

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-464
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v. Buncombe County
Nos. 08 CRS 430
AUSTON CORLEY WOOD 08 CRS 51137-38

Appeal by Defendant from judgment entered 13 January 2011 by Judge Mark E. Powell in Superior Court, Buncombe County. Heard in the Court of Appeals 1 November 2011.

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

Edward Eldred for Defendant-Appellant.

McGEE, Judge.

Auston Corley Wood (Defendant) appeals from judgment entered revoking his probation and activating his sentence for multiple drug offenses. Defendant's sole argument on appeal is that the trial court abused its discretion in denying his motion to continue the revocation of probation hearing. We affirm.

Defendant pleaded guilty to possession of drug paraphernalia, possession with intent to sell or deliver a

controlled substance, and felonious possession of a controlled substance on 20 May 2009. Pursuant to a plea agreement, the offenses were consolidated for judgment, and Defendant received a suspended sentence of six to eight months and was placed on probation for thirty-six months. Defendant's probation officer filed a report on 1 July 2009, alleging that Defendant violated his probation by testing positive for marijuana on 27 May 2009. On 7 August 2009, Defendant admitted the violation and the trial court continued Defendant's probation on condition that Defendant participate in a drug treatment program.

Defendant's probation officer filed a second probation violation report on 10 August 2010, alleging the following violations: (1) on 14 June 2010, Defendant missed a scheduled appointment with the probation officer; (2) Defendant was in arrears in the amount of \$1,254.74 in his court-ordered payments; (3) Defendant was in arrears in the amount of \$450.00 in his probation supervision fees; and (4) Defendant absconded supervision by failing to make himself available.

The probation revocation hearing was held on 13 January 2011. Defendant moved to continue the hearing because Defendant's probation officer was not available. The trial court denied Defendant's motion. After Defendant admitted the

violations, the trial court determined that Defendant willfully violated the terms of his probation and ordered that Defendant's probation be revoked. The trial court entered judgment activating Defendant's sentence. Defendant appeals.

As an initial matter, we address the State's argument that Defendant's appeal should be dismissed as moot since Defendant was scheduled to be released from the State's custody in July of 2011. The appeal is not moot, however, since Defendant's probation violation may be used as an aggravating factor to enhance a sentence in future cases pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(12a) (2009). *State v. Black*, 197 N.C. App. 373, 377, 677 S.E.2d 199, 202 (2009). Thus, "'collateral legal consequences of an adverse nature can reasonably be expected to result therefrom . . . and the appeal has continued legal significance' for defendant." *Id.* (citation omitted). Therefore, we address Defendant's argument on the merits.

Defendant contends the denial of his motion to continue violated his constitutional right to present beneficial evidence in order to confront the allegations against him. "When a motion for continuance raises a constitutional issue, the trial court's ruling is a question of law and is fully reviewable on appeal." *State v. Cody*, 135 N.C. App. 722, 725, 522 S.E.2d 777,

779 (1999). In moving for a continuance, a defendant must provide proof establishing the reasons for delay and must show material prejudice. *Id.* at 726, 522 S.E.2d at 780. Whether based on a constitutional claim or not, a new trial is warranted only when a defendant is able to show that the denial of the continuance was error and that his defense was prejudiced as a result. *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982).

In this case, Defendant made an oral motion to continue his probation revocation hearing at the beginning of the hearing because his probation officer, David Barbour (Mr. Barbour), was not available and supervision of Defendant's case had been assumed by another probation officer. Defense counsel stated to the trial court that she did not know the case had been transferred, and that "Mr. Barber [sic] would have good things to say about" Defendant, although she then equivocated, stating that "[m]aybe he has bad things to say, but I have a feeling he would have positive things to say." We conclude that counsel's statements did not constitute sufficiently detailed proof of adequate reasons for delaying the probation revocation hearing where she was unable to say whether Mr. Barbour's testimony would be positive or negative.

Further, we conclude Defendant has failed to show that denial of his motion materially prejudiced his defense. It was Mr. Barbour who filed the violation report against Defendant, listing four separate violations, including that Defendant absconded from supervision. Defendant admitted that he had met with Mr. Barbour only once. It is unlikely Mr. Barbour would have provided sufficient positive evidence to offset the very same violations he submitted to the trial court. Accordingly, the trial court did not err in denying Defendant's motion to continue.

Affirmed.

Judges ELMORE and McCULLOUGH concur.

Report per Rule 30(e).