

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA02-220

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

STATE OF NORTH CAROLINA

v.

Davidson County
No. 01 CRS 8315

EDDIE ROSS DUNLAP

Appeal by defendant from judgment entered 4 October 2001 by Judge Robert P. Johnston in Superior Court, Davidson County. Heard in the Court of Appeals 26 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly E. Gunter, for the State.

Kay S. Murray for defendant-appellant.

McGEE, Judge.

Defendant Eddie Ross Dunlap pled guilty to taking indecent liberties with a child and was sentenced to a term of thirteen to sixteen months imprisonment on 27 July 1999. Defendant's sentence was suspended and he was placed on supervised probation for thirty-six months. As a condition of his probation, defendant was ordered to pay probation supervision fees, fines and court costs. Additionally, defendant was to obtain a mental health assessment specifically for inappropriate sexual contact with children and follow treatment recommendations.

A probation violation report was filed on 26 June 2001 alleging that defendant had violated his probation because he was in arrears on the monetary conditions of his probation and had been discharged from sex offender treatment due to lack of participation and attendance failure.

A probation violation hearing was held on 1 October 2001. Defendant admitted violating his probation. However, defendant testified that he failed to attend one meeting because his car had broken down, and that he did not participate in the classes because he did not understand them and that they were "over my head." Defendant did not testify as to why he was in arrears on the monetary conditions of his probation, but his attorney argued that defendant was disabled, was of low intelligence, and could not get a job. The trial court found that defendant had willfully violated the terms of his probation, revoked his probation, and activated his suspended sentences. Defendant appeals.

Defendant first argues that he received ineffective assistance of counsel. Defendant asserts that his counsel admitted the allegations in the probation violation report, yet failed to produce any evidence that would show to the trial court that the violations were not willful. Defendant further contends that his counsel did not prepare for the hearing. Specifically, defendant argues that counsel stated at the hearing that he had only glanced at documents which formed the basis of the probation officer's violation report. Accordingly, defendant contends that the record shows that trial counsel did nothing to defend him against the

allegations in the probation violation report.

Our Supreme Court stated in *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), that a defendant's ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." However, a motion for appropriate relief may be preferable to a direct appeal because in order to

defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor. "[O]nly when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance." Thus, superior courts should assess the allegations in light of all the circumstances known to counsel at the time of representation.

State v. Buckner, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citations omitted).

The Supreme Court also directed in *Fair* that "should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *Fair*, 354 N.C. at 167, 557 S.E.2d at 525. A review of the record in the case before us shows that evidentiary issues may need development for defendant to adequately raise his IAC claim. We therefore dismiss

this assignment of error without prejudice to defendant's right to file a motion for appropriate relief.

We next consider whether the trial court erred in revoking defendant's probation because there was insufficient evidence and findings of fact that his failure to comply was willful. Defendant argues that he presented sufficient evidence concerning his disability which prevented him from complying with the monetary conditions of his probation, and his limited intellect prevented him from participating as ordered in the counseling program. Furthermore, defendant contends that the trial court's findings fail to clearly state which of the allegations defendant willfully violated.

After careful review of the record, briefs and contentions of the parties, we find no error. This Court has stated:

Any violation of a valid condition of probation is sufficient to revoke defendant's probation. All that is required to revoke probation is evidence satisfying the trial court in its discretion that the defendant violated a valid condition of probation without lawful excuse. The burden is on defendant to present competent evidence of his inability to comply with the conditions of probation; and that otherwise, evidence of defendant's failure to comply may justify a finding that defendant's failure to comply was wilful or without lawful excuse.

State v. Tozzi, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987) (citations omitted). In the case before us, defendant violated the condition of his probation that he attend sex offender treatment. Defendant admitted that he failed to attend on at least two or three occasions, and while he presented evidence that he failed to

attend on one occasion because his car "broke down," defendant failed to offer any evidence to account for his other absences. His admission that he did not regularly attend the treatment program, without offering any evidence to justify the absences, was sufficient in itself to sustain the trial court's finding that his failure to comply was without lawful excuse. See *State v. Alston*, 139 N.C. App. 787, 794-95, 534 S.E.2d 666, 671 (2000). Accordingly, we conclude it was within the trial court's discretion to revoke defendant's probation.

No error.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).