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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-171

Filed 3 October 2023

Pitt County, Nos. 16CRS54112, 16CRS54199

STATE OF NORTH CAROLINA

v.

MARVIN MELLETT RAMIREZ, Defendant.

Appeal by defendant from judgment entered 1 September 2022 by Judge Marvin K. Blount III in Pitt County Superior Court. Heard in the Court of Appeals 6 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica B. Helms, for the State-appellee.

Jackie Willingham for defendant-appellant.

GORE, Judge.

Marvin Ramirez (“defendant”) appeals from the trial court’s Judgment and Commitment Upon Revocation of Probation. This Court has jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1347(a). Upon review, we discern no abuse of discretion in the trial court’s decision to revoke defendant’s probation, but remand for the correction of clerical errors noted herein.

I.

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On 11 February 2020, defendant pled guilty to attempted trafficking heroin, possession of a firearm by a felon, and two counts of common law robbery. He was sentenced to 14 to 26 months imprisonment and 17 to 30 months imprisonment, and both sentences were suspended for 36 months of supervised probation. Defendant was ordered to pay \$22,470.31 (\$19,937.81 in restitution, \$372.50 in costs, \$2,100.00 in attorney's fees, \$60.00 in miscellaneous charges) and an undetermined amount of probation supervision fees.

A previous probation violation hearing was held on 2 February 2021. At that hearing, the trial court ordered defendant pay a minimum of \$50 per month, be placed on electronic house arrest for six months, and serve 90 days as a Confinement in Response to Violation ("CRV") in the Department of Adult Corrections. A second previous probation violation hearing was held on 9 September 2021. At that hearing, the trial court ordered defendant serve 90 days imprisonment as a CRV in the Department of Adult Corrections.

On 10 June 2022, Probation Officer Zachery Swehla filed violation reports alleging defendant: (i) had paid nothing towards the costs; and (ii) had committed a new criminal offense (larceny). On the same day, Officer Swehla filed a violation report alleging defendant: (i) had paid nothing towards the restitution in the case; (ii) had failed to pay any money towards his probation fees, and (iii) had committed a new criminal offense (larceny). The third alleged violation was marked out with a note that the State was not going to proceed on that charge. On 23 August 2022,

Officer Swehla filed new violation reports in both cases alleging defendant committed a new criminal offense (possession of drug paraphernalia, resisting a public officer, and possession of marijuana paraphernalia) on 17 August 2022.

These violations came before the trial court for a hearing on 1 September 2022. Defendant was arraigned on the failure to pay probation supervision fees. Defendant admitted to not having paid any of his \$372.50 in probation supervision fees or \$650.00 in arrears.

Probation Officer Swehla testified defendant had not paid any money toward his court costs, restitution, or probation supervision fees. He stated defendant missed court on 11 August 2022, where an order for defendant's arrest was issued. Defense counsel argued defendant had "worked on and off" throughout the period of supervision, but "work unfortunately is not steady for him." Defense counsel also noted that, at the time of the hearing, defendant had a four-month-old child and recently had his electricity turned off due to non-payment.

After hearing the evidence presented, and the statements made on behalf of the State and defendant, the trial court ruled:

All right. Madam Clerk, the Court upon review of the files and upon the admitted violation, although technical, and given the-that defendant has received two prior CRVs, the Court will order that the defendant's or probationer's probation is revoked, and the underlying sentences are invoked accordingly. All right.

On the written Judgment and Commitment, the trial court found that

defendant violated each of the specified conditions of his probation as alleged in the violation reports. The trial court revoked defendant's probation "for the willful violation of the condition(s) that [defendant] not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a)." The Judgment further stated that "[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence." The trial court ordered that the restitution be a civil judgment and struck the outstanding jail fees.

Defendant was committed to the Department of Adult Corrections for 17 to 30 months and 14 to 26 months, to be served consecutively. Defendant gave oral notice of appeal in open court on 1 September 2022.

II.

The issue presented is whether the trial court erred by revoking defendant's probation.

A.

Under the Justice Reinvestment Act, a trial court may only revoke probation where the probationer: (i) commits a criminal offense in any jurisdiction, (ii) absconds supervision; or (iii) violates any condition of probation after serving two prior periods of confinement in response to a violation of probation. N.C. Gen. Stat. § 15A-1344(a) (2022).

"Before revoking or extending probation, the court must, unless the

probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings.” N.C. Gen. Stat. § 15A-1345(e) (2022). “Formal rules of evidence do not apply at the hearing” *Id.* “A probation revocation proceeding is not a formal criminal prosecution, and probationers thus have more limited due process rights.” *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (cleaned up). “All that is required in a hearing of this character is 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.” *Id.* (cleaned up).

Thus, we review a trial court’s decision to revoke probation for abuse of discretion. *Id.* Under this standard, we must determine whether the trial court’s “decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.” *State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 732 (1992) (cleaned up).

B.

Defendant raises two arguments for this Court’s consideration. First, defendant asserts the trial court erred by finding that he willfully violated the conditions of his probation by committing any criminal offense, section 15A-1343(b)(1), or absconding from supervision, section 15A-1343(b)(3a). Defendant contends he was not arraigned on those violations, that he did not waive a hearing on those violations, and that there was no competent evidence presented at the

hearing to support the finding. In the alternative, defendant argues if the trial court intended to revoke probation for the failure to pay his supervision fee, the trial court abused its discretion by failing to consider evidence that his failure was not willful.

Having reviewed the record and transcripts, together with the arguments of counsel, we discern no abuse of discretion in the trial court's decision to revoke defendant's probation. However, we also determine that the trial court "checked" the incorrect boxes on its written Judgment and Commitment. These omissions are clerical errors that warrant remand for entry of a corrected judgment. *See State v. Lee*, 232 N.C. App. 256, 261, 753 S.E.2d 721, 724 (2014) (holding that where "the record clearly supports the grounds, reasoning, and authority for the trial court's order of revocation of probation, . . . any error in failing to check a box on the revocation form is clerical only."), *overruled in part by State v. Moore*, 370 N.C. 338, 807 S.E.2d 550 (2017); *State v. Jones*, 225 N.C. App. 181, 185, 736 S.E.2d 634, 637-38 (2013) (concluding that the trial court made a clerical error when it failed to check the right boxes on the AOC form to revoke probation); *see also State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation omitted) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'").

III.

At the outset of the hearing, defendant expressly admitted to violating a

regular condition of his probation by failing to make any payment on the amount due in probation supervision fees. *See* § 15A-1343(b)(6), (c1). Defendant admitted to a violation of a valid condition of his probation, and evidence adduced at the hearing showed defendant has been subject to two prior CRVs. Therefore, defendant's probation is subject to revocation. *See* § 15A-1344(d2). This determination is reflected in the trial court's oral ruling issued from the bench, "*upon the review of the files and upon the admitted violation, although technical, and given . . . defendant has received two prior CRVs, the [c]ourt will order that the defendant's or probationer's probation is revoked, and the underlying sentences are invoked accordingly.*"

When, as in this case, "the violation alleged is the nonpayment of fine or costs, the issues and procedures at the hearing include those specified in [section] 15A-1364 for response to nonpayment of fine." § 15A-1345(e). Section 15A-1364 provides a defendant must be given the opportunity to show that his "inability to comply and that his nonpayment was not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment" § 15A-1364(d). "[O]nce the State has presented competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms." *State v. Talbert*, 221 N.C. App. 650, 652, 727 S.E.2d 908, 910-11 (2012) (citation omitted).

When a defendant has offered "evidence as to his ability or inability to make the required payments, . . . the defendant is entitled to have the trial judge make

findings of fact which will clearly show that he has considered and evaluated that evidence.” *State v. Smith*, 43 N.C. App. 727, 732, 259 S.E.2d 805, 808 (1979). However, when a defendant “offers no such evidence, then the evidence which establishes that defendant has failed to make payments as required by the terms of the judgment is sufficient within itself to justify a finding by the judge that defendant’s failure to comply was without lawful excuse.” *State v. Williamson*, 61 N.C. App. 531, 534, 301 S.E.2d 423, 426 (1983) (citation omitted).

In considering defendant’s evidence, our decision in *State v. Jones*, 78 N.C. App. 507, 337 S.E.2d 195 (1985), is of note. In *Jones*, “the only conceivable evidence offered by the defendant as to his inability to pay is his unsworn statement to the trial court that ‘I’ve just been out of work, sir.’” *Jones*, 78 N.C. App. at 509, 337 S.E.2d at 197. We held, “assuming without deciding, that [the] defendant’s unsworn statement to the trial court that ‘I’ve just been out of work’ constituted presenting evidence of his inability to pay, the trial court’s finding ‘from evidence presented’ was sufficient to show that the trial court considered and evaluated defendant’s evidence.” *Id.* at 510, 337 S.E.2d at 197 (cleaned up).

In this case, the only “evidence” defendant presented concerning willfulness, without lawful excuse, or inability to pay, was by argument of counsel. The burden is on defendant to demonstrate good faith inability to comply with the terms of his probation, and it is “axiomatic that the arguments of counsel are not evidence.” *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996).

Following Probation Officer Swehla's testimony, defense counsel requested the trial court "consider something short of revocation of all these offenses." He asserted defendant "has worked on and off," but "work unfortunately is not steady for him." He informed the court that defendant lives with his girlfriend and four-month-old child, and that their electricity was recently turned off due to nonpayment. Defendant argues the trial court failed to consider this evidence or make appropriate findings concerning whether his failure to pay was willful or inexcusable.

If, as in *Jones*, we assume without deciding that defense counsel's remarks constitute presenting evidence of inability to pay, defendant's evidence did not tend "to show that he was unavoidably without the means to make payments as required by his probationary judgment." *State v. Young*, 21 N.C. App. 316, 321, 204 S.E.2d 185, 188 (1974). Defendant's evidence bears less resemblance to legal justification than it does to an appeal for discretion, forbearance, and mercy.

However, unlike in *Jones*, we are not presented with similar findings of fact in the trial court's written Judgment and Commitment. While it is clear from the transcript that there was a hearing on this matter, the trial court failed to check the box in its written Judgment and Commitment indicating it reached its determination "from the evidence presented." Instead, the trial court checked the box for finding 2b, which states, "the defendant waived a violation hearing and admitted that he/she violated each of the conditions of his/her probation as set forth below."

Further, the trial court checked the box for finding of fact 5a, indicating it "may

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revoke defendant's probation . . . for the willful violation of the condition(s) that he/she not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a) . . . ,” but the State presented no evidence of a criminal offense or absconding at the hearing, and the trial court did not discuss or rule upon it. *See State v. Graham*, 282 N.C. App. 158, 160, 869 S.E.2d 776, 778 (2022) (concluding that “[t]here was no evidence beyond the fact that defendant was arrested that tended to establish he committed a crime.”). While the record clearly supports the grounds, reasoning, and authority for the trial court to revoke defendant's probation based on failure to pay supervision fees and two prior CRVs, the trial court failed to check the box for finding of fact 5b, which states defendant's probation is subject to revocation “because the defendant twice previously has been confined in response to violation under G.S. 15A-1344(d2).”

IV.

Upon review of the record, we discern no abuse of discretion in the trial court's decision to revoke defendant's probation. However, due to failure to “check the correct boxes,” the trial court's findings are inadequate to support its decision. Accordingly, we remand for the trial court to correct the clerical errors in the written Judgment and Commitment.

AFFIRMED IN PART, AND REMANDED.

Judges TYSON and CARPENTER concur.

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Report per Rule 30(e).