No. COA24-1029 SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

v. ) From New Hanover County

 )

LUTHER MELVIN JOHNSON, II )

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DEFENDANT-APPELLANT’S BRIEF

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DEFENDANT-APPELLANT’S BRIEF

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**ISSUE PRESENTED**

**Whether the trial court abused its discretion by revoking Mr. Johnson’s probation when there was insufficient evidence that he absconded as alleged in the probation violation report?**

**STATEMENT OF THE CASE**

 On 12 July 2022, in New Hanover County Superior Court, Mr. Johnson pled guilty to two counts of obtaining property by false pretenses. The sentences were consolidated for judgment in file number 16CRS51130. Pursuant to the plea agreement, Mr. Johnson was sentenced to 11 to 23 months suspended for 24 months of supervised probation. (R pp. 8-11; 14-15)

 On 3 January 2024, Mr. Johnson’s probation officer filed a probation violation report. (R p. 16) The matter came on for hearing at the 6 May 2024 Criminal Session of New Hanover County Superior Court, the Honorable Bob R. Cherry presiding. On 6 May 2024, Judge Cherry concluded Mr. Johnson violated the conditions of probation and activated the 11 to 23-month active sentence.

 On 6 May 2024, Mr. Johnson entered oral and written notice of appeal. (R pp. 26-27)

**STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW**

Mr. Johnson appeals from a final judgment of the Superior Court pursuant to N.C.G.S. §§ 7A-27 and 15A-1347.

**STATEMENT OF THE FACTS**

 Mr. Johnson’s probation officer, Daniel Mattlin, testified Mr. Johnson was sentenced to probation in North Carolina and transferred to Virginia under the Interstate Compact. (T pp. 5-8) Mr. Johnson’s application to transfer supervision from North Carolina to Virginia was signed on 12 July 2022. (T p. 9; R p. 20) On 25 August 2022, Mr. Johnson applied to have his probation transferred to West Virginia and it was approved. (T pp. 11, 13; R p. 22) P.O. Mattlin testified that at some point he learned Mr. Johnson left West Virginia and moved back to Virginia without notifying North Carolina. (T p. 12) P.O. Mattlin explained Mr. Johnson was also on probation in Virginia for separate convictions so he did a “request for reporting instructions” under the Interstate Compact and it was denied. P.O. Mattlin was told Mr. Johnson could not be in Virginia while awaiting approval for the transfer and Mr. Johnson was supposed to return to North Carolina. (T pp. 13-14)

 On 17 December 2023, P.O. Mattlin told Mr. Johnson to report back to North Carolina by Monday, December 18th at 4:00 p.m. Mr. Johnson told P.O. Mattlin he did not have the money or a car to come back to North Carolina. P.O. Mattlin testified he thinks he spoke to Mr. Johnson “a couple more times after that” but he wasn’t sure. (T p. 14)

 Officer Mattlin filed a violation report on 3 January 2024 alleging Mr. Johnson absconded, failed to report as direct, and failed to provide advanced notice to North Carolina before moving from “WV back to VA.” The report also alleged Mr. Johnson failed to pay his court costs. (R pp. 16-17) Specifically, the allegation of absconding cited N.C.G.S. § 15A-1343(b)(3a) and stated:

ON OR ABOUT 10/27/23, IT WAS FOUND THAT OFFENDER FAILED TO NOTIFY NC THAT HE HAD MOVED FROM WEST VIRGINIA TO VIRGINIA WITHOUT PERMISSION AND HAS FAILED TO REPORT BACK TO NORTH CAROLINA AS DIRECTED FOR SUPERVISION. OFFENDER FAILED TO REPORT AS DIRECTED ON 12/18/23 BY 4 PM.

(R p. 17) An order for arrest was also issued on 3 January 2024. (R pp. 16-19)

Over a month after the violation report was filed, the investigative team tried to locate Mr. Johnson. On 6 February 2024, the investigative team spoke to Mr. Johnson’s probation officer in Virginia. The team was unable to find Mr. Johnson at the address the probation office had on file. Mr. Johnson was living at the Budget Motel, and he testified he might not have been home when the investigative team came by because he works. (T pp. 29-32) At some point the investigative team was in contact with Mr. Johnson and they told him to report to his probation officer in Virginia. (T pp. 14-15) When Mr. Johnson went to the probation office, the investigative team arrested him. (T p. 21)

 Mr. Johnson testified in his own defense. When Mr. Johnson was initially sentenced to probation in New Hanover County, he was residing in Abingdon, Virginia. (T p. 23) Mr. Johnson had his probation transferred to Virginia and eventually had it transferred to West Virginia. Mr. Johnson was also on probation in Virginia and Mr. Johnson testified he had that sentence transferred back to Virginia. This transfer was approved by Mr. Johnson’s Virginia probation officer, Dalton Chapman. (T p. 24)

 Mr. Johnson believed his probation was successfully transferred. When Mr. Johnson was told to report to North Carolina, he spoke to P.O. Chapman. P.O. Chapman told him to stay in Virginia. Mr. Johnson told P.O. Mattlin he was told to stay in Virginia. Mr. Johnson did not have a car or money to get to North Carolina. (T p. 26) Mr. Johnson was also concerned about violating his probation in Virginia if he traveled to North Carolina. (T p. 30) Mr. Johnson also spoke to one of the investigators from North Carolina, Dean Guite. Officer Guite told Mr. Johnson he did not see a problem with the transfer and that he was going to “fix it” so Mr. Johnson could stay in Virginia. (T p. 27) Mr. Johnson asked if he should call back in a week or two to find out and Officer Guite told him yes. (T p. 27) Mr. Johnson testified that when he spoke to Officer Guite on the phone, “he acted like a deer in headlights. Like he thought I was running from the state of North Carolina.” Mr. Johnson further testified that every time his phone beeped, he called Officer Guite back “within four or five minutes.” (T p. 27)

After Mr. Johnson spoke to Officer Guite, P.O. Chapman called Mr. Johnson one or two days later and told him to report to the probation office in Virginia. Mr. Johnson learned North Carolina issued a warrant for his arrest and he went to the probation office in Virginia because that was the only way he could get to North Carolina. (T p. 28)

Following the presentation of evidence, defense counsel argued Mr. Johnson did not abscond and there was no statutory authority to revoke probation for violating the “ICOTS agreement.” (T pp. 36-37) The trial court announced it was “reasonably satisfied that…for purposes of our North Carolina probation that he is absconding.” (T p. 40) The Court also found the other violations alleged in the violation report. The trial court entered written order finding Mr. Johnson violated the conditions of probation as set forth in the violation report. The trial court’s order found Mr. Johnson absconded pursuant to N.C.G.S. § 15A-1343(b)(3a) and revoked Mr. Johnson’s probation. (R p. 25)

**STANDARD OF REVIEW**

In general, a trial court’s judgment revoking probation is reviewed for an abuse of discretion. *State v. Johnson*, 246 N.C. App. 132, 134 (2016). “[T]he evidence [must] 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.” *State v. Hewett*, 270 N.C. 348, 353 (1967). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285 (2005). However, “when a trial court’s determination relies on statutory interpretation, [this Court’s] review is *de novo* because those matters of statutory interpretation necessarily present questions of law.” *Johnson*, 246 N.C. App. at 134 (cleaned up).

**ARGUMENT**

**The trial court abused its discretion by revoking Mr. Johnson’s probation when there was insufficient evidence that he absconded as alleged in the probation violation report.**

 The violation report stated Mr. Johnson absconded under N.C.G.S. § 15A-1343(b)(3a), but the allegations described in the report only amounted to a failure to report under N.C.G.S. § 15A-1343(b). The State’s evidence at the hearing demonstrated P.O. Mattlin was in contact with Mr. Johnson and there were no efforts to locate Mr. Johnson until a month after the probation violation report was filed. There was no testimony that Mr. Johnson was avoiding supervision. Despite the insufficient evidence, the trial court was “reasonably satisfied” that Mr. Johnson absconded under N.C.G.S. § 15A-1343(b)(3a). The trial court abused its discretion by revoking Mr. Johnson’s probation, and this Court should reverse the order revoking probation.

1. **The trial court should have only considered the relevant period of 18 December 2023 through 3 January 2024 in determining whether Mr. Johnson absconded.**

In determining whether a defendant absconded, the trial court is limited to considering evidence from the specific period of absconding alleged in the violation report. *State v. Melton*, 258 N.C. App. 134, 137 (2018). In *Melton*, the probation violation report alleged the defendant absconded on 2 November 2016 and the violation report was filed on 4 November 2016. *Id.* This Court determined the trial court erred by considering evidence beyond 4 November 2016. This Court limited its review to whether there was sufficient evidence to support a finding that the defendant absconded based on the dates alleged in the report. *Id.*

In the present case, the probation violation report alleged Mr. Johnson absconded probation on 18 December 2023 when he failed to report back to North Carolina as directed. The probation violation report was filed on 3 January 2024. (R pp. 16-17) Under *Melton*, the relevant time period is 18 December 2023 through 3 January 2024.

1. **The State did not present sufficient evidence that Mr. Johnson absconded under N.C.G.S. § 15A-1343(b)(3a) as alleged in the probation violation report.**

At a probation violation hearing, the State must present “competent evidence establishing a defendant’s failure to comply with the terms of probation….” *Melton*, 258 N.C. App. at 136 (internal quotations and citation omitted). A defendant’s probation cannot be revoked for simply failing to report as directed under N.C.G.S. § 15A-1343(b)(3). *See* N.C.G.S. § 15A-1344(a); *State v. Williams*, 243 N.C. App. 198, 203 (2015). A trial court may only revoke probation when a defendant has committed a new criminal offense, absconded, or violated one or more conditions of probation after previously serving two periods of confinement in response to a violation. N.C.G.S. § 15A-1344(a); *accord Williams*, 243 N.C. App. at 202.

North Carolina General Statutes define absconding as “willfully avoiding supervision or…willfully making the defendant’s whereabouts unknown to the supervising probation officer[.]” N.C.G.S. § 15A-1343(b)(3a). This Court has held that a defendant willfully absconded supervision when the probation officer did not know where the defendant was for weeks and did not have any contact with the defendant. *See State v. Trent*, 254 N.C. App. 818-821 (2017).

In *Melton*, this Court considered whether there was sufficient evidence to support a finding that the defendant absconded. *Melton*, 258 N.C. App. 136-137. The probation officer testified that the defendant absconded when she failed to attend two meetings and did not contact the officer. The probation officer further testified they attempted to call and visit the defendant “multiple times over the course of two days and called and left messages with defendant’s parents for defendant to call her.” *Id.* at 138. However, the probation officer could not provide any details about how many phone calls she made or the dates and times of the phone calls. The probation officer also could not provide details about when they went to the defendant’s home. *Id.* The defendant testified that her cell phone was missing, she was not home when the probation officer visited, and the probation officer did not leave messages at the house. The defendant also testified her parents told her the probation officer did not come by or call her. *Id.* at 139.

This Court explained there was insufficient evidence that the defendant willfully refused to make herself available for the two-day period alleged in the violation report. *Id.* Thus, the State’s evidence was insufficient to establish the defendant willfully absconded under N.C.G.S. § 15A-1343(b)(3a). Therefore, the trial court abused its discretion by revoking the defendant’s probation. *Id.* at 140.

Similar to *Melton*, the State did not present sufficient evidence to establish that Mr. Johnson absconded supervision. Like *Melton*, the State presented very little, undetailed evidence for the relevant time period of 18 December 2023 through 3 January 2024. P.O. Mattlin testified he spoke to Mr. Johnson on 17 December 2023 and told Mr. Johnson to report back to North Carolina by 18 December 2023. P.O. Mattlin could not provide any further detail about when he spoke to Mr. Johnson during the relevant time period. P.O. Mattlin testified he believed he spoke to Mr. Johnson “a couple more times” after the 17 December 2023 phone call. The remainder of P.O. Mattlin’s testimony was about events outside of the relevant time period.

Mr. Johnson did not willfully abscond under N.C.G.S. § 15A-1343(b)(3a) because he believed his probation was successfully transferred to Virginia; he did not have the means to get back to North Carolina; and he was in contact with P.O. Mattlin. *Compare* *Melton*, 258 N.C. App. at 138-140 (holding defendant did not willfully abscond supervision), *and* *Trent*, 254 N.C. App. at 818-821 (holding defendant absconded supervision where P.O. did not know where defendant was for weeks and did not have contact with defendant). The State failed to present sufficient evidence that Mr. Johnson willfully absconded supervision.

Moreover, Mr. Johnson’s actions did not even amount to absconding. In *Williams*, the allegation of absconding stated:

Regular Condition of Probation: “Not to abscond, by willfully avoiding supervision or by willfully making the supervisee’s whereabouts unknown to the supervising probation officer” in that, THE DEFENDANT IS NOT REPORTING AS INSTRUCTED OR PROVIDING THE PROBATION OFFICER WITH A VALID ADDRESS AT THIS TIME. THE DEFENDANT IS ALSO LEAVING THE STATE WITHOUT PERMISSION. DUE TO THE DEFENDANT KNOWINGLY AVOIDING THE PROBATION OFFICER AND NOT MAKING HIS TRUE WHEREABOUTS KNOWN THE DEFENDANT HAS ABSCONDED SUPERVISION.

*Williams*, 243 N.C. App. at 200-01. This Court determined this allegation of absconding merely alleged violations of N.C.G.S. §§ 15A-1343(b)(2) and (3). This Court also noted that “[a]lthough the report alleged that Defendant’s actions constituted absconding supervisions, this wording cannot convert violations of N.C. Gen. Stat. § § 15A-1343(b)(2) and (3) into a violation of N.C. Gen. Stat. § 15A-1343(b)(3a).” *Id.* at 205 (cleaned up and internal quotations omitted). Ultimately, this Court held the evidence did not support a finding of absconding and reversed the judgment revoking probation. *Id.* at 205-206.

 This Court reached in similar result in *State v. Johnson*, 246 N.C. App. 132, 139 (2016). In *Johnson*, the defendant told his probation officer he would not make it to his scheduled meeting the next day because he did not have a car and he would not be able to find a ride by the morning. The defendant also asked if the meeting could be rescheduled. *Id.* at 141. When the defendant failed to show up for the meeting after being told he needed to report, the probation officer filed a probation violation report alleging absconding. *Id.* at 144. This Court explained the defendant’s actions did not amount to absconding and only “violated the general condition of probation listed in [N.C.G.S.] § 15A-1343(b)(3).” *Id.* at 146. A trial court cannot revoke probation based on a mere failure to report. *Id.* This Court also noted the “[d]efendant’s ‘whereabouts’ were never ‘unknown’ by [the probation officer].” *Id.*

 As in *Williams* and *Johnson*, Mr. Johnson’s actions did not amount to absconding. Similar to *Williams*, Mr. Johnson moved to Virginia without contacting P.O. Mattlin because he believed his probation was successfully transferred. Like *Johnson*, when P.O. Mattlin contacted Mr. Johnson on 17 December and told him to report by 18 December, Mr. Johnson told him he did not have the means to get to North Carolina. As in *Johnson*, P.O. Mattlin filed the probation violation report when Mr. Johnson failed to report to North Carolina. P.O. Mattlin knew Mr. Johnson was in Virginia and had been in contact with him. Therefore, like *Williams* and *Johnson*, the trial court abused its discretion by revoking Mr. Johnson’s probation based on a mere failure to report as directed.

1. **A technical violation of the Interstate Compact for Adult Offender Supervision Rules is not sufficient grounds to revoke probation in North Carolina.**

N.C.G.S. § 15A-1344 does not state that probation can be revoked for a mere technical violation of the Interstate Compact for Adult Offender Supervision Rules. The North Carolina General Statutes that discuss the Interstate Compact also do not provide that a defendant’s probation can be revoked for a technical violation of the Interstate Compact for Adult Offender Supervision Rules. *See* N.C.G.S. § 148-65.5 and § 148-65.9. The Interstate Compact only provides guidelines for the transfer, return, and supervision of those who move across state lines while on probation. *See* N.C.G.S. § 148-65.6, Art. I; *see also* Interstate Compact Transfer Guide (Appendix)[[1]](#footnote-1). If a defendant’s transfer to another state is not done in compliance with the Interstate Compact for Adult Offender Supervision Rules, the sending state is supposed to direct the defendant to return to the sending state. ICAOS R. 2.110.[[2]](#footnote-2) If the defendant does not return to the sending state, then the sending state is supposed to issue an arrest warrant. *Id.*; *see also* Interstate Compact Transfer Guide (App. p. 2).

 Even if Mr. Johnson moved prior to his transfer being approved, this violation of the rules only meant that Mr. Johnson was subject to arrest and being returned to the sending the State. Without more, it was not a revocable offense under North Carolina law.

 Moreover, even after probation is transferred to the receiving state under the Interstate Compact, the conditions of probation imposed in the sending state are still in effect. ICAOS R. 4.103(c). The sending state also retains jurisdiction to revoke a defendant’s probation when violations occur. *See Peppers v. State*, 696 So.2d 444, 445-446 (Fla. Dist. Ct. App. 1997). Under the ICAOS Rules, if a defendant violates the conditions of probation while in the receiving state, the receiving state can file a violation report and ask that the sending state retake the defendant. ICAOS R. 4.109 and 5.103. Even if the defendant commits the technical violation of absconding[[3]](#footnote-3) as defined by the ICAOS Rules, the receiving state is supposed to submit a violation report. Then the sending state is supposed to issue an arrest warrant and retake the offender. ICAOS R. 5.103-1.

 The ICAOS Rules further provide that if a retaking could result in a defendant’s probation being revoked, certain procedural hearings must occur. ICAOS R. 5.108; N.C.G.S. § 148-65.8. Because there are no grounds for probation revocation set forth in the ICAOS Rules and the sending State retains jurisdiction to revoke a defendant’s probation, a defendant would be subject to probation revocation proceedings in the sending state that retakes the defendant. Therefore, the state rules governing the revocation proceedings would apply.

 In the present case, the sending state that retook Mr. Johnson and subjected him to probation revocation proceedings was North Carolina. Mr. Johnson’s probation could only be revoked if it was permitted by North Carolina General Statutes. *See* N.C.G.S. § 15A-1344(a). More specifically, Mr. Johnson’s probation could only be revoked if it amounted to absconding as defined by N.C.G.S. § 15A-1343(b)(3a). As previously explained, the State did not present sufficient evidence that Mr. Johnson willfully absconded supervision, nor did Mr. Johnson’s actions amount to absconding.

1. **Relief**

 The trial court explicitly found Mr. Johnson absconded under North Carolina law even though the State’s evidence was insufficient to establish Mr. Johnson willfully absconded supervision. At most, Mr. Johnson’s actions amounted to a failure to report which is not a revocable offense. The trial court abused its discretion by revoking Mr. Johnson’s probation. This Court should reverse the trial court’s order revoking probation.

**CONCLUSION**

 For the foregoing reasons, Mr. Johnson respectfully requests this Court reverse the trial court’s order revoking probation and remand for further proceedings.

 Respectfully submitted, this the 27th day of December, 2024.

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**CERTIFICATE OF COMPLIANCE WITH RULE 28(J)**

Undersigned counsel hereby certifies that this brief complies with North Carolina Rule of Appellate Procedure 28(j), in that it is printed in 13-point Century Schoolbook 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 27th day of December, 2024.

 By Electronic Submission:

 Candace Washington

 Assistant Appellate Defender

**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of Defendant-Appellant’s Brief has been duly served by sending it electronically to Ms. Janon M. Harris, Assistant Attorney General at jmharris@ncdoj.gov.

 This the 27th day of December, 2024.

 By Electronic Submission:

Candace Washington

Assistant Appellate Defender

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NORTH CAROLINA COURT OF APPEALS

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APPENDIX

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Interstate Compact Transfer Guide App. 1

1. Available online at Interstate Compact, *NC Department of Adult Correction* (Dec. 19, 2024) https://www.dac.nc.gov/divisions-and-sections/community-supervision/interstate-compact [↑](#footnote-ref-1)
2. Available online at *Interstate Compact for Adult Offender Supervision Rules*, Interstate Commission for Adult Offender Supervision (Dec. 19, 2024), https://interstatecompact.org/icaos-rules [↑](#footnote-ref-2)
3. The Interstate Compact for Adult Offender Supervisions Rules define absconding as being “absent from the offender’s approved place of residence and employment; and failing to comply with reporting requirements.” ICAOS R. 1.101. [↑](#footnote-ref-3)