The Cherokee Supreme Court

Eastern Band of Cherokee Indians
Qualla Boundary, Cherokee, North Carolina

EASTERN BAND OF CHEROKEE INDIANS, APPELLEE,	)	
VS.	)	FILE NO. CSC 22-06
BILLY JACK CROWE, APPELLANT.	)	

Attorney General Michael W. McConnell, Senior Tribal Prosecutor Shelli Henderson Buckner, and Associate Attorney General Cody White, for the Eastern Band of Cherokee Indians.

Shira Hedgepeth, for Defendant-Appellant.

SAUNOOKE, Chief Justice.

FACTUAL AND PROCEDURAL HISTORY

On July 6, 2022, Appellant Billy Jack Crowe ("Appellant") pled guilty to domestic violence, assault on a female, and two counts of failure to obey a court order. The trial court sentenced Appellant to 196 days' imprisonment for one count of failure to obey a court order and gave him credit for time served. The trial court sentenced Appellant to 365 days' imprisonment for the three remaining convictions, but suspended his sentence and placed him on a period of 24 months' supervised probation. Appellant's probation conditions included, in pertinent

part, that he commit no criminal offense in any jurisdiction, that he was subject to random drug testing, and that he not use or possess any controlled substance.

Appellant met with probation officer Jay Douglas Woodard ("Woodard") on August 3, 2022. When he arrived, Woodard asked Appellant if he would submit to a drug screen. Appellant replied that he would submit to the drug screen, but he thought he would fail. When Woodard asked Appellant why he thought he would fail the drug screen, Appellant answered that he had used methamphetamine in the recent past. (Although Woodard testified at the probation revocation hearing that Appellant actually failed the drug test, the trial court excluded this testimony.) Woodard took Appellant into custody following the drug test and explained to him that "he was in violation by using methamphetamine." Woodard completed a Notice of Hearing on Violation of Probation, dated August 3, 2022. The probable cause for the alleged probation violation was listed as: "Billy [J]ack came in at his appointed date and time and submitted to a drug screen and tested positive for Methamphetamine."

Appellant's probation violation hearing occurred on September 15, 2022. At the hearing, Woodard testified about Appellant's statement indicating he thought he would fail the drug test due to recent use of methamphetamine. The court found that Appellant "made an admission that he used drugs. That he admitted to his probation officer that he had used methamphetamine which is in violation of the conditions of his release and a violation of his probation." Following a sentencing hearing on October 6, 2022, the court ordered that Appellant's

suspended sentence be activated. The Judgment for Probation Violation noted that the court found that Appellant had willfully violated the terms of his probation. Appellant filed Notice of Appeal on October 22, 2022.[1]

DISCUSSION

I

On appeal, Appellant contends that the trial court erred in considering Woodard's testimony that Appellant stated that he "thought he would fail" his drug test because "he had used methamphetamine in the recent past." Appellant argues that because he was not provided with prior notice that this specific evidence would be used against him at the hearing, this testimony should not have been considered, and therefore the trial court's decision should be overruled. The Tribe counters that Appellant failed to preserve this issue for appellate review, and even if the issue was preserved, the trial court did not err. The parties dispute whether the alleged error is reviewable under the plain error standard. *See* Cherokee Rule 31(D).

On review, this Court is "bound by the laws, customs, traditions, and precedents of the Eastern Band of Cherokee Indians." C.C. § 7-2(d) (2020). If there is no applicable Cherokee law, we next look to federal law, then to North Carolina law, and finally to the law of other jurisdictions for guidance. *Id.* The

[1] In the course of these appellate proceedings, Appellee Eastern Band of Cherokee Indians filed a Rule 9(b)(5) Supplement to the Record on June 23, 2023. Thereafter, Appellant filed a Motion to Strike that supplement on July 10, 2023. Because Appellant's motion has no basis in law in this jurisdiction or under the North Carolina Rules of Appellate Procedure, we deny Appellant's motion. *See* C.C. § 7-14(a) (2017) (stating that proceedings shall be governed by the North Carolina Rules of Appellate Procedure).

question of plain error analysis appears to be a first in our jurisdiction. As such, this Court elects to follow the guidance provided by North Carolina courts, where it is well settled that a prerequisite to engaging in a plain error analysis is the determination that the instruction complained of constitutes "error" at all. *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468 (1986). Thus, before deciding that an error by the trial court amounts to plain error, we must be convinced that absent the error, the trial court probably would have reached a different outcome. *See id.* Here, because we conclude that the admission and consideration of Woodard's testimony did not constitute error at all, we find that a plain error analysis is unnecessary. *Id.*; *see also State v. Johnson*, 320 N.C. 746, 750, 360 S.E.2d 676, 679 (1987); *State v. Bailey*, 157 N.C. App. 80, 85, 577 S.E.2d 683, 687 (2003) (where court failed to ascertain how challenged testimony constituted error at all, concluding that plain error analysis was "inappropriate").

Appellant argues that because the Notice of Hearing "does not assert any willful statements admitting violation of the probation as required by Cherokee Code Rule 19 or N.C.G.S. § 15A-1345(e)," the trial court erred in relying on Woodard's testimony about Appellant's admission during their conversation. We disagree.

Rule 19(b) provides, in pertinent part, that a probationer "is entitled to: (1) Notice of the alleged violation(s); [and] (2) Disclosure of the evidence against the probationer[.]" Rule 19 does not require that a defendant receive advance notice of the evidence against him prior to the hearing. On the contrary, N.C. Gen. Stat.

§ 15A-1345(e), which Appellant erroneously relies upon, specifically states, "*At the hearing*, evidence against the probationer must be disclosed to him." (Emphasis added.)

Appellant cites *State v. Cunningham*, 63 N.C. App. 470, 305 S.E.2d 193 (1983), in support of his contention that the trial court erred in admitting Woodard's testimony about Appellant's admission. Appellant's reliance on *Cunningham* is misplaced. In *Cunningham*, the probation violation report served on the defendant alleged that he had played loud music disturbing his neighbors and removed property signs posted by his neighbors, in violation of the good behavior condition of the defendant's probation. *Id.* at 475, 305 S.E.2d at 196. However, at the revocation hearing, the State sought to prove "*additional* conduct in violation not contained in the notice served upon" the defendant—namely, that the defendant had trespassed upon and damaged real and personal property belonging to his neighbors. *Id.* (emphasis added). The trial court revoked the defendant's probation for his playing loud music as well as for his trespass and damage to property. *Id.* The North Carolina Court of Appeals reversed the probation revocation based on the defendant's trespass and damage to property because "[t]he record does not show that defendant received notice or a statement of an alleged violation consisting of trespass or damage to property." *Id.*

Cunningham is not meaningfully similar to the facts at hand. Here, Appellant's Notice of Probation Revocation Hearing stated, "Billy [J]ack came in at his appointed date and time and submitted to a drug screen and tested positive

for Methamphetamine." (R. 13.) The alleged conduct constituting a probation violation was clearly methamphetamine usage. Whether a drug test or a verbal admission provided evidence of the illegal drug usage, the underlying violative behavior remains the same. Unlike the *Cunningham* case, here, no new substantive violation was alleged at the hearing. Thus, Appellant was on notice of the actual violation alleged. *See State v. Moore*, 370 N.C. 338, 344, 807 S.E.2d 550, 554-55 (2017) (explaining that under N.C. Gen. Stat. § 15A-1345(e), "notice needed to contain a statement of the *actions* defendant allegedly took that constituted a violation of a condition of probation—that is, a statement of *what defendant allegedly did* that violated a probation condition" (emphasis added)).

In contrast to *Cunningham*, the *Moore* case is apposite here, and we elect to follow its guidance. In *Moore*, the defendant argued that, because the probation violation reports did not specifically list the "commit no criminal offense" condition as the condition violated, the reports did not provide notice as required under N.C. Gen. Stat. § 15A-1345(e). The violation reports in *Moore* listed the defendant's pending criminal charges. The North Carolina Supreme Court explained that while incurring criminal charges does not constitute a violation of a probation condition, criminal charges are alleged criminal offenses, and committing a criminal offense is a violation of a probation condition. *Id.*, 807 S.E.2d at 555. Thus, a statement of pending criminal charges is a statement of alleged violations. *Id.* The Court held that the information in the violation reports therefore constituted a statement of the violations alleged because it sufficiently notified

the defendant of the *actions* he allegedly took that violated a probation condition. *Id.* The Court concluded that the defendant had received notice of the specific behavior he was alleged and found to have committed in violation of his probation, and that was "all that is required under subsection 15A-1345(e)." *Id.* at 345, 807 S.E.2d at 555. *See also State v. Hubbard*, 198 N.C. App. 154, 159, 678 S.E.2d 390, 394 (2009) (in contrast to *Cunningham*, defendant received notice of the specific behavior defendant was alleged and found to have committed in violation of probation).

Here, the Notice of Hearing clearly raised the issue of the use of illegal drugs, specifically methamphetamine. Woodard's testimony was relevant and probative of the fact that Appellant had engaged in illegal methamphetamine use, in violation of his probation condition. We hold that the trial court did not err in relying on Woodard's testimony. Accordingly, there was no plain error.

II

Appellant next argues that the trial court abused its discretion in finding that he willfully violated the terms of his probation. We agree with the North Carolina courts that, as a general principle, "'[p]robation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime.'" *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (alteration in original) (quoting *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967)). Further, we also choose to apply a "highly deferential" standard of review when considering a trial court's probation revocation determination. *State v. Bradley*,

384 N.C. 652, 653, 887 S.E.2d 698, 698 (2023). The North Carolina Supreme Court has explained:

> A probation revocation proceeding is not a formal criminal prosecution, and probationers thus have "more limited due process right[s]." [*Gagnon v. Scarpelli*, 411 U.S. 778,] 789, 93 S. Ct. [1756,] 1763 [(1973)]. Consistent with this reasoning, we have stated that "[a] proceeding to revoke probation is not a criminal prosecution" and is "often regarded as informal or summary." *Hewett*, 270 N.C. at 353, 154 S.E.2d at 479. Thus, "the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *Duncan*, 270 N.C. at 245, 154 S.E.2d at 57 (citations omitted). Instead, "[a]ll 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." *Hewett*, 270 N.C. at 353, 154 S.E.2d at 480. Accordingly, the decision of the trial court is reviewed for abuse of discretion. *See State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) ("[Abuse of discretion] occurs when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." (citations and internal quotation marks omitted)).

State v. Murchison, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014). In North Carolina, substantial evidence is not the standard; rather, competent evidence is the evidentiary standard, meaning evidence which is admissible or otherwise relevant. *State v. Bradley*, 282 N.C. App. 292, 296, 870 S.E.2d 297, 301, *aff'd as modified*, 384 N.C. 652, 887 S.E.2d 698 (2023). We approve of and here adopt North Carolina's guidance on the standard of review.

Appellant argues that the evidence was insufficient to support the trial court's finding that his violation was willful and that it occurred during his

probationary period. At the hearing, under direct examination by the Tribe, Woodard testified as follows:

> Q Officer Woodard, did Mr. Crowe make any statement to you?
>
> A Yeah, when he come [sic] in the office I asked him if he would submit to a drug screen and he said yeah, but he said he thought he would fail.
>
> Q Did he say why he thought he would fail?
>
> A He said he had used methamphetamine in the recent past.

This evidence—Appellant's own admission that he had recently used drugs—supported the trial court's conclusion. We, therefore, hold that the trial court did not abuse its discretion in finding that Appellant willfully violated the terms of his probation. *See State v. Young*, 190 N.C. App. 458, 461-62, 660 S.E.2d 574, 577 (2008); *State v. Monroe*, 83 N.C. App. 143, 144-45, 349 S.E.2d 315, 317 (1986).

III

Lastly, Appellant argues that that this Court should apply North Carolina's Justice Reinvestment Act ("JRA"), and hold that under that act, the trial court erred in concluding that Appellant's probation violation was a revocable offense. The Tribal Council has not adopted the JRA, and therefore this argument is without merit.

CONCLUSION

For the foregoing reasons, we hold that the trial court did not err in revoking Appellant's probation.

AFFIRMED.

Kirk Saunooke

Chief Justice

Brenda Toineeta Pipestem

Associate Justice

Robert C. Hunter

Associate Justice