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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-663

Filed: 18 February 2020

Gaston County, Nos. 15 CRS 64037, 18 CRS 2028

STATE OF NORTH CAROLINA

v.

TIMOTHY LAMAR DAVIS, Defendant.

Appeal by defendant from judgments entered 31 January 2019 by Judge Daniel A. Kuehnert in Gaston County Superior Court. Heard in the Court of Appeals 22 January 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele Goldman, for defendant-appellant.

YOUNG, Judge.

Where the State alleged that defendant committed and was convicted of a crime while on probation, and defendant admitted to this violation of probation, the trial court had subject matter jurisdiction to revoke defendant's probation. Where the trial court did not cite this violation as its basis for revoking probation, but

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competent evidence in the record supported the trial court's decision to revoke on this basis, we hold that the omission of this basis from the trial court's judgments was a clerical error. Moreover, because this competent evidence supported the trial court's decision, we hold that the trial court did not abuse its discretion in revoking probation. We affirm the revocation of probation, but remand for the correction of the clerical error.

I. Factual and Procedural Background

On 7 March 2016, Timothy Lamar Davis (defendant) was indicted by the Gaston County Grand Jury of possession of a firearm by a felon (case number 64037). He pleaded guilty, and the trial court sentenced him to a minimum of 12 months and a maximum of 24 months in the custody of the North Carolina Department of Adult Correction. The trial court suspended that sentence, and sentenced defendant to 18 months of supervised probation. On 14 March 2016, defendant was also indicted by the Cleveland County Grand Jury, this time on two charges of possession of a firearm by a felon (case numbers 55584 and 55585). Defendant pleaded guilty, and the trial court consolidated the two offenses for judgment, and sentenced him to a minimum of 17 and a maximum of 30 months in the custody of the North Carolina Department of Adult Correction. The court suspended that sentence, and sentenced defendant to 24 months of supervised probation.

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On 23 March 2018, probation violation reports were filed in case numbers 64037 and 55584. Additional violation reports were filed on 31 May 2018, 29 August 2018, 3 December 2018, and 14 December 2018. On 31 January 2019, the Gaston County Superior Court entered judgments revoking defendant's probation in case numbers 64037, 55584 and 55585.¹ From these judgments revoking probation, defendant appeals.

II. Subject Matter Jurisdiction

In his first argument, defendant contends that the trial court lacked subject matter jurisdiction to revoke his probation. We disagree.

A. Standard of Review

“[A]n appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review.” *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008).

B. Analysis

At the outset of the probation revocation hearing, the State laid out the five violation reports. In the first violation report, dated 23 March 2018, the probation officer alleged that defendant absconded, tested positive for marijuana, and failed to

¹ At this point in the proceedings below, case numbers 55584 and 55585, collectively, received the new case number 2028. From this point forward, we will refer to the two collectively by this new case number.

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report as directed; the State, at the hearing, struck the allegation of absconding. In the second violation report, dated 31 May 2018, the probation officer alleged that defendant refused to provide a urine sample and failed to obtain satisfactory employment; the State proceeded with this report as alleged. In the third violation report, dated 29 August 2018, the probation officer alleged that defendant failed to pay monies owed to the Clerk of Court, failed to pay supervision fees, and was convicted of misdemeanor resisting a public officer; the State proceeded with this report as alleged. In the fourth violation report, dated 3 December 2018, the probation officer alleged that defendant once again absconded, and once again failed to report; the State again struck the allegation of absconding. And in the fifth report, dated 14 December 2018, the probation officer alleged that defendant committed felony cocaine possession and sale offenses; the State struck this report entirely.

In case 64037, the trial court found, as a basis for revoking probation, that defendant violated paragraphs 1 and 2 of the 3 December 2018 probation violation report which alleged absconding and failure to report. In case 2028, the trial court found that defendant violated paragraph 1 of the 14 December 2014 violation report, alleging the commission of drug-related felonies, and paragraphs 1 and 2 of the 3 December 2018 probation violation report.

On appeal, defendant contends that the trial court could not revoke his probation based upon absconding or committing other felonies, as these allegations

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had been stricken, and could not revoke his probation based upon failure to report, as this allegation alone does not statutorily permit the revocation of probation. He therefore contends that the trial court lacked subject matter jurisdiction to revoke his probation.

Ordinarily, most violations of the ordinary conditions of probation result in a confinement in response to violation (CRV); probation cannot typically be revoked for most probation violations. *See* N.C. Gen. Stat. § 15A-1344(d2) (2019). The trial court may only revoke probation where a defendant commits a crime or willfully absconds, or has previously received two CRVs. N.C. Gen. Stat. § 15A-1344(a). Prior to revoking probation, unless waived by the probationer, the trial court must conduct a hearing on revocation. The State must, unless waived by the probationer, provide advance notice of the alleged violations. N.C. Gen. Stat. § 15A-1345(e) (2019). Where the State fails to provide adequate notice of alleged violations to the probationer, the trial court lacks jurisdiction to revoke probation. *State v. McCaster*, ___ N.C. App. ___, ___, 811 S.E.2d 211, 214 (2018).

In the instant case, the State did indeed allege bases for revocation of probation, namely absconding and the commission of crimes. However, at the outset of the hearing, the State struck those allegations. The State concedes, and we so hold, that the trial court did not have the authority to revoke probation based upon the stricken allegations in the probation reports.

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The State contends, however, that defendant's conviction for misdemeanor resisting a public officer, alleged in the 29 August 2018 violation report, was a valid basis for revocation of probation, and that the trial court's failure to include that as a basis in its judgments was merely a clerical error.

It is true that the 29 August 2018 violation report alleged that defendant violated the "Commit no criminal offense in any jurisdiction" condition of probation in that defendant was "convicted in Cleveland County District Court of misdemeanor resisting public officer." It is true also that this act, committing a criminal offense, is a basis for revocation of probation. N.C. Gen. Stat. § 15A-1344(a). And it is true that, as this allegation was cited initially as a basis for revocation, and was never stricken by the State, the trial court could have relied upon it to revoke defendant's probation.

The question, however, is whether the trial court could rely upon defendant's misdemeanor resisting public officer conviction as a basis for revoking defendant's probation where the trial court did not cite that basis in its judgments revoking probation. The State contends that the omission was merely a clerical error.

The State relies, *inter alia*, upon this Court's decision in *State v. Jones*, 225 N.C. App. 181, 736 S.E.2d 634 (2013). In *Jones*, the trial court, in its judgment revoking probation, indicated that its basis for revocation was that the defendant had previously received two CRVs. On appeal, the defendant contended, and this Court agreed, that there was no competent evidence in the record to support this finding.

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However, this Court noted that the record also contained a probation violation report “indicating that defendant had been convicted of a criminal offense, namely possession of 0.5 to 1.5 ounces of marijuana,” which had been considered by the trial court during the hearing. *Id.* at 185, 736 S.E.2d at 638. We noted that defendant admitted this violation during the hearing, and held that the trial court should have indicated that its basis for revocation was the commission of a criminal offense. We therefore held that “[t]he finding of such a willful violation by defendant is supported by competent evidence and supports the trial court’s decision to revoke defendant’s probation under the provisions of the Justice Reinvestment Act. Therefore, we must remand for correction of this clerical error in the judgment.” *Id.* at 186, 736 S.E.2d at 638.

Defendant attempts to distinguish the instant case from *Jones* by noting that here, unlike in *Jones*, the trial court never mentioned the misdemeanor conviction the State sought to use as a basis for revocation. Defendant suggests that the trial court’s revocation was based exclusively on absconding. However, examination of the transcript reveals that the State explicitly expressed its desire to revoke probation on the basis of the misdemeanor conviction, stating that it was “moving to revoke these cases of probation based upon convictions of resisting a public officer in Cleveland County[.]” When prompted, defendant admitted the allegation. The issue was clearly before the trial court, admitted by defendant, and a proper basis for revocation.

Notwithstanding defendant's arguments, therefore, it is clear that the trial court had a valid basis for revocation. As we held in *Jones*, we hold that the finding of a willful violation of probation, namely defendant's conviction of a criminal offense, was supported by competent evidence and in turn supported the trial court's decision to revoke defendant's probation. Accordingly, we hold that the omission of this basis from the trial court's written judgments was a clerical error, and remand for the correction of the clerical error in the judgments.

III. Sufficiency of the Evidence

In his second argument, defendant contends that the trial court's findings were not supported by sufficient evidence. We disagree.

A. Standard of Review

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) (citation and quotation marks omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the

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result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

B. Analysis

Defendant contends that, even if the trial court had subject matter jurisdiction to revoke his probation, it lacked a sufficient evidentiary basis to find that he absconded or committed new drug offenses. Defendant is correct. The State did not present evidence, nor did defendant admit, that defendant willfully engaged in any of the bases for revocation cited by the trial court in its judgments.

However, there was evidence of defendant’s conviction of misdemeanor resisting a public officer. Specifically, defendant himself admitted to the allegation. As we held above, this was a valid basis for revocation. Because this was a valid basis for revocation, and because the record contains evidence to support the allegation – namely, defendant’s admission – we hold that the trial court’s ultimate determination of revocation was supported by competent evidence in the record, and therefore that the trial court did not abuse its discretion in revoking defendant’s probation.

NO ERROR IN PART, REMANDED IN PART.

Judges ZACHARY and BERGER concur.

Report per Rule 30(e).