

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-463

NORTH CAROLINA COURT OF APPEALS

Filed: 20 October 2009

STATE OF NORTH CAROLINA

v.

New Hanover County  
No. 08 CRS 50158

KALMEACIE WILLIAMS

Appeal by Defendant from judgment entered 26 January 2009 by Judge D. Jack Hooks, Jr., in Superior Court, New Hanover County. Heard in the Court of Appeals 19 October 2009.

*Attorney General Roy Cooper, by Assistant Attorney General Gaines M. Weaver, for the State.*

*Richard Croutharmel for defendant-appellant.*

WYNN, Judge.

To revoke probation, all that is required is evidence sufficient to support a conclusion that the defendant violated a valid condition of probation without lawful excuse.<sup>1</sup> Because we find sufficient evidence to show that Defendant Kalmeacie Williams violated his 7:00 p.m. probation on 27 December 2008 by being at the City Limits Saloon, we affirm.

On 15 December 2008, Defendant pled guilty to financial card theft and the trial court sentenced him to eight to ten months

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<sup>1</sup> *State v. Robinson*, 248 N.C. 282, 287, 103 S.E.2d 376, 380 (1958).

imprisonment. The trial court suspended the sentence and placed Defendant on eighteen months supervised probation, including six months of intensive supervision. Special conditions of Defendant's probation included: (1) Defendant not use, possess, or control any illegal drug or controlled substance unless it has been prescribed by a licensed physician; (2) Defendant not consume, control, or possess any alcoholic beverages or go upon the premises of any establishment that primarily sells alcoholic beverages; and (3) Defendant not be away from his place of residence between the hours of 7:00 p.m. and 6:00 a.m., unless his probation officer modified the hours.

Melissa Ryan was initially assigned as Defendant's probation officer; however, Matthew Apke replaced Ryan on 19 January 2009. On 23 January 2009, Officer Apke filed a probation violation report alleging: (1) Defendant had tested positive for marijuana on 8 January 2009; (2) Defendant had violated his 7:00 p.m. curfew on 27 December 2008 by being at the City Limits Saloon; and (3) Defendant was on the premises of the City Limits Saloon, an establishment that primarily served alcohol.

The trial court conducted a probation revocation hearing on 26 January 2009. Defendant admitted testing positive for marijuana, but argued it was not willful, and denied the remaining two violations. Officer Apke testified that on 8 January 2009, Defendant had one "instant screen" positive drug test under probation officer Ryan. In a handwritten statement, Ryan recalled Defendant "stated that the use was actually prior to him coming out

on probation, that he used [] at the jail." Officer Apke further testified that Defendant's file contained a written statement from Detective L.P. Irving of the Wilmington Police Department, who stated that he had seen Defendant at the City Limits Saloon between 11:30 p.m. and 12:00 a.m on 27 December 2008.

Officer Apke subsequently read into evidence Detective Irving's written statement:

On December 27, 2008, approximate 2330 hours between 2400 hours, I was working an outside contract for City Limits Saloon located at 28 South Front Street. I was standing in front [of] the building when I looked up, I saw Mr. Kalmeacie Williams and Tyra Mallory standing in front of the building. I spoke to Mr. Williams and Ms. Mallory. Mr. Williams asked for the manager, and I called for the manager to come over. Mr. Williams asked the manager if he remembered him from the House of Blues in Myrtle Beach, where he used to "DJ" there. The manager responded that he [did] remember him from there. Mr. Williams asked me to vouch for him that he just got out of jail. I told the manager that he just did get out of jail. Before Mr. Williams could walk away, I told him to have fun and not get into any trouble. I saw Mr. Williams and Ms. Mallory enter into the City Limits Saloon.

On Thursday, January 8, 2009, ADA Joy Alford overheard me talking about me seeing Kalmeacie Williams downtown, and she stated that he was not supposed to be out after 7 p.m., that he was on probation. I was not aware that Mr. Williams was not - - placed on probation, nor was he supposed to be at any establishment where alcohol was served. I made contact with his probation officer, Melissa Ryan, who requested a statement on the incident.

Officer Apke also testified that Detective Irving signed his written statement, and the City Limits Saloon served alcohol.

On cross-examination, Officer Apke acknowledged that the "instant test" does not indicate how long ago Defendant consumed the marijuana. Officer Apke testified that Defendant was home the two times he made curfew checks on Defendant. When asked whether the City Limits Saloon served food, Officer Apke responded, "I have not been to the establishment myself."

Defendant did not testify at the hearing. After hearing arguments from counsel, the trial court found that "allegation number 2, that being the curfew violation, in fact occurred; that no lawful excuse has been shown; that his probation should be revoked." By the written judgment entered 26 January 2009, the trial court found Defendant had violated all three conditions set forth in the violation report, revoked Defendant's probation and activated his original sentence. Defendant appeals.

Preliminarily we note that the court's written judgment states that Defendant violated the special conditions "in paragraph(s) 1-3 in the Violation Report or Notice dated 01/23/2009." However, the transcript of the hearing shows the trial court specifically found that Defendant violated paragraph two, Defendant's 7:00 p.m. curfew. Although there is a discrepancy between the trial court's determination as announced in open court and the written judgment, the trial court did find that defendant violated paragraph 2 regarding the curfew. Accordingly, we limit our review of Defendant's arguments to those that relate to Defendant's failure to abide by his curfew. However, we note that the judgment improperly reflects that the trial court found that the Defendant

violated paragraphs one through three of the violation report. We consider this as a clerical error, and it is "properly addressed with correction upon remand because of the importance that the records 'speak the truth.'" *State v. Sellers*, 55 N.C. App. 51, 574 S.E.2d 101 (2002). (Internal citations and quotes omitted.) Therefore, upon remand, the trial court shall correct the clerical error as to the finding that defendant violated paragraphs one and three.

Here, Defendant argues there was no competent evidence that Defendant violated his curfew because the only evidence presented at trial was incompetent hearsay evidence introduced by Officer Apke, who had no actual knowledge of Defendant not abiding by his 7:00 p.m. curfew.

Although formal rules of evidence do not apply in a probation revocation hearing, one's probation may not be revoked solely on the basis of hearsay evidence. *State v. Hewett*, 270 N.C. 348, 356, 154 S.E.2d 476, 482 (1967). However, when both competent and incompetent evidence is admitted in a probation revocation hearing, it is presumed that the court disregards the incompetent evidence. *State v. Coleman*, 64 N.C. App. 384, 385, 307 S.E.2d 207, 208 (1983). As long as there is competent evidence to support a finding of a single violation of probation, the court's order revoking probation must be affirmed. *Id.*

Here, Officer Apke did not relate statements made to him by Detective Irving or by Officer Ryan. Rather, Officer Apke read into evidence Detective Irving's signed written statement, in which

Detective Irving stated that he saw Defendant at the City Limits Saloon between 11:30 p.m and 12:00 a.m. Importantly, Defendant never objected to the court's consideration of the evidence on the ground it was inadmissible hearsay. Further, Defendant offered no evidence to rebut the State's proffer as to the curfew violation, including the verified violation report filed by Officer Apke. See *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 58 (1967) (holding a verified violation report constitutes competent evidence sufficient to support a finding of a probation violation); see also *State v. Dement*, 42 N.C. App. 254, 255, 255 S.E.2d 793, 794 (1979) ("Sufficient evidence was presented in the verified and uncontradicted violation report served upon the defendant to support the trial court's findings and conclusions.").

Contrary to Defendant's contention, the State's evidence is sufficient to support the court's finding that he willfully and without lawful excuse violated his curfew. Defendant has the burden of presenting evidence of his inability to comply with the conditions of probation; otherwise, evidence of Defendant's failure to comply may justify a finding that Defendant's failure to comply was willful or without lawful excuse. *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985). As stated previously, the evidence presented at the hearing tended to show that Defendant was at the City Limits Saloon on 27 December 2008 around 11:30 p.m. Further, Defendant offered no explanation or reason for being at the City Limits Saloon after his curfew of 7:00 p.m.

Accordingly, we hold the evidence supports the court's finding and conclusion that Defendant willfully and without lawful excuse violated the terms and conditions of his probation. We therefore affirm the trial court's judgment.

Affirmed in part, remanded in part for correction of clerical error.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).