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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-379

Filed: 1 December 2020

McDowell County, No. 15 CRS 51148

STATE OF NORTH CAROLINA

v.

RICKY FRANK BURLESON

Appeal by Defendant from judgment entered 20 September 2019 by Judge Marvin P. Pope, Jr., in McDowell County Superior Court. Heard in the Court of Appeals 17 November 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Jason Rosser and Assistant District Attorney Kent W. Brown, for the State-Appellee.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Defendant-Appellant.*

COLLINS, Judge.

Defendant Ricky Frank Burleson appeals from entry of judgment revoking his probation and activating his sentence. Defendant argues that the trial court erred by revoking his probation at a revocation hearing that occurred after Defendant had completed his probation, without the trial court making a finding of good cause. We

reverse and remand for a determination of whether there was good cause to revoke Defendant's probation.

### **I. Procedural History**

After being indicted on several felony charges, Defendant agreed on 28 October 2015 to a global plea deal, which resulted in two consecutive prison sentences, followed by a third consecutive sentence that was suspended for 18 months of supervised probation to begin when Defendant was released from prison. On 11 December 2017, Defendant was released from prison, and his probation began. The probation was set to run from this date until 10 June 2019. Defendant's probation officer filed a probation violation report on 14 November 2018 and subsequent addenda on 18 January, 14 February, and 24 April 2019. On 7 January 2019, Defendant failed to appear in court for a pending probation violation hearing, for which Defendant was arrested on 8 February 2019.

A probation revocation hearing was held on 20 September 2019, during which Defendant admitted the probation violations alleged in the reports, waived formal presentation of evidence, and allowed for summarization. Based on Defendant's admission and the sworn violation reports, the trial court found that Defendant had willfully violated his probation. The trial court entered judgment revoking Defendant's probation and activating the sentence that had been suspended. The trial court indicated on the judgment form that Defendant waived a violation hearing

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and admitted having violated the conditions of his probation, as set forth in the violation reports dated 18 January, 14 February, and 24 April 2019.

On 9 June 2020, Defendant filed a pro se, handwritten notice of appeal with the McDowell County Clerk of Court, which Defendant signed and which stated:

Dear Clerk of Court of McDowell County,

My name is Ricky Burleson[.] I would like [to] enter a notice of appeal on my hearing on 9-20-19. Please make note of my notice.

As sworn by me Ricky Burleson on this 22nd day of September, 2019.

## **II. Grounds for Appellate Review**

We first address the sufficiency of Defendant's pro se notice of appeal. Defendant has failed to comply with the requirements for noticing an appeal in this Court, as prescribed by Rule 4 of the North Carolina Rules of Appellate Procedure. Defendant did not orally notice appeal at the revocation hearing, as is allowed in criminal cases, and failed to serve written notice on the State within 14 days after entry of judgment. *See* N.C. R. App. P. 4(a). Also, Defendant failed to indicate in his written notice of appeal the judgment being appealed from and the Court to which he appeals. *See* N.C. R. App. P. 4(b).

Defendant concedes that he has lost his right to appeal as a result of his failure to give proper notice under Rule 4, and he acknowledges that dismissal by this Court

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is proper. *See State v. Johnson*, 246 N.C. App. 132, 135, 782 S.E.2d 549, 552 (2016) (dismissing appeal from probation revocation where written notice of appeal failed to meet requirements of Rule 4).

However, Defendant has submitted a petition for writ of certiorari contemporaneously with his brief, wherein he asks this Court to review the judgment revoking his probation, because (1) his notice of appeal, although defective, shows his intent to appeal the trial court's judgment, and (2) his challenge to the judgment revoking probation is potentially meritorious.

It is within our discretion to issue a writ of certiorari to review a judgment when the right to appeal has been lost by failure to take timely action. N.C. R. App. P. 21(a)(1). In our discretion, we grant Defendant's petition for writ of certiorari to review the judgment revoking his probation, for the reasons Defendant has articulated. *See State v. Jackson*, 234 N.C. App. 80, 84, 758 S.E.2d 39, 42 (2014), *rev'd on other grounds*, 368 N.C. 75, 772 S.E.2d 847 (2015) (granting certiorari to review the merits of appeal where defendant's right to appeal had been lost by failure to take timely action, and State neither moved to dismiss appeal nor opposed review by writ of certiorari).

### **III. Discussion**

Defendant argues that the trial court erred by revoking his probation at a revocation hearing that occurred after Defendant had completed his probation, without the trial court making a finding of good cause.

While this Court generally reviews a judgment revoking probation and activating a sentence for abuse of discretion, *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014), “when a trial court’s determination relies on statutory interpretation, our review is *de novo* because those matters of statutory interpretation necessarily present questions of law,” *Johnson*, 246 N.C. App. at 134, 782 S.E.2d at 551-52 (citation omitted). “Under *de novo* review, the appellate court considers the matter anew and freely substitutes its own judgment for that of the lower court.” *State v. Hughes*, 265 N.C. App. 80, 82, 827 S.E.2d 318, 320 (2019) (citation omitted).

“When a sentence has been suspended and [the] defendant [has been] placed on probation on certain named conditions, the court may, *at any time during the period of probation*, require defendant to appear before it, inquire into alleged violations of the conditions, and, if found to be true, place the suspended sentence into effect.” *State v. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980) (citing N.C. Gen. Stat. § 15A-1344(d)) (other citations omitted).

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“But the State may not do so *after the expiration of the period of probation*[,] except as provided in [N.C. Gen. Stat. §] 15A-1344(f),” *id.*, which provides:

(f) Extension, Modification, or Revocation after Period of Probation. -- 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.

(4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under [N.C. Gen. Stat. §] 15A-1342(a).

N.C. Gen. Stat. § 15A-1344 (2019) (emphasis added).

“Subsection (f)(2) . . . makes clear that in order to revoke a defendant’s probation following the expiration of his probationary term, the trial court must first make a finding that the defendant did violate a condition of his probation. After making such a finding, trial courts are then 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.” *State v. Morgan*, 372 N.C. 609, 617, 831 S.E.2d 254, 259 (2019). The requirement to make a specific finding of good cause “is not satisfied simply because evidence existed in the

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record that *could* have supported such a finding.” *Id.* at 615, 831 S.E.2d at 258 (citation omitted).

In this case, Defendant’s probationary term ended on 10 June 2019. The trial court held the probation revocation hearing on 20 September 2019—over three months after the completion of the period of probation. Therefore, in order to revoke Defendant’s probation, the trial court was required to make a specific finding of good cause. *See id.* It is undisputed that the trial court’s 20 September 2019 judgment contained no findings referencing the existence of good cause to revoke Defendant’s probation, despite the expiration of his probationary term. Therefore, the trial court erred by revoking Defendant’s probation and activating his sentence without making such a finding. *See id.* at 617, 831 S.E.2d at 260.

Because we are unable to say that the record lacks evidence that would allow the trial court on remand to make a finding of good cause, we remand the case to the trial court for the purpose of determining whether good cause exists to revoke Defendant’s probation. *See id.* (remanding for finding of whether good cause existed to revoke probation despite expiration of probationary period, noting that appellate court was unable to say based on its review of the record that *no* evidence existed that would allow trial court on remand to make finding of good cause).

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If the trial court determines on remand that there is good cause to revoke Defendant's probation and activate his sentence, then the trial court shall make a specific finding of good cause in conformity with N.C. Gen. Stat. § 15A-1344(f)(3).

REVERSED AND REMANDED.

Judges DIETZ and ZACHARY concur.

Report per Rule 30(e).