

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-611

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v.

Pitt County
No. 10 CRS 50591

JOSHUA PERNAILL CHAMBERLAIN

Appeal by Defendant from judgment entered 24 January 2011 by Judge Alma L. Hinton in Pitt County Superior Court. Heard in the Court of Appeals 28 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General Tracy J. Hayes, for the State.

Irons & Irons, P.A., by Ben G. Irons, II, for Defendant.

STEPHENS, Judge.

On 29 November 2010, Defendant Joshua Pernail Chamberlain pled guilty in Pitt County Superior Court to possession of a weapon of mass destruction. The court sentenced Defendant to 12 to 15 months in prison, suspended the sentence, and placed Defendant on supervised probation for 24 months. On 13 January 2011, Defendant's probation officer filed a report that

Defendant had violated the conditions of his probation. On 24 January 2011, Defendant admitted that he had possessed marijuana, a controlled substance, in violation of the conditions of his probation. At a revocation hearing, a probation officer¹ stated that, *inter alia*, Defendant had voiced his intention to violate the terms of his probation and to make the probation period difficult for the probation officers. Defendant's counsel responded that he hoped Defendant's comments were simply a "miscommunication or a misunderstanding," noted that Defendant had no other violations, and asked the court to continue Defendant's probation. The trial court then revoked Defendant's probation and activated his sentence. Defendant appeals, arguing that the trial court violated Defendant's due process rights by denying him an opportunity to speak in mitigation of his probation violation and that his counsel provided ineffective assistance at the revocation hearing. We affirm.

Our appellate courts have consistently held that proceedings to revoke probation are informal in nature such that the trial court is not bound by the strict rules of evidence. Additionally, once the State has presented competent evidence establishing a

¹Defendant's probation officer was ill on the date of the revocation hearing and another probation officer appeared on his behalf.

defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms. If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior sentence was suspended, it may within its sound discretion revoke the probation.

State v. Terry, 149 N.C. App. 434, 437-38, 562 S.E.2d 537, 540 (2002) (internal citations omitted).

Defendant first argues that the trial court violated his constitutional due process rights by allowing a probation officer to present hearsay statements allegedly made by Defendant without permitting Defendant an opportunity to refute the statements. However, neither Defendant nor his counsel requested an opportunity for Defendant to speak in mitigation or raised any constitutional matter during the revocation hearing. It is well-established that we will not address constitutional arguments not raised in the trial court. *State v. Braswell*, 283 N.C. 332, 336, 196 S.E.2d 185, 187-88 (1973). Defendant admitted violating conditions of his probation by possessing marijuana, which fully supports the court's decision to revoke his probation and activate his sentence. *See Terry*, 149 N.C. App. at 437-38, 562 S.E.2d at 540.

Neither at the revocation hearing nor on appeal has Defendant suggested, much less argued, that he was unable to comply with the terms of his probation. Further, Defendant fails to explain how the trial court abused its discretion in activating his sentence. *Id.* On the contrary, his position relies entirely on speculation that the court based its decision to revoke his probation solely on the hearsay statements of the probation officer. Defendant's argument in this regard finds no support in the record before this Court and is overruled.

Defendant also argues that the trial court violated the statutory requirements of N.C. Gen. Stat. § 15A-1345(e). We disagree.

"When a trial court acts contrary to a statutory mandate, the right to appeal the court's action is preserved, notwithstanding the failure of the appealing party to object at trial." *State v. Jones*, 336 N.C. 490, 497, 445 S.E.2d 23, 26 (1994). Subsection (e) provides that "the probationer may appear [at a revocation hearing] and speak in his own behalf, may present relevant information, and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." N.C. Gen. Stat. § 15A-1345(e) (2009). Defendant does not explain how the trial court violated

these provisions, except to assert, without supporting authority, that he "received no . . . opportunity" to be heard because "[t]here can be no 'opportunity' unless the [trial c]ourt specifies it." Here, as noted *supra*, Defendant and his counsel appeared at the hearing. Defendant's counsel presented relevant information to the court in response to the statements of the probation officer. Although he chose not to cross-examine the officer, Defendant was given the opportunity to do so. We see no violation of the statute's provisions. Accordingly, this meritless argument is likewise overruled.

Defendant last argues that he received ineffective assistance of counsel at the revocation hearing because his counsel failed to adequately address the statements of the probation officer about Defendant's alleged comments. We disagree.

To demonstrate ineffective assistance of counsel, a defendant must show his counsel's performance was deficient and that the deficiency likely affected the outcome of the proceeding. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). However, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the

proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at 563, 324 S.E.2d at 249. Here, trial counsel *did* address the matter, telling the trial court that he hoped Defendant's comments were the result of a "miscommunication or a misunderstanding" and emphasizing that Defendant had no other violations. In light of Defendant's admission that he had violated the terms of his probation, no action or advocacy by trial counsel was likely to have changed the outcome of the revocation hearing. Accordingly, the judgment and commitment upon revocation of probation is

AFFIRMED.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).