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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-812

No. COA22-400

Filed 6 December 2022

Rutherford County, Nos. 11CRS052476, 11CRS053057-63

STATE OF NORTH CAROLINA

v.

ROBERT ACE LEE ALLEN

Appeal by Defendant from judgments entered 6 August 2021 by Judge J. Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 19 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew W. Bream, for the State-Appellee.

Jason Christopher Yoder for Defendant-Appellant.

COLLINS, Judge.

¶ 1

Defendant Robert Ace Lee Allen appeals from judgments entered upon the revocation of his probation. Defense counsel filed an *Anders* brief asking this Court to conduct an independent review of the proceedings to determine whether any non-frivolous justiciable issue exists to support Defendant's appeal. Defendant filed written arguments on his own behalf. After careful review, we find no non-frivolous

justiciable issue and dismiss the appeal.

I. Procedural History

¶ 2 Defendant pled guilty on 15 November 2013 in file numbers 11CRS052476, 11CRS052482, 11CRS053057-63, 12CRS00998, and 11CRS053065. Defendant’s 60-month term of probation in 11CRS052476 and 11CRS053057-63 commenced on 1 May 2019, after he completed his active terms of imprisonment. On 18 October 2019, 3 February 2020, 10 November 2020, and 11 December 2020, the State filed violation reports in 11CRS052476 and 11CRS053057-63. On 6 August 2021, the trial court revoked Defendant’s probation in these cases. Defendant gave oral notice of appeal.

II. Factual Background

¶ 3 At the revocation hearing, Michael Hardin testified that he was lying in bed when he heard the doorbell ring. About 15 to 20 minutes later, he looked out the back door and saw an unknown white car. He got his handgun and went to investigate. He saw Defendant at a metal shed, bent over with a screwdriver jiggling the lock. When he asked Defendant what he was doing, Defendant shouted, “You have my dog locked in your building.” Hardin told Defendant to “put the burglar tools down there and remove his gloves.” Defendant left three tools and a pair of gloves. As Defendant was getting ready to leave the property, Hardin wrote down his license tag and called the Sheriff’s Department.

¶ 4 Defendant’s probation officer testified that she began supervising him on 21

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August 2019. On 22 October 2020, she attempted to visit Defendant at his home. Nobody was home and she left reporting instructions on the door. He did not report as instructed.

¶ 5 On 29 October, she tried calling him at two different telephone numbers. One of the voice mailboxes was full and the other was not in service. On 3 November, she attempted to make another home contact and left reporting instructions again. He did not report as instructed.

¶ 6 On 5 November, she attempted another home visit, leaving reporting instructions. Defendant did not report.

¶ 7 On 9 November, she checked various online resources to see if Defendant was incarcerated; he was not. The same day, she saw Defendant at Goodwill. She told him to report the next morning at 10:30 a.m. The next day, he did not report as instructed.

¶ 8 On 12, 14, 18, 19, 22 and 23 November, she attempted home visits and left reporting instructions. He did not report. She attempted to call him on 23 November. Additional contacts were attempted on 30 November and 1 December. On 2 December, Defendant did not appear for a court date and a warrant was issued for failure to appear.

¶ 9 On 3, 4, and 9 December, Defendant's probation officer checked online to see if he was incarcerated. On 3 December, she made another attempt at a home contact.

On 8 December 2020, Defendant contacted an officer and stated on a voicemail that he had no intention of turning himself in before Christmas, that he knew he was going back to prison, and that he wanted to stay out for the holiday. On 20 December 2020, he was picked up and arrested.

¶ 10 Defendant took the stand in his own defense. He testified that he was doing tree work the day he was at Hardin's home and accidentally went to the wrong address. When he was stopped by Hardin, he had two screwdrivers and a chainsaw file in his back pocket that he used for tree cutting. He never went near the shed. Hardin ordered him to say, "Donald Trump 2020."

¶ 11 After the hearing, the trial court found to its reasonable satisfaction that Defendant (1) committed the criminal offense of attempted breaking and entering and possession of burglary tools and (2) willfully avoided supervision and therefore absconded. The trial court found that Defendant admitted to other non-revocable offenses and that the State failed to prosecute the remaining allegations. The trial court continued the disposition until the next day.

¶ 12 The next day, the trial court sua sponte modified two judgments in Defendant's case and changed the order of the sentences.

III. Discussion

¶ 13 Defense counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), and *State v.*

Velasquez-Cardenas, 259 N.C. App. 211, 225, 815 S.E.2d 9, 18 (2018) (recognizing *Anders* review for appeals of the denial of a defendant’s motion for post-conviction DNA testing, pursuant to N.C. Gen. Stat. § 15A-270.1), explaining that he was “unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal.” In our discretion, we will conduct a review of the proceedings, consistent with *Anders* and *Kinch*.

¶ 14 The record discloses that defense counsel has complied with the requirements of *Anders* and *Kinch* by advising Defendant of his right to file his own supplemental arguments and providing him with defense counsel’s brief, the trial transcript, the record on appeal, and the mailing address of this Court.

¶ 15 To fulfill his obligation to refer the Court to “anything in the record that might arguably support the appeal,” *Anders*, 386 U.S. at 744, defense counsel raised the following issues:

This Court should determine if the trial court erred or abused its discretion in determining that [Defendant] committed a criminal offense while on probation.

.....

This Court should determine if the trial court erred or abused its discretion in determining that [Defendant] absconded from probation.

¶ 16 Defendant filed written arguments with this Court on 13 September 2022. Defendant appended various pictures and documents to his written arguments “to

point out the abuse of discretion that the courts used to violate my probation” (capitalization omitted, ellipses in original). Defendant explained that, although he has an extensive record, which he regrets, he is not a violent offender, is soon to be 53 years old, and has heart disease. He posits that it is an abuse of discretion to revoke his probation, given the high cost to taxpayers of treating his heart disease while he is imprisoned.

¶ 17 Defendant further argues that revoking his probation for an attempted crime is an abuse of discretion and that he did everything he could to make his probation appointments, but it was never enough. Defendant asserts that he did not commit a new crime and that he did not abscond, and that the transcript reveals that revocation of his probation was an abuse of discretion.

¶ 18 In accordance with our duty under *Anders*, we have conducted “a full examination of all the proceedings[,]” including a “review [of] the legal points appearing in the record, transcript, and briefs, not for the purpose of determining their merits (if any) but to determine whether they are wholly frivolous.” *Kinch*, 314 N.C. at 102-03, 331 S.E.2d at 667. Upon our examination of all the proceedings, we conclude that the appeal is wholly frivolous, and we dismiss the appeal. *See id.* at 106, 331 S.E.2d at 669.

DISMISSED.

Judges DILLON and WOOD concur.

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Report per Rule 30(e).