No. COA22-232 DISTRICT 11A

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

)

v. ) Lee County

)

JAMES DEREK GARY )

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**DEFENDANT-APPELLANT’S BRIEF**

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**DEFENDANT-APPELLANT’S BRIEF**

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# ISSUE PRESENTED

## THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING “GOOD CAUSE” TO REVOKE PROBATION AFTER MR. GARY COMPLETED PROBATION BECAUSE HE “COMMITTED NEW CRIMINAL CONDUCT WHILE ON PROBATION” WHERE THAT FINDING WAS ALREADY REQUIRED TO REVOKE PROBATION UNDER BOTH N.C. GEN. STAT. § 15A-1344(A) AND N.C. GEN. STAT. § 15A-1344(F)(2).

# STATEMENT OF THE CASE

On 11 September 2019, in Harnett County Superior Court, Mr. James Derek Gary pled guilty to assault with a deadly weapon with intent to kill and discharging a weapon into occupied property in case files 19 CRS 50625-26. (R pp 8-15). The two charges were consolidated into one judgment for 25 to 42 months in prison with an active term of 120 days in custody of the sheriff. Mr. Gary was given 203 days credit for time served. The remaining sentence was suspended for 24 months of supervised probation. (R pp 15-18).

On 18 June 2021, the State filed a violation report. (R pp 23-24). On 23 November 2021, the matter came on for a hearing in Lee County Superior Court, the Honorable Charles W. Gilchrist presiding. After a hearing, the trial court revoked probation and activated the sentence. (R pp 28-29). After judgment, Mr. Gary’s attorney entered oral notice of appeal. (R p 30).

# STATEMENT OF THE GROUNDS

# FOR APPELLATE REVIEW

Mr. Gary appeals from the final judgments revoking probation entered against him in Lee County Superior Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1347.

# STATEMENT OF THE FACTS

Mr. Gary’s 24-months of probation in this case commenced on 11 September 2019. (R p 15).

On 18 June 2021, the State filed a violation report alleging that Mr. Gary

1. failed to report to his probation officer on 7/6/2020 as directed at a prior meeting,
2. failed to make himself available for his probation officer to visit him at his listed home address on 1/14/21,
3. was arrested on 4/27/20 for 1) possession of drug paraphernalia, 2) speeding, reckless driving and 3) possessing an open container (an infraction), and
4. was arrested on 4/27/20 for 1) possession with intent to manufacture, sell or distribute a Schedule II substance and 2) maintaining a vehicle or dwelling place.

(R pp 23-24).

Mr. Gary’s probation expired on 11 September 2021.

The revocation hearing in this case occurred on 23 November 2021, 74 days after Mr. Gary’s probation expired. Mr. Gary admitted to failing to report but denied the remaining allegations. (T pp 3-4).

Mr. Gary’s probation officer testified that he went to Mr. Gary’s home on 14 January 2021 for a surprise “pop up” “home visit” but Mr. Gary was not home. (T pp 6-7). He called Mr. Gary who informed him over the telephone that he was out of town. (T p 6). When the probation officer told him he would be back the following week for a scheduled home visit, Mr. Gary was home. (T p 7).

Officer Cox was operating a radar on 27 May 2020 when he clocked a black Chevy Malibu traveling 102 miles per hour in a 65 miles per hour zone. (T pp 9-10). Officer Gaster pursued the vehicle and stopped it. (T p 10). Mr. Gary was driving the car. (T p 11). As the officer approached the vehicle, he smelled a slight odor of unburnt marijuana coming from inside the vehicle, and saw a green leafy substance on the front right seat. (T p 12). A search of the vehicle located flakes of marijuana and rolling paper containing marijuana. (T p 13). In the trunk, the officers found three pint-size bottles of liquid self-identified as Promethazine with no prescription information on it, a digital scale, sandwich bags, a bag of marijuana, and a bag of multi-colored pills. (T pp 13, 26).

After the hearing, the trial court found to its reasonable satisfaction that Mr. Gary violated the conditions of probation as alleged in violations one, three, and four, but made no findings for the infraction of possessing an open container. (T pp 28-29). The trial court activated the suspended sentence and gave Mr. Gary credit for time served. (T p 29).

The State did not explain the delay in the hearing. However, after revoking Mr. Gary’s probation, the trial court announced

In addition, [the] court find[s] that a violation report was filed while the defendant was on probation. The defendant violated his probation willfully during the term of probation. Good cause exists for the revocation of probation, given the defendant committed new criminal conduct while on probation.

(T p 29). No written finding of “good cause” was entered on the judgment revoking probation.

# STANDARD OF REVIEW

“[W]hen a trial court's determination relies on statutory interpretation, our review is *de novo* because those matters of statutory interpretation necessarily present questions of law.” *State v. Johnson*, 246 N.C. App. 132, 134, 782 S.E.2d 549, 551-52 (2016) (citation omitted).

Under a *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

This Court reviews the trial court’s ultimate decision to revoke probation for an abuse of discretion. *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960).

An abuse of discretion occurs when because “[w]hen a trial judge acts under a misapprehension of the law,” *State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010), or when “the decision of the trial court is manifestly unsupported by reason or so arbitrary that it cannot be the result of a reasoned decision.” *State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 732 (1992).

“When a trial court acts contrary to a statutory mandate, the error ordinarily is not waived by the defendant's failure to object at trial.” *State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988).

# ARGUMENT

## THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING “GOOD CAUSE” TO REVOKE PROBATION AFTER MR. GARY COMPLETED PROBATION BECAUSE HE “COMMITTED NEW CRIMINAL CONDUCT WHILE ON PROBATION” WHERE THAT FINDING WAS ALREADY REQUIRED TO REVOKE PROBATION UNDER BOTH N.C. GEN. STAT. § 15A-1344(A) AND N.C. GEN. STAT. § 15A-1344(F)(2).

## 

The trial court erred and abused its discretion in finding “good cause” to revoke probation after expiration based solely on the fact that Mr. Gary “committed new criminal conduct while on probation.” (T p 29). The judgment revoking probation should be reversed for the following reasons.

First, because the trial court was required to make a finding that Mr. Gary committed a criminal offense while on probation in order to revoke probation under both N.C. Gen. Stat. § 15A-1344(a) and N.C. Gen. Stat. § 15A-1344(f)(2), it was both an erroneous interpretation of the statute and an abuse of discretion to use that same finding as “good cause” to revoke probation after probation expired. Such an interpretation would render the “good cause” finding required by N.C. Gen. Stat. § 15A-1344(f)(3) superfluous in violation of well-established cannons of statutory construction.

Second, our North Carolina Supreme Court in *State v. Morgan*, 372 N.C. 609, 831 S.E.2d 254 (2019) rejected the notion that the underlying violation could satisfy the “good cause” requirement under N.C. Gen. Stat. § 15A-1344(f)(3).

Third, the trial court’s “good cause” finding fails to explain the delay as required by the tests set forth by this Court in *State v. Sasek*, 271 N.C. 568, 844 S.E.2d 328 (2020) and *State v. Geter*, 2021-NCCOA-98.

The trial court’s “good cause” finding in this case relies on an erroneous interpretation of N.C. Gen. Stat. § 15A-1344(f)(3). The order revoking probation should be reversed*.*

A defendant’s period of probation typically begins either on the day it is imposed by the sentencing court or upon the expiration of a designated prison sentence. *See* N.C. Gen. Stat. § 15A-1346(a)-(b); *See, e.g., Morgan*, 372 N.C. at 610, 831 S.E.2d at 255-56 (36-month period of probation imposed on 28 August 2013 expired on 28 August 2016). Mr. Gary’s 24-months of probation in 19 CRS 50625 commenced on 11 September 2019 and therefore expired on 10 September 2021. The hearing in this case was held on 23 November 2021, 74 daysafter expiration of probation.

### The trial court erred in finding that the commission of a criminal offense could constitute “good cause” to revoke probation after probation expired when such a finding was already statutorily required to revoke probation under both N.C. Gen. Stat. § 15A-1344(a) and N.C. Gen. Stat. § 15A-1344(f)(2).

After electing to revoke Mr. Gary’s probation, the trial court announced that

In addition, [the] court find[s] that a violation report was filed while the defendant was on probation. The defendant violated his probation willfully during the term of probation. Good cause exists for the revocation of probation, given the defendant committed new criminal conduct while on probation.

(T p 29). Such a finding was both error and an abuse of discretion because the trial court was already statutorily required to find that Mr. Gary committed a new criminal offense while on probation in order to revoke probation under both N.C. Gen. Stat. § 15A-1344(a) and N.C. Gen. Stat. § 15A-1344(f)(2).

Our Supreme Court has consistently held that “a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.” *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). Further, “ ‘[i]t is well settled that statutes dealing with the same subject matter must be construed *in pari materia,* “as together constituting one law.” ’ ” *Williams v. Alexander Cty. Bd. of Educ.*, 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998) (*quoting Williams v. Williams,* 299 N.C. 174, 180–81, 261 S.E.2d 849, 854 (1980)). In accordance with these cases, North Carolina’s statutory probation scheme may not be interpreted "in a manner which would render any of its words superfluous." *Morgan,* 372 N.C. at 614, 831 S.E.2d at 258 (quoting *State v. Coffey*, 336 N.C. 412, 417, 444 S.E.2d 431, 434 (1994)).

When revoking probation after expiration of a probationary period, two statutory provisions must be satisfied: N.C. Gen. Stat. § 15A-1344(a) and N.C. Gen. Stat. § 15A-1344(f). The “good cause” finding made by the trial court in this case was already required under N.C. Gen. Stat. § 15A-1344(a) and N.C. Gen. Stat. § 15A-1344(f)(2). The trial court’s interpretation of our statutory revocation scheme would render N.C. Gen. Stat. § 15A-1344(f)(3) entirely superfluous. It was error to use the same finding for all three provisions.

### *The finding that Mr. Gary committed a criminal offense while on probation was already required under N.C. Gen. Stat. § 15A-1344(a).*

First, under the Justice Reinvestment Act (JRA), a trial court can only revoke probation if the probationer:

1. commits a new criminal offense in violation of N.C. Gen. Stat. § 15A–1343(b)(1);
2. absconds supervision in violation of N.C. Gen. Stat. § 15A–1343(b)(3a); or
3. violates any condition of probation after serving two prior periods of CRV [confinement in response to violations] under N.C. Gen. Stat. § 15A–1344(d2).

N.C. Gen. Stat. § 15A–1344(a); *State v. Krider*, 258 N.C. App. 111, 113-114, 810 S.E.2d 828, 830, *affirmed in part,* 371 N.C. 466, 818 S.E.2d 102 (2018). “For all other violations, the trial court may either modify the conditions of the defendant’s probation or impose a 90–day period of CRV.” *Id.*

The State did not allege that Mr. Gary absconded. Further, the State did not allege that Mr. Gary had any prior 90-day periods of CRV. Thus, Mr. Gary’s probation in this case could only be revoked with proof that he committed a new criminal offense while on probation in violation of N.C. Gen. Stat. § 15A–1343(b)(1).

Here, the trial court effectively eliminated the “good cause” finding under N.C. Gen. Stat. § 15A-1344(f)(3), replacing it with the finding that was already required to revoke probation under N.C. Gen. Stat. § 15A-1344(a). This interpretation of the statute would render the “good cause” finding entirely superfluous. This was error.

### *The finding that Mr. Gary committed a criminal offense while on probation was already required under N.C. Gen. Stat. § 15A-1344(f)(2).*

In addition to the requirements of N.C. Gen. Stat. § 15A-1344(a), a trial court is without any authority to revoke a defendant’s probation “after the expiration of the period of probation except as provided in G.S. 15A-1344(f).” *State v. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980). A trial court’s compliance with N.C. Gen. Stat. § 15A-1344(f) is jurisdictional, *id.* at 528, 263 S.E.2d at 595, and failure to satisfy the statute is reversible error. *Morgan*, 372 N.C. at 616, 831 S.E.2d at 259.

Pursuant to N.C. Gen. Stat. § 15A-1344(f):

the court may extend, modify, or revoke probation *after the expiration of the period* *of probation* if all of the following apply:

(1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

(2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.

(3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

In *State v. Morgan,* our North Carolina Supreme Court explained that the “good cause” finding required by N.C. Gen. Stat. § 15A-1344(f) was a two-step process:

Subsection (f)(2) of N.C.G.S. § 15A-1344 makes clear that in order to revoke a defendant's probation following the expiration of his probationary term, the trial court must first make a finding that the defendant did violate a condition of his probation.

After making such a finding, trial courts are then required by subsection (f)(3) to make an *additional* finding of "good cause shown and stated" to justify the revocation of probation even though the defendant's probationary term has expired.

*Morgan,* 372 N.C. at 617, 831 S.E.2d at 259. The required finding may not be “inferred from the record,” and thus “the specific finding described in the statute must actually be made by the trial court.” *Id*. at 616, 831 S.E.2d at 259.

This Court has found that the “good cause” finding under subsection (f)(3) requires either “evidence that the State made reasonable efforts to conduct the revocation hearing at a sooner date[,]” *State v. Sasek,* 271 N.C. App. at 576, 844 S.E.2d at 335, or evidence “to justify the untimely revocation.” *Geter*, 2021-NCCOA-98 ¶ 14.[[1]](#footnote-1)

Here, the trial court effectively eliminated the “good cause” finding under N.C. Gen. Stat. § 15A-1344(f)(3), replacing it with the finding that was already required to revoke probation under N.C. Gen. Stat. § 15A-1344(f)(2). This interpretation of the statute would render the “good cause” finding superfluous. This was error.

### Under the North Carolina Supreme Court’s precedent in *State v. Morgan*, the “good cause” finding must be something beyond the mere finding that a violation occurred during probation.

The trial court’s interpretation of “good cause” was also previously rejected by our North Carolina Supreme Court in *Morgan*, 372 N.C. at 617, 831 S.E.2d at 259. The trial court’s judgment revoking probation should be reversed.

In *State v. Morgan*, this Court found that the “good cause” requirement was satisfied if a trial court found that a defendant violated probation prior to the expiration of probation. 259 N.C. App. 179, 183, 814 S.E.2d 843, 847 (2018) *reversed by and remanded* *by Morgan*, 372 N.C. 609, 831 S.E.2d 254. In a dissenting opinion, then Chief Judge McGee opined that this Court’s holding was inconsistent with the statutory scheme and that the General Assembly intended subsection (f)(3) to require a finding that the State acted reasonably in pursuing a revocation after expiration of probation. *Id.* at 195, 814 S.E.2d at 854 (J. McGee, dissenting).

In *Morgan*, our High Court reversed this Court’s interpretation of subsection (f)(3), finding that the language “the court finds” in N.C. Gen. Stat. § 15A-1344(f) requires a trial court to make an actual finding of fact beyond the mere finding that the defendant violated probation prior to expiration of probation and that a failure to do so is reversible error. 372 N.C. at 616, 831 S.E.2d at 259.

Further, our High Court found that a finding that the defendant has violated probation cannot satisfy the “good cause” finding because to do so would render subsection (f)(3) “superfluous.” *Id.* at 617, 831 S.E.2d at 259.

[B]y contending the trial court's determination that defendant did, in fact, violate conditions of his probation simultaneously satisfied subsections (f)(2) and (f)(3), the State incorrectly conflates two separate and distinct findings that must be made by the trial court under these circumstances.

*Id.* (emphasis added).

The finding in this case, like the State’s argument in *Morgan*, conflates subsections (f)(2) and (f)(3). The simple fact that a defendant committed a revocable offense prior to expiration cannot be used as “good cause” to revoke probation because it “conflates two separate and distinct findings.” *Id*. The trial court should be reversed.

### C. The trial court’s “good cause” finding fails to address the tests announced by this Court in *State v. Sasek* and *State v. Geter.*

The trial court’s “good cause” finding also fails to address the tests set forth by this Court in *State v. Sasek*, 271 N.C. 568, 844 S.E.2d 328 (2020) and *State v. Geter*, 2021-NCCOA-98. The judgment revoking probation should be reversed.

In *State v. Sasek*, this Court announced that when reviewing an appellate record to determine if a “good cause” finding can be made, it looks to see if there is any “evidence that the State made reasonable efforts to conduct the revocation hearing at a sooner date.”271 N.C. App. at 576, 844 S.E.2d at 335. Then Judge Phil Berger, Jr. concurred in the result. He fully agreed with the majority that the reasonable efforts test applied but asserted that the record contained “some evidence in the record of reasonable efforts such that remand for additional findings would be appropriate.” *Id.* at 577, 844 S.E.2d at 335 (Berger, J., Concurring).

This Court has since applied *Sasek*’s reasonable efforts test in at least one other case:

[W]hen the trial court fails to make a finding of good cause under N.C. Gen. Stat. § 15A-1344(f)(3), we may only remand where “the record contain[s] sufficient evidence to permit the necessary finding of “reasonable efforts" by the State to have conducted the probation revocation hearing earlier.”’ *State v. Sasek*,  N.C. App.    ,    , 844 S.E.2d 328, 334, *disc. rev. denied*, 376 N.C. 543, 851 S.E.2d 49 (2020) (citations omitted).

*State v. Black*, 2021-NCCOA-116, ¶ 10 (unpublished) (appendix).

Similarly, in *State v. Geter*, this Court found that “good cause” was satisfied by evidence “to justify the untimely revocation.” 2021-NCCOA-98 ¶ 14.

The trial court’s oral finding in this case fails both tests. The trial court’s oral finding does not address in any way the fact that the revocation hearing was held **74 days** after Mr. Gary’s probation expired. The finding does not address whether the State made reasonable efforts to hold the hearing prior to expiration of probation as required by *Sasek*. Further, the trial court did not find the delay to be justified, as this Court required in *Geter II.* The judgment revoking probation should be reversed.

# CONCLUSION

For all the foregoing reasons and authorities, Mr. Gary respectfully asks this Court to reverse the judgment revoking probation.

Respectfully submitted, this the 18th day of April, 2022.

**/s/ JASON CHRISTOPHER YODER**

Electronically submitted

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ATTORNEY FOR

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# CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28(j)(2)

Undersigned counsel hereby certifies that this brief is in compliance with N.C. R. App. P. 28(j)(2) in that it is printed in 13-point Century font and contains no more than 8,750 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program used to prepare this brief.

This the 18th day of April, 2022.

**/s/ JASON CHRISTOPHER YODER**

Electronically submitted

Jason Christopher Yoder

ATTORNEY FOR

DEFENDANT-APPELLANT

# CERTIFICATE OF FILING AND SERVICE

I hereby certify that the originalDefendant-Appellant’s Brief has been filed pursuant to Rule 26 by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the Defendant-Appellant’s Brief has been duly served upon the following party by email to:

**award@ncdoj.gov**

**Mr. Alexander Hiram Ward**

**N.C. Department of Justice**

**P.O. Box 629**

**Raleigh, NC 27602**

This the 18th day of April, 2022.

**/s/ JASON CHRISTOPHER YODER**

Electronically submitted

Jason Christopher Yoder

ATTORNEY FOR

DEFENDANT-APPELLANT

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NORTH CAROLINA COURT OF APPEALS

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# APPENDIX

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*State v. Black*,

2021-NCCOA-116 (unpublished) . . . . . 1

1. On 10 August 2021, the North Carolina Supreme Court allowed Mr. Geter’s petition for discretionary review. *See* Docket 182PA21. As of the filing of this brief, no decision has been issued. [↑](#footnote-ref-1)