

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA19-452

Filed: 16 June 2020

Iredell County, No. 15CRS56083-84

STATE OF NORTH CAROLINA

v.

JOSPEH ANTHONY BROWN, Defendant.

Appeal by Defendant from Judgments entered 17 December 2018 by Judge Julia Lynn Gullett in Superior Court, Iredell County. Heard in the Court of Appeals 3 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Ryan Zellar, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling P. Rozear, for Defendant-Appellant.

McGEE, Chief Judge.

I. Factual and Procedural History

Joseph Anthony Brown (“Defendant”) was placed on supervised probation on 6 March 2017 following *Alford* pleas to felony common law robbery and two counts of felony second-degree kidnapping. Almost nine months later, Defendant’s

STATE V. BROWN

Opinion of the Court

then-probation officer filed a probation violation report on 8 December 2017, alleging that Defendant violated his probation when he, *inter alia*, possessed alcohol and controlled substances. The trial court enhanced the conditions of Defendant's probation on 8 May 2018, but did not revoke it.

Another probation violation report was filed by Defendant's new probation officer, Zachary Holmes ("Holmes"), on 4 December 2018 alleging that Defendant committed the following acts violative of his probation:

1. Regular Condition of Probation: General Statute 15A-1343 (b) (3a) "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, ON OR ABOUT 11/29/2018 THE DEFENDANT [LEFT] HIS PLACE OF RESIDENCE . . . IN STATESVILLE, NC WITHOUT PRIOR APPROVAL OR KNOWLEDGE OF HIS PROBATION OFFICER AND FAILED TO MAKE HIS WHEREABOUTS KNOWN, MAKING HIMSELF UNAVAILABLE FOR SUPERVISION AND THEREBY ABSCONDING SUPERVISION. AS OF THE DATE OF THIS REPORT, THE DEFENDANT'S WHEREABOUTS ARE UNKNOWN AND ALL EFFORTS TO LOCATE THE DEFENDANT HAVE BEEN UNSUCCESSFUL.

2. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and place . . ." in that THE DEFENDANT FAILED TO REPORT TO SCHEDULED OFFICE APPOINTMENTS ON 11/07/2018, 11/13/2018, AND 11/16/2018. ALL EFFORTS TO CONTACT THE DEFENDANT TO GET HIM INTO THE OFFICE HAVE BEEN UNSUCCESSFUL.

STATE V. BROWN

Opinion of the Court

3. Condition of Probation “. . . obtain prior approval from the officer for, and notify the officer of, any change in address . . .” in that ON OR ABOUT [11]/18/2018¹ THE DEFENDANT LEFT HIS PLACE OF RESIDENCE . . . [IN] STATESVILLE NC WITHOUT NOTIFYING HIS PROBATION OFFICER.

The probation officer testified at Defendant’s probation violation hearing on 17 December 2018 that Defendant failed to attend an appointment with him on 7 November 2018, but later called him that same day and rescheduled for 13 November 2018. The probation officer, however, lost all contact with Defendant thereafter, testifying on cross-examination that Defendant’s phone had been disconnected. After Defendant missed the 13 November appointment, the probation officer spoke with Defendant’s father and brother. Defendant’s father told the probation officer that he would contact Defendant and have him see the probation officer on 16 November. The probation officer left Defendant a voicemail that he should meet with him on that day as well, but Defendant did not respond or attend.

The probation officer also visited Defendant’s last known address at a Hallmark Inn on 18, 26, and 29 November 2018. An employee with the Inn informed the probation officer that Defendant moved out on 18 November and the employee did not know where he went. Defendant did not provide a new address. He spoke with Defendant’s father again on 27 November and told him that he would not file a

¹ The date given on the report mistakenly asserted that Defendant left his residence on 18 October, rather than 18 November. The probation officer acknowledged this clerical error at the hearing, and the trial court allowed the report to be amended to reflect the correct month.

violation report if Defendant “turn[ed] himself in to me before the next week.” Defendant failed to disclose his whereabouts or contact his probation officer, prompting the officer to file his violation report on 4 December. Defendant turned himself in two days later after the arrest warrant was issued.

At the conclusion of the hearing, the trial court found that Defendant had absconded probation and subsequently activated his sentences, with credit given for time served. The trial court entered two written orders on 17 December 2018. Defendant gave oral notice of appeal.

II. Analysis

Defendant contends that the trial court erred in revoking his probation after finding that he absconded by willfully making his whereabouts unknown to his probation officer. In light of the insufficient evidence presented at the probation violation hearing, we agree.

N.C. Gen. Stat. § 15A-1343 governs what regular conditions of probation a trial court can order for a defendant who has been placed on supervised probation. N.C.G.S. § 15A-1343(b) (2017). A defendant is subject to any and all of the seventeen statutorily-prescribed conditions that a trial court may impose, such as, in relevant part:

(b) Regular Conditions.—As regular conditions of probation, a defendant must:

(1) Commit no criminal offense in any jurisdiction.

STATE V. BROWN

Opinion of the Court

(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 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.

Id. §§ 15A-1343(b)(1)-(3a). In the event a defendant violates any of the prescribed conditions, the trial court may extend, modify, continue, terminate, revoke, or reduce a defendant's probation. *Id.* § 15A-1344(a).

Pursuant to the Justice Reinvestment Act of 2011 ("JRA"), a defendant who violates a condition of his probation "on or after 1 December 2011" cannot have his probation revoked and his sentence activated unless the defendant: (1) commits a new crime, in violation of N.C.G.S. § 15A-1343(b)(1); (2) "absconds" by either willfully avoiding supervision or willfully making his whereabouts unknown to his supervising probation officer, in violation of N.C.G.S. § 15A-1343(b)(3a); or (3) has already served two periods of confinement in response to violations ("CRV"), under N.C.G.S. § 15A-

1344(d2). *State v. Nolen*, 228 N.C. App. 203, 205, 743 S.E.2d 729, 731 (2013) (citations omitted).

In the probation violation report filed against Defendant, the only allegation that could support the trial court's decision to revoke Defendant's probation was the assertion that Defendant absconded—having willfully avoided supervision and refused to disclose his whereabouts. No evidence was presented at the probation violation hearing showing that Defendant had committed any crime or had previously served two CRVs. The trial court specifically found that Defendant had absconded. In its pre-printed written form order, the trial court checked the box finding that Defendant's probation was revoked for absconding supervision, under N.C.G.S. § 15A-1343(b)(3a). We therefore limit our review to whether the State produced sufficient evidence to support the trial court's finding that Defendant violated N.C.G.S. § 15A-1343(b)(3a) by absconding.

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) (quotation marks and citation omitted). “Nonetheless, when a trial court's determination relies on

STATE V. BROWN

Opinion of the Court

statutory interpretation, our review is *de novo* because those matters of statutory interpretation necessarily present questions of law.” *State v. Johnson*, 246 N.C. App. 139, 142, 783 S.E.2d 21, 24 (2016) (citation omitted).

Defendant first argues, relying on *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015), that the actions described in the probation violation report do not sufficiently allege absconding as contemplated by N.C.G.S. § 15A-1343(b)(3a). In *Williams*, this Court reversed the trial court’s order revoking the defendant’s probation based on willful absconding. *Id.* at 205, 776 S.E.2d at 746. The probation violation report in *Williams* alleged, without expressly citing N.C.G.S. § 15A-1343(b)(3a), that because the defendant (1) failed to report for scheduled office visits as instructed, (2) failed to provide a valid address, and (3) left the state without permission, he was “abscond[ing] supervision” by “knowingly avoiding the probation officer and not making his true whereabouts known.” *Id.* at 204, 776 S.E.2d at 745. We held that the report was “simply a re-alleging” of other violations in the report pertaining to N.C.G.S. §§ 15A-1343(b)(2) and (3). *Id.* We discussed that the General Assembly, in enacting the JRA, did not intend for violations of N.C.G.S. §§ 15A-1343(b)(2) and (3) to result in revocations absent the requirements of N.C.G.S. § 15A-1344(d2) being established. *Id.* This Court reasoned that, prior to the amendment to N.C.G.S. § 15A-1343(b) “to include not ‘absconding’ as a regular condition of probation, ‘abscond’ ha[d] traditionally been used to refer to other conditions of

STATE V. BROWN

Opinion of the Court

probation.” *Id.* at 205, 776 S.E.2d at 745 (citing *State v. Hunnicutt*, 226 N.C. App. 348, 355, 740 S.E.2d 906, 911 (2013); *Nolen*, 228 N.C. App. at 206, 743 S.E.2d at 731). Although reports may allege that a defendant’s actions constitute “absconding,” such a “wording cannot convert violations of [N.C.G.S.] §§ 15A-1343(b)(2) and (3) into a violation of [N.C.G.S.] § 15A-1343(b)(3a).” *Id.* Therefore, because there was no difference in the conduct alleged among N.C.G.S. §§ 15A-1343(b)(2), (3), and (3a), the violation report failed to specifically allege a violation of N.C.G.S. § 15A-1343(b)(3a). *Id.* at 205-06, 776 S.E.2d at 746.

Defendant analogizes the violation report in his case with the report in *Williams* and contends that the allegation that he willfully absconded only reflected conduct violating N.C.G.S. § 15A-1343(b)(3). However, the allegation here is more similar to the one in this Court’s recent opinion in *State v. Crompton*, No. COA19-504, ___ N.C. App. ___, ___ S.E.2d ___, ___ (filed March 17, 2020). In *Crompton*, the probation violation report alleged that the defendant violated N.C.G.S. § 15A-1343(b)(3a) by failing to report as directed by his probation officer, to return phone calls, to provide a certifiable address, or to make himself available for supervision. *Id.* at ___, ___ S.E.2d at ___. Although the defendant in *Crompton* also argued that *Williams* applied to his case, this Court distinguished the holding in *Williams* and relied on the fact that the report in *Williams* failed to reference N.C.G.S. § 15A-1343(b)(3a) entirely. *Id.* at ___, ___ S.E.2d at ___. The Court in *Crompton* held that

“[w]here a violation report alleges that willful violations of [N.C.G.S. §] 1343(b)(3) together amount to the defendant ‘willfully avoiding supervision’ or ‘willfully making the defendant’s whereabouts unknown’ in violation of [N.C.G.S. §] 15A-1343(b)(3a), and the State subsequently proffers sufficient evidence to establish those willful violations, then revocation of the defendant’s probation is within the trial court’s discretion.” *Id.* at ___, ___ S.E.2d at ___ (citations omitted). *Crompton* thus stands for the proposition that the allegations in a probation violation report are sufficient to allege absconding even when “using the language” of N.C.G.S. §§ 15A-1343(b)(2) and (3) “to describe violations of [N.C.G.S. §] 15A-1343(b)(3a).” *Id.* at ___, ___ S.E.2d at ___. Although the dissent in *Crompton* argued that the majority was overlooking key precedents and the purposes underlying the JRA, *see id.* at ___, ___ S.E.2d at ___ (McGee, C.J., dissenting), this Court is bound by its prior decision. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

In the present case, the probation violation report substantially tracks the language of the report found in *Crompton*. Both reports cite N.C.G.S. § 15A-1343(b)(3a) and allege that the defendants absconded by failing to contact the probation officer or to disclose their whereabouts after leaving their last place of residence without approval. *Id.* at ___, ___ S.E.2d at ___. We therefore must disagree with Defendant’s argument that the violation report failed to sufficiently allege he absconded supervision.

STATE V. BROWN

Opinion of the Court

Notwithstanding the propriety of the allegation itself, the evidence supporting the trial court's absconding determination is insufficient. Unlike the defendant in *Crompton*, in this case, Defendant denied the allegation of willful absconding in the violation report. *See id.* at ___, ___ S.E.2d at ___. Moreover, in *State v. Melton*, 258 N.C. App. 134, 811 S.E.2d 678 (2018), this Court held that in making a finding of absconding and reviewing such a finding by a trial court, courts are constrained to consider evidence to the dates in the violation report alleging when the absconding occurred. *Id.* at 137, 811 S.E.2d at 681. The violation report in *Melton* alleged that the defendant absconded from on or about 2 November 2016 until the probation officer filed the report on 4 November. *Id.* at 135, 811 S.E.2d at 679. This Court held it is error for a trial court to consider evidence supporting allegations of absconding from the period when the alleged absconding began until the defendant is arrested, rather than until the date the violation report is filed. *Id.* at 137, 811 S.E.2d at 681. The rationale for this limitation is that “[i]n order to provide a defendant with notice of the allegations against him, as required by N.C. Gen. Stat. § 15A-1345(e), probation violation reports must contain a statement of the specific violations alleged.” *Id.* at 137, 258 N.C. App. at 681 (citation omitted).

The State contends that this Court's review should begin from the initial date when Defendant allegedly first violated any regular condition of his probation—specifically, his failure to attend an office visit on 7 November. The State misreads

STATE V. BROWN

Opinion of the Court

Melton. The probation violation report in *Melton* not only alleged that the defendant absconded, but that she also failed to report to meetings and to pay her court costs, violating N.C.G.S. §§ 15A-1343(b)(3) and (9). *See id.* at 135, 811 S.E.2d at 679-80. The defendant's probation officer testified that the defendant failed to report to her meetings on 2 August, 4 October, 12 October, 28 October, and 2 November 2016. *Id.* at 135, 811 S.E.2d at 680. On appeal, this Court did not consider any evidence outside the date range alleging when the defendant absconded—notably, not even evidence of other alleged probation violations—“because the violation reports only specifically allege[d] that [the] defendant absconded from ‘on or about’ 2 November 2016 to the date the reports were filed, 4 November 2016.” *See id.* at 137, 811 S.E.2d at 681. Failing to limit consideration of evidence to the time period and specific conduct alleged for the relevant violation in the violation reports would violate the notice requirement of N.C.G.S. § 15A-1345(e).

In the present case, because the probation violation report, incorporated by reference in the trial court's judgments, alleged that Defendant absconded from 29 November 2018 until the report was filed on 4 December 2018, our review is limited to that timeframe. Accordingly, besides the probation officer's visit to Defendant's last known address on 29 November 2018 at the Hallmark Inn, no other evidence was presented to establish Defendant's alleged absconding between 29 November and 4 December 2018. Thus, there is insufficient evidence establishing that Defendant

STATE V. BROWN

Opinion of the Court

violated N.C.G.S. § 15A-1343(b)(3a). Although the State argues that Defendant had a duty to apprise his probation officer of his whereabouts, “this duty does not relieve the State of its burden to provide competent evidence that [D]efendant *refused* to make [himself] available for supervision.” *Melton*, 258 N.C. App. at 139-40, 811 S.E.2d at 682 (emphasis added).

Assuming, *arguendo*, that all the evidence presented at the revocation hearing is considered, regardless of the dates involved, there is still insufficient evidence showing that Defendant was willfully avoiding his probation officer. The State relies on *State v. Trent*, 254 N.C. App. 809, 803 S.E.2d 224 (2017), in which this Court affirmed the trial court’s absconding finding when the evidence showed: the probation officer could not locate the defendant on two different occasions during unannounced visits on 24 April and 5 May 2016; the defendant’s wife told the probation officer the defendant took her car and bank card without permission and she did not know where he was; the defendant acquired a job in Raleigh and failed to notify the probation officer; and the defendant missed his 9 May appointment. *Id.* at 812, 803 S.E.2d at 227. Most importantly, the defendant testified that when he returned home on 6 or 7 May 2016, he learned that the probation officer was searching for him, but he refused to ever contact him before his arrest on 10 May. *Id.*

Unlike *Trent*, the evidence in the present case does not show Defendant’s failure to contact his probation officer was willful. Prior to the probation officer losing

STATE V. BROWN

Opinion of the Court

contact, Defendant had called him and rescheduled his original appointment on 7 November 2018. Because Defendant's phone had been disconnected, the record does not show whether Defendant received the probation officer's voicemail on 13 November 2018. Although the probation officer subsequently spoke with Defendant's father and brother, the State presented no evidence that either family member notified Defendant of the probation officer's desire to contact him. Here, as in *Melton*, although the probation officer "testified that [h]e attempted to call and visit [D]efendant, and left messages with [D]efendant's parent[] for [D]efendant to contact h[im], there was no showing that a message was given to [D]efendant or, more generally, that defendant knew [his probation officer] was attempting to contact h[im]." *Melton*, 258 N.C. App. at 139, 811 S.E.2d at 682. Moreover, nothing in the record shows where Defendant was living after he left the inn, why he left, what he was doing, or if he had any means of contacting his probation officer. The probation officer further testified that he suspected Defendant "may have just been having some issues" and that Defendant had "been doing fine" and had done everything he asked of him before failing to contact him prior to the deadline he gave to Defendant's father. In summary, there was no evidence Defendant was on notice his probation officer wanted to contact him or that he willfully avoided contact with his probation officer. Under these circumstances, there is simply insufficient evidence to establish absconding under N.C.G.S. § 15A-1343(b)(3a).

STATE V. BROWN

Opinion of the Court

III. Conclusion

For the foregoing reasons, we hold that there was insufficient evidence that Defendant violated N.C.G.S. § 15A-1343(b)(3a) and the trial court's judgments revoking Defendant's probation are reversed. We therefore do not address Defendant's second argument as to the clerical error in the court's written judgments.

REVERSED.

Judges DIETZ and ZACHARY concur.

Report per Rule 30(e).