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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-910

Filed 7 May 2024

Cabarrus County, No. 20 CRS 53548

STATE OF NORTH CAROLINA

v.

RYAN JEFFREY HILL

Appeal by defendant from judgment entered 10 March 2023 by Judge Martin B. McGee in Superior Court, Cabarrus County. Heard in the Court of Appeals 17 April 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Ryan C. Zellar, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

ARROWOOD, Judge.

Ryan Jeffrey Hill ("defendant") appeals from the trial court's judgment entered 10 March 2023. For the following reasons, we remand for further findings pursuant to N.C.G.S. § 15A-1345(e) and to correct a clerical error in the judgment.

I. Background

Defendant was indicted on charges of attempted first-degree arson and burning personal property. Defendant pled guilty to both charges pursuant to a plea agreement, and the trial court sentenced him to twenty-two months to thirty-nine months' imprisonment on 3 December 2020. However, the trial court suspended the sentence and placed defendant on supervised probation for sixty months.

Probation Officer Cheryl Young ("PO Young") filed an initial probation violation report against defendant on 6 January 2021. The report alleged that defendant had left the state without obtaining permission from his supervising officer and had also been charged with a criminal offense. PO Young filed addenda to the report on 22 June 2021, 22 July 2021, 21 February 2022, and 7 March 2022, alleging additional violations.[1]

On 22 August 2022, defendant was in the Cabarrus County courthouse for a hearing involving an alleged probation violation. Probation Officer Tyree Simmons ("PO Simmons"), who was serving as defendant's probation officer, texted defendant stating, "Mr. Hill you know you have probation court today? And I haven't heard

[1] According to the 22 June 2021 addendum, PO Young alleged defendant violated his probation by failing to report to his supervising officer after being unsuccessfully discharged from McLeod Residential Program; by being unsuccessfully discharged from McLeod; and by being charged with misuse of the 911 system, assault on a female, violating a domestic violence protective order, and injury to personal property. The 22 July 2021 addendum alleged defendant violated his probation by failing to pay the Clerk of Superior Court as directed by his probation officer and by failing to pay the monthly supervision fee and for being charged with communicating threats and stalking. The 21 February 2022 addendum alleged defendant violated his probation by being charged with larceny and habitual misdemeanor assault. Lastly, the 7 March 2022 addendum alleged defendant violated his probation by leaving the county without probation officer approval and being charged with larceny.

from your lawyer and DA need proof that you are at a recovery house?" According to defendant, he provided PO Simmons that day at the courthouse with a letter from Sober Living America ("SLA") regarding his attendance in SLA's rehabilitation program.[2] After presenting the letter, defendant testified that PO Simmons told him he was "free to go."[3]

On 30 September 2022, Probation Officer Queen ("PO Queen), an officer assigned to the probation department's absconding unit called the "Ace Team," contacted defendant via text message. The text message exchange between PO Queen and defendant included the following:

> **PO Queen**: Good Morning, [defendant], this is Officer Queen with Probation/Parole and I need for you to contact me back before you're listed as an absconder and will [be] doing up to 39 months in prison.
>
> **Defendant**: Officer [Q]ueen I'm at work right now, sorry [I] missed your call. But, I am still participating in the Sober Living of America program, which is where [I] currently live at which is in Charlotte. I had no clue that they switched my P.O. which is why nobody has seen me or heard from me. This is the address to the Sober Living of America program where I live . . . . Can I call you on my break?

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[2] The letter defendant alleged he provided PO Simmons, which was entered into evidence, stated that "[defendant] has lived at Sober Living America . . . from 07/23/2022 [t]hrough current" and that defendant "is a model guest and inspiration amongst fellow peers, as well as a dedicated and trustworthy individual." The letter was dated 3 August 2022.

[3] Specifically, defendant testified, "I left court because that day [PO] Simmons said the only reason I need to be here is to present a notice from the director of Sober Living America that I was in fact in an intensive rehab and work related program, so I came here to give him that documentation. Upon his direction, he told me I was free to go."

> **PO Queen**: Thank you for letting me know where you're staying. Give me a call on your break.

Defendant and PO Queen arranged for defendant "to turn himself in" the following week. On 7 October 2022, defendant texted PO Queen stating that he would arrive to turn himself in at 3:00 p.m. that day. PO Queen asked defendant whether they were meeting in Salisbury or Concord, and defendant replied, "Concord." According to PO Queen's narrative, PO Queen called and texted defendant between 3:00 and 4:00 p.m. but defendant did not answer. PO Queen's narrative also alleged that he texted defendant on 11 October 2022, advising defendant that he had "until Thursday, 10/13/2022, to turn himself in or he would be listed as an absconder."

Conversely, defendant testified that he—accompanied by the director of SLA—traveled to the probation department building in Concord "on three separate occasions to meet" PO Queen during the week of 7 October 2022. However, according to defendant, despite waiting in the building for several hours, PO Queen was not present.[4]

On 11 October 2022, PO Simmons filed an addendum to the probation violation report, alleging the following:

> Regular Condition of Probation: General Statute 15A-1343(b)(3a) "Not to abscond, by willfully avoiding

[4] Defendant further testified, "It was just a matter of miscommunication because I willingly came and presented myself. I don't know where he was at."

> supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, on 08/22/2022, the defendant left the courtroom after speaking with his attorney. The defendant left due to PPO and State asking for revocation due to the conviction on one of his pending charges on his violations report. The defendant has failed to make his whereabouts known and making himself unavailable for supervision and thereby absconding. As of the date of this report, the defendant's whereabouts are unknown and all efforts to locate the defendant have been unsuccessful.

Defendant testified that he did not know the "Ace Team" was looking for him until his mother-in-law told him on 16 January 2023. Defendant told his mother-in-law that he was at his SLA residence, and probation officers arrived there and arrested him on 17 January 2023.

A probation violation hearing took place on 8 March 2023. Probation Officer Jennifer Walker ("PO Walker") testified as the State's sole witness. As of the 8 March 2023 hearing date, PO Walker had never met or spoken to defendant and had received defendant's case following his arrest. PO Walker's entire testimony derived "from internal notes and narratives from previous probation officers"—specifically, PO Young, PO Simmons, and PO Queen. During PO Walker's testimony on re-direct, defense counsel objected and moved to dismiss as follows:

> I would submit that the defendant has the right to confront his accuser, and in this case, his accuser would be his probation officers, that would either be [PO] Young or it would be [PO] Simmons. Neither one of them have testified[.]
>
> . . . .

> Your Honor, I would also submit that even at a probation violation hearing, the statute indicates that the State cannot exclusively rely on hearsay evidence. Hearsay evidence is admissible if it is competent evidence which I didn't object at the time because I believe the Court likely would have found that it was competent evidence based on it coming from the probation office's file and I understand that it would likely have been admitted.
>
> That being said, everything that [PO Walker] testified to is hearsay. She was not assigned to the case until after he had already been arrested. The folks that did the actual work on the case, the Ace Team, his two prior probation officers, those are the individuals that have firsthand knowledge, and to [PO Walker's] credit, upon cross examination, I asked her if she had firsthand knowledge of any of these things, and her testimony was that she does not.
>
> [PO Walker has] never spoken to [defendant] before. She's never been his actual supervising officer. She did not go out to his house to verify that he lived there. She didn't go to his place of employment. She didn't talk to his family or his friends to determine if his location could be ascertained . . . .
>
> So, at this point, I would submit that the State has not presented his accuser. He has the right to confront his accuser and they have only presented hearsay evidence which, although admissible, cannot be the exclusive basis for a revocation.

The trial court denied defense counsel's motion. At the close of all evidence, defense counsel renewed the objection that defendant had a right to confront his accuser and that the only evidence submitted was hearsay. The trial court did not respond to defense counsel's renewed objection and, in its ruling on the matter, orally found the following:

> I'm reasonably satisfied based on the evidence before the Court that you have willfully violated your probation as set forth in the violation report with the exception of additional convictions.
>
> He does have one conviction but it is a Class three. I would find based on all the evidence before the Court, *that you have indeed absconded and in my discretion I'm going to order that your probation be revoked* and your sentence be put into effect. (emphasis added).

Upon defendant's request and with the State's consent, the trial court reopened the probation violation hearing to receive additional evidence the following day. PO Walker testified as the State's sole witness, and her testimony was again drawn from the narratives of defendant's previous probation officers. At the close of evidence, defense counsel renewed the arguments from the previous hearing.

The trial court ordered that defendant's probation be revoked. In ruling, the trial court found "that the grounds are sufficient to find . . . that he did abscond and as a result of that, I'm going to order that his probation be revoked and his sentence be put into effect." The trial court further found that "the other violations . . . [were] unchanged as well." Defendant gave notice of appeal in open court. In its 10 March 2023 judgment upon revocation of probation, the trial court checked the box that "[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence."

II. <u>Discussion</u>

Defendant contends that the trial court violated defendant's right to

confrontation by overruling his objections and revoking his probation based solely on hearsay evidence. In the alternative, defendant argues that this Court should remand the case back to the trial court to determine whether good cause existed for disallowing confrontation. Defendant also contends that the trial court erred by finding that defendant willfully violated conditions of his probation and revoking his probation, including its "erroneous findings regarding the six non-revocable violations." We take each argument in turn.

A. Confrontation and Finding of Good Cause

"Pursuant to N.C.G.S. § 15A-1345(e), a defendant in a probation revocation hearing 'may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation.' " *State v. Jones*, 382 N.C. 267, 277 (2022) (quoting N.C.G.S. § 15A-1345(e) (2023)). In *Jones*, our Supreme Court modified and affirmed this Court's opinion, concluding that arguments pursuant to § 15A-1345(e) are preserved for appeal when "a defendant lodges a proper objection or the trial court does not permit confrontation and fails to make a finding of good cause." *Id.*

The *Jones* Court further concluded that "[a]bsent confrontation-related requests or objections by defendant, the condition requiring a finding of good cause has not been satisfied." *Id.* In other words, the trial court is not necessarily required to expressly find good cause if the defendant fails to make confrontation-related requests or objections. *See id.* But if the defendant properly objects, a trial court may

be required to do so.[5] *See id*; *see also State v. Morgan*, 372 N.C. 609, 616 (2019) ("[W]hen the General Assembly has inserted the phrase 'the court finds' in a statute setting out the exclusive circumstances under which a defendant's probation may be revoked, the specific finding described in the statute must actually be made by the trial court and such a finding cannot simply be inferred from the record." (citations omitted)).

For example, in *State v. Hemingway*, the defendant objected to admissible hearsay evidence on the grounds that the witness was not present to confront. 278 N.C. App. 538, 550 (2021). In response to the objection, the trial court stated, "[U]nderstanding the nature of these proceedings, the [trial court] overrules the objection." *Id.* at 551. This Court explained that such a response indicated that the trial court failed to "make specific findings that denying [d]efendant the right to confront the [witness] was because of good cause" and remanded for such findings pursuant to N.C.G.S. § 15A-1345(e). *Id.* at 552.

Conversely, in *State v. Singletary*, this Court held that "the trial court did not prejudicially err by not making an explicit finding of good cause where sufficient evidence and testimony supported the trial court's finding that defendant had

[5] On appeal, defendant contends that the holding in *Jones* requires a finding of good cause whenever a defendant makes confrontation-related requests or objections. But *Jones* does not go that far. Rather, *Jones* stands for the proposition that confrontation-related requests or objections are necessary but not necessarily sufficient to satisfy the condition requiring a finding of good cause. *Jones*, 382 N.C. at 277.

violated her probation." 290 N.C. App. 540, 551 (2023) (cleaned up). Specifically, the *Singletary* Court pointed to ample evidence that supported defendant's probation violation, including testimony from one of the probation officers who had worked the defendant's case and filed a violation report, arrest warrants, incriminating security footage images, and independent testimony of defendant's admission to the violation. *Id.* at 549. Although the *Singletary* Court expressly recognized the trial court's mandate "to find good cause before denying a defendant's request to cross-examine an absent witness[,]" it reasoned that any testimony from the absent witness would have been "merely extraneous in light of other sufficient evidence" supporting the probation violation.[6] *Id.* (citing *State v. Terry*, 149 N.C. App. 434 (2002)).

Here, defendant objected to PO Walker's testimony in that "the State ha[d] not presented his accuser[s,]" who defendant "ha[d] the right to confront[.]" Although defendant specifically named PO Young and PO Simmons as accusers he was unable to confront, he also referred to PO Queen in his objection.[7] Defendant further renewed the objection concerning confrontation at the close of evidence, and then again during the reopened hearing on 9 March 2023.

Defendant thus sufficiently preserved his confrontation argument under

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[6] The *Singletary* Court further reasoned that the details on which defendant wished to cross-examine the absent witness concerned a probation violation that was not the particular violation the trial court had based its revocation on. *Id.* at 550.

[7] Defendant referred to PO Queen when mentioning the Ace Team member that had worked his case and had firsthand knowledge.

Jones. And like in *Hemingway*, the trial court failed to make any findings—express or implied—whether good cause existed in its decision to disallow confrontation. Further, the trial court did not have nearly the level of evidence as the trial court in *Singletary*—e.g., incriminating images, arrest warrant details, testimony about defendant previously admitting to absconding, nor testimony from one of the probation officers who had worked defendant's case before he was arrested. Defendant's testimony also included relevant details that either were not covered in the absent probation officers' narrative summaries or that contradicted essential parts of those summaries. Thus, unlike in *Singletary*, it cannot be said that defendant's cross-examination of the absent probation officers would be "extraneous" in the face of other evidence. *See Singletary*, 290 N.C. App. at 549.

The State contends that defendant waived his right to confrontation under *State v. Jones*, 269 N.C. App. 440, 444 (2020), *aff'd as modified*, 382 N.C. 267 (2022) because he failed to subpoena the absent probation officers. That case, which was modified and affirmed by the Supreme Court opinion discussed above, states that "the failure of a probationer to request that a witness attend the violation hearing or be subpoenaed and required to testify can constitute waiver of the right to confrontation[.]" *Id.* (citing *Terry*, 149 N.C. App. at 438). But this statement does not create some bright-line rule that waiver occurs whenever a defendant fails to either request or subpoena a witness for confrontation purposes; rather, the statement merely suggests that waiver may occur in certain cases when a defendant fails to act

in one of the ways specified. *See id.*

For example, in *Terry*—the case cited as support for the waiver proposition in *Jones*—this Court concluded that the defendant was not denied her right to confrontation for multiple reasons. 149 N.C. App. at 438. Although the *Terry* Court considered the fact that the defendant "did not request that [the witness] be subpoenaed" in its ruling, it also considered, *inter alia*, that the defendant had admitted to lying about the exact subject she planned to examine the witness about, which, as the *Terry* Court explained, rendered her contention regarding confrontation meritless. *Id.*

Here, although defendant did not subpoena the absent probation officers, he expressly requested to exercise his right to confront two of them, and impliedly requested to confront the other. Moreover, because defendant's testimony included relevant details not covered by probation officers' narrative summaries or contradicted by those narratives, defendant implied that the absent probation officers had information other than what was reported by PO Walker. Thus, the confrontation-related waiver analysis in *Jones* is not applicable in this case.

And because no findings were made as to good cause and the record is insufficient for us to resolve the issue of good cause, we are unable to tell whether the trial court abused its discretion by allowing the hearing to proceed without defendant's requested confrontation. Accordingly, we must remand to the trial court to determine whether good cause existed pursuant to N.C.G.S. §15A-1345(e).

Further, since we are remanding for additional findings, we need not address defendant's contention that the trial court abused its discretion by finding that defendant willfully violated his probation by absconding and revoking his probation.

B. Grounds for Revocation

Defendant contends that the trial court's finding in its 10 March 2023 judgment that "[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation" constituted an abuse of discretion and is thus grounds for reversal. Defendant contends this was reversible error because multiple alleged violations were either not revocable under N.C.G.S. § 15A-1344(a) or not supported by evidence. We disagree.

A trial court's authority to revoke probation is limited to circumstances in which the probationer: (1) commits a new crime,[8] (2) absconds supervision, or (3) violates a condition of probation after serving two periods of confinement in response to violations. *See* N.C.G.S. § 15A-1344(a).

"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.' " *State v. Smith*, 188 N.C. App. 842, 845 (2008) (citation omitted). "Generally, clerical errors include mistakes such as inadvertent checking of boxes on forms or minor discrepancies between oral rulings

[8] But "probation may not be revoked solely for conviction of a Class 3 misdemeanor." N.C.G.S. § 15A-1344(d).

and written orders." *State v. Lynch*, 254 N.C. App. 334, 339 (2017) (cleaned up).

In *State v. Thorne*, the trial court checked the box on its judgment that "[e]ach violation is, in and of itself, a sufficient basis" for revocation. 279 N.C. App. 655, 663 (2021) (alteration in the original). But since only one of the two alleged violations was revocable under N.C.G.S. § 15A-1344(a), the defendant claimed the trial court erred by revoking his probation for a non-revocable violation. *Id.* at 662–63. This Court disagreed, holding that the checked box—indicating that the two violations independently justified revocation—appeared to be a clerical error because it was unsupported by the record. *Id.* at 663.

Here, as the State concedes in its brief, the only *revocable* violation was the alleged absconding violation from the 11 October 2022 addendum. Thus, the trial court's 10 March 2023 judgment incorrectly checked the box stating that each violation alleged in the reports constituted "a sufficient basis" for revocation. However, like in *Thorne*, such finding checked on the judgment form is unsupported by the record and appears to be a clerical error.

Specifically, after the close of evidence during the 8 March 2023 hearing, the trial court's oral revocation order was based on and preceded exclusively by the finding that defendant had "indeed absconded." Although the trial court also found that defendant had "willfully violated [his] probation as set forth in the violation report with exception of additional convictions[,]"—thus seemingly referring to more than just the absconding violation—that particular finding was not followed by a

revocation order. Further, after the close of evidence during the reopened hearing, the trial court stated that it was revoking defendant's probation because of his absconding while alluding to no other violation. Accordingly, the trial court's checking of the box was inadvertent clerical error under *Lynch* and *Thorne*, and we remand for correction of that error.

III. Conclusion

For the foregoing reasons, we remand for further findings pursuant to N.C.G.S. § 15A-1345(e) and to correct the clerical error on the trial court's 10 March 2023 judgment.

REMANDED.

Judges MURPHY and THOMPSON concur.

Report per Rule 30(e).