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NO. COA01-1573

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v.

Northampton County
No. 00CRS0454

RICKY GRAY

Appeal by defendant from judgment entered 9 July 2001 by Judge William Griffin in Northampton County Superior Court. Heard in the Court of Appeals 29 July 2002.

Attorney General Roy Cooper, by Assistant Attorney General Claud R. Whitener, III, for the State.

Louie Wilson, III for defendant-appellant.

BIGGS, Judge.

On 10 April 2000, Ricky Gray (defendant) pled guilty to possession of marijuana, a Class 3 misdemeanor, and placed on probation. On or about 29 January 2001, a district court judge found defendant to be in violation of certain terms and conditions of probation, and modified the terms of his probation. In addition, the court ordered defendant to pay a fine and serve an active term of five days in jail commencing Monday, 29 January 2001 at 10:20 a.m. While in jail, defendant drafted a notice of appeal and gave said notice to a jailer at the county jail. The jailer

placed the notice of appeal in the jail files, and the notice was never timely filed in the Clerk of Court's office. Defendant subsequently completed his five-day sentence, paid the requisite fine, and was released from jail on 3 February 2001.

On or about 3 May 2001, defendant's probation officer filed another violation report alleging that defendant had violated certain of the modified terms and conditions of probation. The district court found that defendant had violated the terms and conditions of probation, as alleged in the violation report, and activated defendant's suspended sentence on or about 31 May 2001. Defendant appealed to the superior court, and this matter was heard on 9 July 2001. Defendant, appearing *pro se*, admitted to having violated the terms and conditions of probation as alleged in the violation report, but contended that he should not be held accountable for those conditions since he had intended to appeal from the judgment imposing those modified terms and conditions, but was prevented from doing so by a jailer's failure to properly handle his notice of appeal. The superior court judge found defendant in violation of his probation and activated his suspended sentence. Again, defendant appeals.

On appeal, defendant recapitulates the argument made before the superior court: that his probation was improperly revoked, since he had been deprived of his due process rights when his appeal from the judgment modifying the terms and conditions of his probation was not timely delivered to the Clerk of Court by the jailer. We disagree.

Defendant's attack on the validity of the underlying 29 January 2001 judgment modifying the terms and conditions of his probation in this appeal from the judgment finding and concluding that he had violated those terms and conditions and activating his suspended sentence, is "an impermissible collateral attack." *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971) (holding that the defendant's questioning of validity of original judgment in which his sentence was suspended, on appeal from an order activating the sentence, was an "impermissible collateral attack"). As the Court explained in *Noles*, "The proper procedure which provides the defendant adequate opportunity for adjudication of claimed deprivations of constitutional rights is under the Post-Conviction Hearing Act." *Noles*, 12 N.C. App. at 678, 184 S.E.2d at 410.

Even if a collateral attack on the underlying 29 January 2001 judgment were permissible, defendant is unable to show that he was prejudiced by the jailer's failure to timely file his notice of appeal. It was in response to defendant's missing scheduled appointments with his probation officer and his testing positive for marijuana and cocaine use that the district court modified the terms of defendant's probation to extend his probation for an additional twelve months and require that he "attend N.A. and A.A. meetings not less than three (3) times per week and provide written proof to the probation officer." Had defendant's notice of appeal been properly delivered to the Clerk enabling him to appeal from the 29 January 2001 judgment modifying the terms and conditions of

probation, his only argument on the record is that he "didn't have no [sic] transportation at the time. And didn't have no way [to get to the required N.A. and A.A. meetings]." Such an excuse would not have entitled defendant to any relief on appeal from the 29 January 2001 judgment modifying the terms and conditions of his probation, which was entered upon a finding that defendant had violated probation by testing positive for marijuana and cocaine use and by failing to attend scheduled meetings with his probation officer. See *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987) (providing that once the State presents evidence that defendant willfully or without lawful excuse violated a valid condition of probation, "[t]he burden is on defendant to present competent evidence of his inability to comply with the conditions of probation.") Therefore, defendant's argument in this regard fails.

We conclude that the evidence before the superior court was sufficient to support its finding that defendant willfully and without lawful excuse violated certain terms and conditions of his probation, and those findings support the court's conclusion that defendant's suspended sentence should be activated. Accordingly, the judgment revoking defendant's probation and activating his suspended sentence is affirmed.

Affirmed.

Judges WALKER and THOMAS concur.

Report per Rule 30(e).