NO. COA00-1439

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

STATE OF NORTH CAROLINA

v. Forsyth County
No. 99 CRS 46224

JIMMY LLOYD MOSES

Appeal by defendant from judgment entered 31 August 2000 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 5 November 2001.

Attorney General Roy A. Cooper, by Assistant Attorney General Diane W. Stevens, for the State.

Stowers & James, by Paul M. James, III, for defendant.

BIGGS, Judge.

Defendant appeals from an order revoking his probation. We affirm the trial court.

The relevant facts are as follows: On 18 May 2000, a probation violation report was filed alleging that defendant violated certain terms and conditions of his probation. Specifically, the report alleged that defendant violated "Regular Condition of Probation No. 5 that he remain within the jurisdiction of the [c]ourt unless granted permission to leave by the [c]ourt or his probation officer, in that on or about 27 April 2000, he left

his place of residence . . . [and] failed to make his whereabouts known to his probation officer." Further, it alleged that defendant violated "regular condition of intensive probation 3F that he not be away from his residence between the hours of 6:00 p.m. and 6:00 a.m. Violation occurred on the following dates and times, 4/13/00 - 1740 hrs.[,] 4/14/00 - 2050 hrs., 4/17/00 - 2023 [hrs]." A hearing on the matter was conducted on 31 August 2000.

Based on the evidence presented, the trial court determined that defendant had willfully violated the terms and conditions of his probation and revoked the probation. Defendant's sentence of 15-18 months for his guilty pleas on 9 March 2000, to the charges of sale of cocaine and possession with intent to sale or distribute cocaine, was thereafter activated.

Defendant gave notice of appeal on 6 September 2000.

Defendant contends that the trial court erred in ordering his probation revoked as there was insufficient evidence of a willful violation of the terms of his probation as shown by the State. We disagree and affirm the trial court.

A proceeding "'to revoke probation [is] often regarded as informal or summary,'" *State v. Tennant*, 141 N.C. App. 524, 540 S.E.2d 807, __ (2000) (quoting *State v. Duncan*, 270 N.C. 241, 246, 154 S.E.2d 53, 57 (1967)), "and the court is not bound by strict rules of evidence," *Duncan* 270 N.C. at 245, 154 S.E.2d at 57. An alleged violation by a defendant of a condition upon which his sentence is suspended "need not be proven beyond a reasonable

doubt[;] . . . 'all that is required . . . is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended.'" *State v. Hill*, 132 N.C. App. 209, 510 S.E.2d 413 (1999) (quoting *State v. Robinson*, 248 N.C. 282, 285-86, 103 S.E.2d 376, 379 (1958)); *see also, State v. White*, 129 N.C. App. 52, 496 S.E.2d. 842 (1998). "'"The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion."'" *Tennant*, 141 N.C. App. at 526, 540 S.E.2d at 808, (quoting *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960)) (citations omitted).

"'[O]ur Courts have continuously held that a suspended sentence may not be activated for failure to comply with a term of probation unless the defendant's failure to comply is willful or without lawful excuse.'" *White*, 129 N.C. App. at 57, 496 S.E.2d at 846 (quoting *State v. Sellars*, 61 N.C. App. 558, 560, 301 S.E.2d 105, 106 (1983)), *aff'd in part*, 350 N.C. 302, 512 S.E.2d 424 (1999). "'"[T]he burden of proof is upon the State to show that the defendant has violated one of the conditions of his probation.'" *Tennant*, 141 N.C. App. at 527, 540 S.E.2d at 808 (quoting *State v. Seagraves*, 266 N.C. 112, 113, 145 S.E.2d 327, 329 (1965)).

In the case *sub judice*, the State offered the testimony of Officer Black to support the allegations in the violation report that defendant had moved from his place of residence and failed to make his whereabouts unknown to his probation officer and that he

had violated his curfew on three occasions. Officer Black testified that on at least four separate occasions, the last of which was 27 April 2000, he or his surveillance officer had visited the 810 Willow Street residence during curfew hours but were unable to locate defendant at that residence on any of those occasions. He explained that on each of the visits to the residence, he or his surveillance officer left notes at the door. Defendant did not respond to those notes or otherwise make his whereabouts known to the probation officer. Officer Black also testified that he went to defendant's employment and was advised that defendant no longer worked there.

Defendant presented the testimony of his girlfriend, Ms. Elaine Gamble, who stated that on 27 April 2000, defendant was living with her at 810 Willow Street. When questioned about defendant's residency on the 13, 14 and 17 April 2000, Ms. Gamble repeatedly answered that defendant was living with her. She further testified that when defendant was not at work, "[h]e would be home or he'll be asleep . . . in the back room." Defendant presented no evidence of a lawful excuse for his failure to contact the probation office in response to the notes left by the officer or to otherwise make his whereabouts known. In fact, Ms. Gamble, testified that she told defendant that the probation office was trying to reach him; yet, there was no effort on defendant's part to contact Officer Black. Nevertheless, defendant contends that since the probation officer could not testify that he had actual knowledge that defendant had moved, the State had presented

insufficient evidence to convince a reasonable trier of fact that defendant had violated the conditions of his probation. We disagree.

It is within the trial court's discretion to determine the weight and credibility that should be given to all evidence presented. *Phelps v. Phelps,* 337 N.C. 344, 446 S.E.2d 17 (1994). "The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980) (citations omitted).

We conclude that there is evidence in the record to support the judge's findings that defendant "willfully and without lawful excuse" violated the conditions of his probation by moving from his residence without permission and failing to abide by his curfew on at least two of the occasions outlined in the violation report. Accordingly, we hold that the trial court did not abuse its discretion and defendant's assignment of error is overruled.

Affirmed.

Chief Judge EAGLES and Judge MARTIN concur.

Report per Rule 30(e).