

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-392
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

STATE OF NORTH CAROLINA

v.

Randolph County
No. 10 CRS 238

TEDRON DEON GRAVES

Appeal by defendant from judgment entered 16 December 2010 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 6 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Derek L. Hunter, for the State.

Mercedes O. Chut for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendant Tedron Deon Graves appeals from judgment entered upon revocation of his probation. Defendant contends the trial court erred by revoking his probation because: (1) the judgment entered violated his rights against double jeopardy; and (2) there was insufficient evidence to show that he willfully violated his probation. We affirm.

Defendant pled guilty in Montgomery County Superior Court on 5 May 2010 to maintenance of a vehicle/dwelling for the purpose of the sale or delivery of a controlled substance. The trial court sentenced defendant to 10 to 12 months imprisonment, suspended the sentence, and placed him on 36 months supervised probation. As part of his probation, defendant was required to, among other things, complete 50 hours of community service during the first 180 days of probation; not use, possess, or control illegal drugs; and complete a six-month intensive probation that included abiding by a curfew. Defendant's probation case was subsequently transferred to Randolph County.

Defendant's probation officer filed a violation report and an addendum in August and September 2010, respectively, and the trial court held a hearing in October 2010. The trial court modified defendant's original 5 May 2010 probation by extending the intensive probation period for an additional 120 days and ordering defendant to undergo substance abuse treatment and maintain his current employment.

By a violation report dated 22 November 2010, defendant's probation officer alleged that defendant had willfully violated his probation by testing positive for marijuana. A second violation report dated 24 November 2010 alleged that defendant

had: (1) failed to complete community service as directed in that he "failed to complete any hrs. out [of] the 50 hrs. he was originally ordered to complete[;]" and (2) violated curfew on 23 and 24 November, 11 September, 13 July and 27 June 2010.

The trial court held a hearing on 16 December 2010 and heard testimony from defendant's probation officer. In open court, the trial court found defendant violated his probation as alleged in the two reports by testing positive for marijuana on 16 November 2010, failing to complete any of the 50 hours of community service of his initial intensive probation requirement, and violating curfew. By written judgment filed 16 December 2010, however, the trial court found that defendant willfully violated his probation according to paragraphs 1 and 2 of the 24 November 2010 violation report. The trial court revoked defendant's probation and activated defendant's original sentence. Defendant appeals.

Defendant first challenges the judgment revoking his probation based on double jeopardy grounds. He argues double jeopardy precluded much of the evidence presented at the 16 December 2010 hearing because that evidence could have been presented at the 25 October 2010 hearing upon a prior violation report. Defendant, however, failed to assert a double jeopardy

defense at the 16 December 2010 hearing, and therefore, has waived appellate review of the constitutional issue. See *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (“Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal”). More importantly, our Courts have held that double jeopardy protections do not apply to probation revocation proceedings because they are not a criminal proceeding, but “simply a ministerial proceeding which determines whether an individual has violated the conditions of his probation.” *State v. Sparks*, 182 N.C. App. 45, 48, 641 S.E.2d 339, 341-42 (2007), *affirmed*, 362 N.C. 181, 657 S.E.2d 655 (2008). Defendant’s argument is without merit.

Defendant also contends the trial court erred in revoking his probation because there was insufficient evidence that he willfully and without lawful excuse violated his probation by not performing community service. Defendant specifically asserts that he had no ability to complete community service hours since his probation officer did not extend the time for him to complete his community service requirement after the October hearing. We are not persuaded by defendant’s argument.

In order to revoke a defendant's probation, the evidence need only "reasonably satisfy the [trial court] in the exercise of [its] sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967). A trial court's judgment revoking a defendant's probation will only be disturbed upon a showing of a manifest abuse of discretion. *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960).

Here, defendant was ordered to perform 50 hours of community service within the first 180 days of probation, a period thus extending from 5 May 2010 until 5 November 2010. The violation report alleged that defendant violated his probation by not completing any of the 50 hours of community service. Defendant's probation officer testified that defendant had been on probation for over six months and "didn't complete any hours at all." Defendant did not present any evidence to show why he failed to perform any hours of community service during the 180-day period. The defendant has the burden of showing excuse or lack of willfulness; otherwise, evidence of failure to comply is sufficient to support a finding that the

violation was willful or without lawful excuse. *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985). We hold that there is evidence in the record to support the judge's finding that defendant willfully and without lawful excuse violated the conditions of his probation. We further hold that it was within the trial court's discretion to revoke defendant's probation and activate his sentence. *See State v. Seay*, 59 N.C. App. 667, 670-71, 298 S.E.2d 53, 55 (1982), *disc. review denied*, 307 N.C. 701, 301 S.E.2d 394-95 (1983) (stating breach of any one condition is sufficient grounds to revoke probation).

Affirmed.

Judges MARTIN and THIGPEN concur.

Report per Rule 30(e).