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NO. COA10-1336

NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

STATE OF NORTH CAROLINA

v.

Wake County

No. 02 CRS 110647

DARRELL BURT LANCASTER, JR.,
Defendant.

Appeal by defendant from judgment entered 27 May 2010 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 23 March 2011.

Attorney General Roy Cooper, by Assistant Attorney General Ann Stone, for the State.

Lisa Skinner Lefler for defendant-appellant.

GEER, Judge.

Defendant Darrell Burt Lancaster, Jr. appeals from the judgment revoking his probation and activating his sentence for obtaining property by false pretenses. Defendant, who has been ordered to pay more than half a million dollars in restitution to his victims, primarily argues that the trial court erred in finding that he could have paid more restitution than he has

during his probation and that his failure to do so was willful. Given the evidence regarding defendant's efforts, the trial court could reasonably conclude that defendant was able to earn more, but had chosen not to do so and, therefore, that he willfully failed to make reasonable payments towards the amount due in restitution. We, therefore, affirm the judgment revoking defendant's probation.

Facts

On 9 December 2002, defendant was indicted for obtaining property by false pretenses. According to the indictment, the value of the property was \$116,095.00, and the false pretense consisted of the following:

The property was obtained by means of the defendant, who was the president and owner of Canusa Mortgage Corporation, represented to Robert A. Cerwin that money would be used to fund a construction loan for Isaac Anthony Carpenter to purchase land and construct Carpenter's residence, when in fact, the defendant never intended for the victim's money to be used for said purpose. Robert A. Cerwin at that time had funds to invest. Robert A. Cerwin relied on the information given to him by the defendant and disbursed the funds to Canusa to be used for the purpose represented by the defendant. The defendant did not use the funds for a construction loan for Carpenter, but instead used them for his own personal benefit.

Defendant pled guilty to this charge.

During sentencing, Judge Donald W. Stephens determined that because defendant had committed a class C felony, active punishment was required. Pursuant to N.C. Gen. Stat. § 15A-1340.13 (2009), however, Judge Stephens found the existence of an extraordinary mitigating factor permitting the court to nonetheless impose an intermediate punishment:

THE COURT FINDS EXTRAORDINARY MITIGATION WHICH AUTHORIZES A PROBATIONARY SENTENCE. THE DEFENDANT OWES \$517034.99 IN RESTITUTIN [sic]. THE VICTIMS NEED TO BE REPAID. THE STATE AND THE VICTIMS HAVE CONSENTED TO A PROBATIONARY SENTENCE. THIS EXTRAORDINARY MITIGATION FACTOR IS SIGNIFICANTLY GREATER THAN IN A NORMAL CASE AND OUTWEIGHS ANY AGGRAVATING FACTOR. IT WOULD BE A MANIFEST INJUSTICE TO THE VICTIMS TO PREVENT THE OPPORTUNITY FOR FULL RESTITUTION BY IMPOSING AN ACTIVE SENTENCE.

Judge Stephens imposed a sentence of 73 to 97 months imprisonment, but, based on the extraordinary mitigating factor, suspended the sentence and ordered that defendant be placed on 60 months supervised probation following the expiration of the active sentence for his conviction in file number 02 CRS 110642. The judgment in this case was entered the same day, 7 October 2003, as the judgment in 02 CRS 110642. In addition, defendant was ordered to pay restitution in the amount of \$517,034.99 pursuant to a schedule to be determined by the probation officer.

In October 2009, defendant was released from prison and began serving his probation. In April 2010, defendant's probation officer, Tina Turner, filed a probation violation report alleging that defendant had willfully violated:

1. Condition of Probation "The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" as directed by the Court or probation officer" in that
THE DEFENDANT HAS FAILED TO MAKE MONTHLY PAYMENTS AS REQUIRED. HE IS CURRENTLY IN ARREARS \$8632.00 IN COURT COSTS.

On 27 May 2010, Judge Stephens held a probation violation hearing. Ms. Turner, Dr. Cerwin (one of the persons owed restitution by defendant), and defendant testified at the hearing. The evidence showed in part that defendant had paid approximately \$44,000.00 in restitution while he was in prison and on work release.

Following his release from prison, defendant, who works as an equipment operator for a highway contractor, paid \$400.00 in November 2009, \$400.00 in December 2009, and \$100.00 in January 2010. In February 2010, during a meeting with Ms. Turner, defendant was informed that he still owed a total of \$474,760.14 and that his required monthly payment amount was \$8,632.00. The \$8,632.00 amount was calculated by dividing the total restitution still owed by the number of months remaining in

defendant's probation. After that meeting, defendant paid \$100.00 twice in March 2010 and \$100.00 once in April 2010. In sum, defendant, after leaving prison, paid a total of \$1,200.00.

At the conclusion of the evidence, Judge Stephens recalled that the facts underlying defendant's conviction were "outrageous" and emphasized that making a finding of an extraordinary mitigating factor in this case had been a "really out of the ordinary" step for him to take, but he had done so because "so much money ha[d] been stolen, just flat stolen from good people who had been taken absolute advantage of by a thief, by just a flat thief" and because the victims -- not defendant -- had requested that defendant receive probation so he could pay restitution. Judge Stephens recalled his extreme reluctance in having to place defendant on probation rather than giving him an active sentence.

Judge Stephens then observed that defendant "paid more money while he was in prison on work release than he's paid since he's been out. I'm having a hard time finding that he's making the kind of reasonable effort that I made to keep from putting him in prison to pay this money." Judge Stephens further noted that defendant "had an obligation when he got out to find some way, find some way, whether it's working one job, two jobs, three jobs, to make a reasonable effort to continue to

make that restitution which he had agreed to do." With respect to defense counsel's argument about defendant's difficulty finding another job because he was a convicted felon, Judge Stephens commented, "He's not a registered sex offender, he's a guy who's got prior record for obtaining property by false pretenses."

Ultimately, Judge Stephens determined that defendant had "not made a reasonable effort . . . to make payments by which he should have the means to make or some more payments than he has made and, therefore, the Court finds his violation to be proven and the violation is willful." Judge Stephens entered judgment revoking defendant's probation and activating his sentence. Defendant timely appealed to this Court.

I

Defendant contends on appeal that the trial court erred in finding that defendant willfully violated the condition of his probation that he make monthly restitution payments. It is well settled that "[a]ny 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." *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987) (internal

citation omitted). Once the State meets its burden, the burden shifts to the defendant to "present competent 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 wilful or without lawful excuse." *Id.*

Defendant argues on appeal that "[t]he trial court's finding that [defendant] could have paid more in probation fees and that his failure to do so was willful is unsupported by the evidence." While defendant, in other places in his brief, argues that the required monthly payment of \$8,632.00 was "ridiculous" and insists on "the impossibility of paying that amount," the \$8,632.00 amount was not some arbitrary, punitive figure set by the probation officer. Rather, as Ms. Turner explained in her testimony, the figure represented the amount of restitution defendant still owed divided by the number of months he had left in his probationary sentence.

In any event, defendant's articulation of the actual issue on appeal recognizes that his probation was not in fact revoked because of his failure to pay \$8,632.00 per month. Rather, the trial court revoked defendant's probation because, the trial court found, defendant could have paid more towards his restitution amount than he did and willfully failed to do so.

At the hearing, defendant objected when the State presented evidence regarding amounts that defendant had paid prior to February, the date that defendant was informed that he would need to pay \$8,632.00 per month. Defendant contended in his objection that the sole issue at the hearing was defendant's failure to make the \$8,632.00 monthly payment. The trial court, however, stated to counsel:

Okay. I understand, but if he has to make payments of \$10,000 a month and he doesn't have the means by which to do that, but he has the means by which to make some payment toward that arrearage, and he fails to adequately make reasonable payments consistent with his ability to pay, then that's what I'm interested in.

Defendant has not argued on appeal that the trial court erred in limiting the issue to whether defendant "fail[ed] to adequately make reasonable payments consistent with his ability to pay[.]"

In arguing that any failure to make greater payments was not willful, defendant points to evidence that from the moment defendant was released from prison, he was concerned about his ability to make restitution payments in addition to covering his living expenses; that his job as a heavy equipment operator had an unpredictable work schedule due to the weather and the economy; that the amount of work that the construction company was obtaining had been declining and, therefore, so had defendant's amount of work; that he could not work an additional

job because his first job had an "unpredictable" work schedule, and Ms. Turner did not talk to him about getting a second job; and that his "minimal living expenses" cost more than he earns. Defendant argues that he testified he "has no more ideas about how to trim expenses or get more hours at work." He claims that "[t]he job he has is worth his staying because the hourly compensation is relatively high at \$15.00 per hour." Defendant then insists that the trial court "ignored" this "overwhelming evidence that he cannot make an increased payment with the income he is able to earn."

It is well established, however, that "[t]he trial judge, as the finder of the facts, is not required to accept defendant's evidence as true." *State v. Young*, 21 N.C. App. 316, 321, 204 S.E.2d 185, 188 (1974). Thus, Judge Stephens was not required to accept as true any of defendant's evidence or to conclude that that evidence constituted a lawful excuse for failing to pay restitution.

Here, the record contains evidence that would permit Judge Stephens to determine, as he did, that defendant lacked a valid excuse for failing to pay more towards his restitution. First, defendant had only one job. He contends, however, that "[h]e could not get a second job because the work was unpredictable . . . , yet the \$15.00 per hour is good compensation *when he had*

work." (Emphasis added.) Defendant acknowledged that since his release from prison, he has only had "a couple" of weeks of working more than 40 hours and that 40-hour weeks are "very rare" now. On average, he was working only about 36 to 38 hours per week.

Defendant claimed at the hearing that he had "tried to change jobs, other employment for better pay" and said both that he had "not been able to because [he is] a felon" and that he had "not had any answers yet from anyone." When asked where he had applied, however, defendant testified that he had only applied to two construction companies that work about the same schedule as his current employer (suggesting that even had he been hired, he would not have added net hours), and to unspecified "local people." Defendant presented no evidence that he applied for, or could not have worked, any specific jobs that may have paid a lower hourly rate but offered more regular hours -- allowing defendant to work multiple jobs.

In addition, defendant testified that it cost him \$300.00 to \$350.00 per month in gas for his daily commute from Wake Forest to Mebane to work on his construction job. In arguing that he needed to continue in this job because it "is good compensation," defendant has not taken into account the increased expenses attributable to the job. Alternatively, he

offered no explanation as to why he could not have moved closer to his job to reduce gas expenses and put that extra money toward the restitution payments.

Further, when asked what he did on the weekends, defendant said that he mowed the grass, cleaned his house, and went to church on Sundays. He had no explanation for not seeking out a job that would allow him to work on Saturdays or Sundays apart from the fact that he is a felon. Although defendant also acknowledged that he usually got off work at 2:00 or 3:00 p.m. and, in any event, was home by 6:30 or 7:00 p.m., he did not explain, despite the court's questioning, why he had not sought work for the evenings.

Defendant, on appeal, however, focuses to a large extent on the unreasonableness of the required \$8,632.00 monthly payment. In doing so, defendant overlooks the fact that the size of the amount owed was solely due to the amount of money that defendant stole. Moreover, as Judge Stephens explained in revoking defendant's probation, defendant ordinarily would have had no opportunity for probation, having committed a Class C felony, but he was released so that the people whom he defrauded would have some opportunity of being repaid.

Based on this evidence of defendant's insistence on keeping a job with unreliable and decreasing work that did not assure

him 40 hours a week; his very limited -- and unsubstantiated -- job search for other work; his unwillingness to look for a second job because of his first job and because he was not told to do so; and his failure to work on weekends or evenings, Judge Stephens was entitled to conclude, as he did, that defendant could have paid more towards his restitution amount than \$1,200.00 over a six-month period and had willfully failed to do so. Judge Stephens also had an opportunity to observe defendant's demeanor and hear his tone of voice in assessing the sincerity of his efforts and the credibility of defendant's claim that he could not trim expenses or earn more income in order to make more progress on reimbursing his victims who lost more than half a million dollars.

We therefore hold that Judge Stephens did not err in concluding that defendant's explanations were not lawful excuses for a failure to make greater restitution payments than he had been making. *See State v. Williamson*, 61 N.C. App. 531, 532, 535, 301 S.E.2d 423, 424, 426 (1983) (upholding revocation of probation based on willful failure to make restitution payments where defendant presented evidence tending to show that he had been unable to find employment other than some part-time work and had medical and mental health problems).

Defendant next claims that he was denied a fair and impartial hearing in violation of his due process rights because the trial court's "questions to the prosecutor, the probation officer, and [defendant], as well as the trial court's speech about the case and the following judgment, show that the trial court was unfairly prejudiced against" defendant. We disagree.

Defendant did not raise this issue below and, therefore, did not preserve the issue for review. *See, e.g., State v. Key*, 182 N.C. App. 624, 632, 643 S.E.2d 444, 450 (2007) (where defendant contended that amended show cause order demonstrated that judge was biased against defendant and should have recused himself from hearing contempt matter *ex mero motu*, but defendant had made no motion to recuse judge, holding issue had not been properly preserved and was dismissed); *State v. Love*, 177 N.C. App. 614, 627-28, 630 S.E.2d 234, 243 (2006) (where defendant argued that judge erred in failing to recuse herself based on bias against his counsel, holding that "[t]here was no request, objection or motion made by defendant at trial and therefore the question was not properly preserved for appeal").

In any event, we hold that defendant has not pointed to any indication of "unfair" prejudice by Judge Stephens. Judge Stephens limited the issue at the revocation hearing to a fair question: whether defendant was making reasonable payments

towards restitution in light of defendant's ability to pay. His questions focused specifically on that issue, although demonstrating an unwillingness to take simply at face value defendant's claims that he was not able to earn more. It was not in any way unreasonable for Judge Stephens to probe defendant's testimony in the manner that he did.

Finally, Judge Stephens' remarks, although certainly strongly worded, related to the fact that he had taken the extraordinary step of placing on probation a defendant who had stolen more than half a million dollars rather than giving him active time. Then, Judge Stephens was confronted by the fact that this defendant had made significantly more payments to the victims -- the sole reason he was given probation -- while in prison than after his release. And, Judge Stephens was entitled, based on the evidence, to conclude that defendant had not fully appreciated the opportunity he was given and had not taken seriously his obligation to make restitution.

Judge Stephens' questions and remarks did not show an inappropriate bias, but rather reflected his proper role as the trier of fact and were a reasonable reaction to the facts. We, therefore, affirm the decision of the trial court.

Affirmed.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).