful in treating his mental health without court intervention. The State responded to the request by arguing revocation was more appropriate, as Defendant could "get the mental health evaluation that he needs while he is in jail. Because apparently while he is on the outside, he is not [in] compliance as to what he is suppose[d] to be [doing]." The trial court ultimately

declined to extend and modify Defendant's probation and instead revoked it. In doing so, the trial court failed to make an express finding of fact consistent with N.C. Gen. Stat. § 15A-1344(f)(3) that there was "good cause shown and stated" to revoke Defendant's probation after the probationary period had expired.

II. ANALYSIS

Given the Supreme Court's limitation on remand to reconsider our earlier opinion only in light of *Morgan*, we leave undisturbed our prior determination that the trial court did not violate Defendant's constitutional right by declining to conduct a competency hearing *sua sponte*. *Duff*, 2019 WL 1467728 at *4. We therefore limit our review to whether the trial court's failure to find good cause shown and stated to revoke probation after the probation term expired requires vacatur or remand consistent with *Morgan*.

The central holding of *Morgan* is clear: in order to revoke a defendant's probation after his probationary term has expired, N.C. Gen. Stat. § 15A-1344(f)(3) requires the trial court to make an explicit and distinct "finding of 'good cause shown and stated' to justify the revocation of probation even though the defendant's probationary term has expired." ___ N.C. at ___, ___ S.E.2d at ___. When that necessary finding is absent, the appellate court must either take the ordinary course of remanding the judgment revoking probation or, if a review of the record discloses that no evidence exists to support such a finding, vacate the judgment revoking

probation for lack of jurisdiction. *Id.* at ___, ___ S.E.2d at ___; *see also State v. Bryant*, 361 N.C. 100, 104, 637 S.E.2d 532, 535-36 (2006) (vacating, rather than remanding as is “ordinarily” done, a judgment revoking probation after the probationary term had expired when the trial court failed to make a necessary finding under a prior version of N.C. Gen. Stat. § 15A-1344(f) “because the record lacks sufficient evidence to support such a finding”).

In this case, the trial court failed to make the necessary finding of “good cause shown and stated” as required by N.C. Gen. Stat. § 15A-1344(f)(3) and explained by *Morgan*. ___ N.C. at ___, ___ S.E.2d at ___. Upon review of the record, we cannot say that no evidence exists to support such a finding. Defendant’s request that the trial court extend and modify his probation following its expiration suggests that Defendant believed good cause had been shown and stated to support that outcome. *See* N.C. Gen. Stat. § 15A-1344(f) (“The court may *extend, modify*, or revoke probation after the expiration of the period of probation if all of the following apply: . . . (3) The court finds for good cause shown and stated that the probation should be *extended, modified*, or revoked.” (emphasis added)).¹ The prosecutor stated a basis for post-probation revocation, arguing that Defendant had been unable to manage his mental

¹ To be clear, we do not read N.C. Gen. Stat. § 15A-1344(f) to allow a trial court to revoke probation if good cause exists only to modify or extend it. Rather, we recognize that when, as here, the State seeks revocation and Defendant requests the trial court modify or extend probation following its expiration, some evidentiary basis to take post-probation action may exist, and it is possible that the evidence supporting modification or extension could also support revocation.

health treatment “on the outside” but would receive such treatment while serving his sentence. Because the record discloses that evidence may support a finding of “good cause shown and stated” to revoke Defendant’s probation after its expiration, we remand Defendant’s case to the trial court so that it may comply with N.C. Gen. Stat. § 15A-1344(f)(3) and make a finding of good cause, should it exist. *See Morgan*, ___ N.C. at ___, ___ S.E.2d at ___.

We also remand for correction of the clerical error in the judgment suspending Defendant’s sentence in 14CRS092099 that misclassified Defendant’s punishment as community rather than intermediate as identified in our prior decision. *Duff*, 2019 WL 1467728 at *3. But, because our immediate holding requires remand of the judgments revoking probation and entry of new judgments revoking probation if the trial court finds that good cause to do so exists, the trial court need not correct the clerical errors in the original judgments revoking probation. *See id.* at *5. Instead, in entering any new judgments, the trial court shall make only necessary and proper findings as allowed by law.

III. CONCLUSION

For the foregoing reasons, we remand this case to the superior court for proceedings not inconsistent with this opinion.

REMANDED FOR FURTHER PROCEEDINGS AND TO CORRECT A CLERICAL ERROR.

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Judges DILLON and COLLINS concur.

Report per Rule 30(e).