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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 20-89

Filed: 31 December 2020

Rockingham County, No. 18 CRS 051322

STATE OF NORTH CAROLINA

v.

JARRETT D. NYKAMP, Defendant.

Appeal by Defendant from judgment entered 13 August 2019 by Judge Paul L. Jones in Superior Court, Rockingham County. Heard in the Court of Appeals 8 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Carolyn McLain, for the State.

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

McGEE, Judge.

Jarrett D. Nykamp (“Defendant”) appeals from judgment revoking his conditional discharge and entering a suspended sentence for the charge of obtaining property by false pretenses. On appeal, Defendant argues the trial court erred by failing to make specific findings that: (1) Defendant’s failure to pay the required

restitution and fees was willful and without lawful excuse; and (2) a term of probation longer than the statutory presumptive length was necessary. We vacate and remand.

I. Factual and Procedural History

Defendant, a licensed insurance agent, was arrested 7 June 2018 on the charge of obtaining property by false pretenses. The arrest warrant alleged that between 4 December 2017 and 17 January 2018, Defendant falsified and forged electronic signatures to group health contracts in order to defraud American Family Life Assurance Company. Defendant entered into a plea agreement on 9 August 2018 whereby he agreed to plead guilty pursuant to an *Alford* plea and would receive a conditional discharge under N.C. Gen. Stat. § 15A-1341(a4) (2017). The terms of the conditional discharge required Defendant to serve 12 months of supervised probation, perform 24 hours of community service, submit a DNA sample, and pay restitution in the amount of \$7,049.37. By the terms of his probation, beginning on 9 October 2018, Defendant was to pay \$865.00 per month towards restitution and fees.

Defendant's probation officer filed a violation report on 22 July 2018 charging Defendant with willfully violating his probation. At a compliance hearing held 13 August 2019, the probation officer testified Defendant was working and had only made one payment of \$100.00. Defendant testified he lost his income when his insurance carrier contracts were terminated in December of 2018 and his insurance license was terminated in May of 2019. Defendant further testified he had expected

to keep his insurance license with the plea agreement and thought he would receive commission payments sufficient to pay the restitution. He testified he had been working in catering for a local barbecue restaurant since February 2019, but was having a very difficult time financially.

The trial court stated at the end of the evidence: “[T]he Court finds Defendant has willfully violated the terms of his 90-96 [sic]. The Court is hereby praying judgment in this matter.” The court did not file a Disposition/Modification of Conditional Discharge form (AOC-CR-635), but entered judgment using a Judgment Suspending Sentence – Felony form, sentencing Defendant to a suspended sentence of four to fourteen months, placing Defendant on 36 months probation, and ordering payment of the restitution due. The filed judgment states Defendant denied the probation violation and contains a finding that the defendant failed to comply with the conditional discharge. The judgment contains no finding that the court considered Defendant’s evidence of his inability to pay, nor a written finding that Defendant’s failure to pay was willful and was the basis for revoking Defendant’s probation and conditional discharge. The judgment sentenced Defendant to community punishment and 36 months probation, but does not contain a finding that a longer period of probation than provided by N.C. Gen Stat. § 15A-1343.2(d) was necessary.

II. Analysis

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On appeal, Defendant contends the trial court erred in failing: (1) to make required written findings that the court considered Defendant's evidence of his inability to pay restitution and that the failure to pay was willful and unlawful, and (2) to make a required finding that sentencing Defendant to a term of 36 months probation was necessary under the circumstances. We agree.

We first note that Defendant failed to give proper notice of appeal. A defendant in a criminal case must either give oral notice of appeal at trial or file and serve a written notice of appeal within 14 days of entry of judgment. N.C. R. App. P. 4(a). In this case, Defendant failed to give oral notice of appeal at the end of the hearing on 13 August 2019. Instead, counsel for Defendant gave oral notice of appeal in open court one week later, at the 19 August 2019 session of Superior Court. The presiding judge at the 19 August session entered appellate entries noting Defendant's appeal to this Court. However, no written notice of appeal was ever filed or served. Therefore, Defendant's notice of appeal was insufficient for failure to comply with Rule 4(a). *State v. Johnson*, 246 N.C. App. 132, 134–35, 782 S.E.2d 549, 552 (2016).

In the event we deemed his notice of appeal to be insufficient, Defendant has also filed a petition for writ of certiorari. This Court has broad discretionary powers pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure to allow review “when the right to prosecute an appeal has been lost by failure to take timely action[.]” N.C. R. App. P. 21(a); *see also State v. Matthews*, 266 N.C. App. 558, 561–

63, 832 S.E.2d 261, 263–64 (2019) (granting petition for writ of certiorari to review judgment finding a willful violation of probation and revoking conditional discharge where defendant failed to give oral notice of appeal at hearing and failed to file and serve proper written notice of appeal, but the trial court did file an appellate entries form), *disc. review denied*, 373 N.C. 256, 835 S.E.2d 445 (2019); *Johnson*, 246 N.C. App. at 136, 782 S.E.2d at 552 (granting certiorari in revocation of probation case where the defendant’s written notice of appeal was inadequate and was not properly served). In our discretion, we allow Defendant’s petition and proceed to a review on the merits.

A. Finding of Willful Failure to Comply

Defendant first contends the trial court failed to make a required finding of fact that the court considered Defendant’s evidence of inability to pay the restitution and that Defendant’s failure to pay was a willful failure to comply with the terms of his probation. Defendant does not argue the trial court’s oral finding of a willful violation was an abuse of discretion or otherwise unsupported by the record. *See State v. Hill*, 132 N.C. App. 209, 211, 510 S.E.2d 413, 414 (1999) (“[A]ll that is required [in a probation violation hearing] is that the evidence be such as to reasonably satisfy the judge in the exercise of [their] sound discretion that the defendant has violated a valid condition [of probation]). Instead, Defendant only contends the final judgment lacked the required findings.

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In a probation violation hearing where, as in this case, a defendant presents evidence of the defendant's inability to pay, the evidence must be considered and evaluated by the trial court, and the trial court must make findings of fact clearly showing the court considered and evaluated the defendant's evidence. *State v. Floyd*, 213 N.C. App. 611, 615, 714 S.E.2d 447, 450 (2011). Due process in a final probation revocation hearing requires a written judgment containing findings of fact as to the evidence relied on and the reasons for revoking probation. *Johnson*, 246 N.C. App. at 136, 782 S.E.2d at 552. The trial court's failure to make these required findings in this case was error.

After hearing evidence from the probation officer that Defendant was working and had only paid \$100 towards restitution, hearing evidence from the Defendant that he lost his insurance license and was experiencing a very difficult time financially, and hearing arguments from counsel, the trial court found Defendant willfully violated his probation. As Defendant notes, the trial court did not file a Disposition/Modification of Conditional Discharge form (AOC-CR-635), which contains preprinted language indicating the court considered the record in the case, the evidence presented, and any statements of the State and the defendant. The AOC-CR-635 also contains a check box which can be checked to indicate the defendant's specified violation was willful and without valid excuse. If completed and filed in this case, this form would have constituted sufficient compliance with the

requirement for written findings. *See Johnson*, 246 N.C. App. at 136, 782 S.E.2d at 552 (“Findings of fact noted by the trial court on pre-printed, standard forms are sufficient to comply with the statutory and due process requirements” (citation omitted)). Because Defendant makes no argument that the trial court’s determination he willfully violated probation was an abuse of discretion or otherwise erroneous in light of the facts, the trial court’s error in failing to make the required written findings can be corrected by vacating the judgment and remanding this case to the trial court for entry of a Disposition/Modification of Conditional Discharge form and a new Judgment Suspending Sentence, or by entry of a new judgment containing the required findings. Alternatively, the trial court may, in its discretion, conduct a new hearing before making findings and entering judgment.

B. Finding of Longer Term of Probation

Defendant next contends the trial court erred by sentencing him to a term of probation longer than the statutory presumptive maximum without making a finding that the longer term was necessary. We agree.

Unless the trial court makes specific findings that a shorter or longer period of probation is necessary, the length of probation for felons sentenced to community punishment shall be no less than 12 and no more than 30 months; for felons sentenced to intermediate punishment, the length of probation shall be no less than 18 and no more than 36 months. N.C. Gen. Stat. §§ 15A-1343.2(d)(3), (4) (2017). In this case,

the judgment form indicates Defendant was sentenced to community punishment. However, Defendant was sentenced to a term of 36 months probation. Although the judgment form has a check box to indicate that a longer term than specified by N.C. Gen. Stat. § 15A-1343.2(d) is necessary, the box was not checked. Therefore, the sentence of 36 months probation is longer than allowed by statute and, on its face, erroneous.

It is possible the trial court meant for the probation to be for a term of 36 months and either incorrectly marked the box for community punishment when an intermediate punishment was intended, or inadvertently failed to mark the box finding a longer period of probation was necessary. Such errors would be clerical errors the trial court can correct on remand. *See State v. Jones*, 225 N.C. App. 181, 185–86, 736 S.E.2d 634, 637–38 (2013) (holding “[a] clerical error is an error resulting from a minor mistake or inadvertence, . . . not from judicial reasoning or determination[;]” which, when discovered, makes it “appropriate to remand the case to the trial court for correction” (citations and quotation marks omitted)). Otherwise, without a finding that a deviation from the period prescribed by N.C. Gen. Stat. §§ 15A-1343.2(d)(3), (4) is necessary, the length of probation is erroneous for a community punishment and on remand the trial court must enter a term of probation of no more than 30 months.

III. Conclusion

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We order the judgment in this case be vacated and remanded to the trial court for entry of judgment making appropriate findings of fact consistent with this opinion.

VACATED AND REMANDED.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).