NO. COA01-1208

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v. Warren County
Nos. 99-CRS-2669
CLIFTON SHARPER 00-CRS-1214-15

Appeal by defendant from judgments entered 7 June 2001 by Judge Henry W. Hight, Jr. in Warren County Superior Court. Heard in the Court of Appeals 13 May 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Donald R. Teeter, for the State.

Teresa Gibson for defendant-appellant.

HUNTER, Judge.

On 24 January 2000, Clifton Sharper ("defendant") pled guilty to possession with intent to sell and deliver cocaine and was sentenced to six to eight months' imprisonment in case number 99-CRS-2669. The trial court suspended the sentence and placed defendant on thirty-six months' supervised probation. On 25 September 2000, defendant pled guilty to two counts of the sale of cocaine in cases numbered 00-CRS-1214 and 1215. The trial court sentenced defendant to two terms of fifteen to eighteen months, suspended the sentences, and placed defendant on twenty-four

months' supervised probation for each count. In March of 2000, defendant's probation cases were transferred from Warren County to Vance County, where he resided.

On 6 June 2001, defendant's probation officer filed violation reports in each of the above cases alleging: (1) in paragraph one, defendant was in arrears of his monetary condition of probation; (2) in paragraph four, defendant failed to be at his residence numerous times between the hours of 7:00 p.m. to 6:00 a.m.; and (3) in paragraph five, that defendant had only completed thirty-three and one half hours of his fifty hours of community service requirement.

When the case was called for hearing the next day, defendant's attorney moved to continue the case because of the "newness of the case." The trial court denied the motion. At the beginning of the hearing, defendant denied willful violation of the terms of his probation. Thomas H. McCaffity, supervisor of defendant's intensive probation, testified that defendant failed to comply with his curfew on the 26th and 29th of March 2000, the 2nd, 9th, 18th, 24th, 26th, 27th, and 30th of April 2000, and the 1st, 6th, 7th, 9th, 10th, 14th, 15th, 17th, 20th, and 21st of May 2000. McCaffity also testified that defendant had only completed thirty-three and one half hours of community service with the Afton-Elberon Fire Department. Furthermore, the individual with the Afton-Elberon Fire Department responsible for monitoring defendant's community service wrote a non-compliance letter on defendant on 14 March 2001 and defendant was "cited back for community service." McCaffity stated that

defendant told him he did not complete the community service hours because "he reported to the fire department and no one was there."

Defendant testified that he missed curfew because he was working in Raleigh. He further testified that he told his Vance County probation officer that he had to work. Defendant also admitted he had completed thirty-three and one half hours of the fifty hours of community service. He testified that the reason he did not complete his community service hours was that he "was in between jobs, I had switched jobs in Raleigh from Cochrane and some of the times they just didn't have nothing else for me to do." At the conclusion of the hearing, the trial court concluded that defendant had willfully violated the terms of his probation without lawful excuse. In cases numbered 99-CRS-2669 and 00-CRS-1215, the trial court found defendant violated paragraphs one, four and five. In case number 00-CRS-1214, the trial court found defendant violated paragraph five. The trial court revoked defendant's probation and activated his original sentences.

Defendant contends the trial court erred by denying his motion to continue. He argues he was denied a fair probation hearing because his counsel was not adequately prepared.

No set length of time is guaranteed to defendant for investigating, preparing and presenting a defense. *State v. Allen*, 112 N.C. App. 419, 425, 435 S.E.2d 802, 806 (1993). Whether defendant is denied due process must be determined in light of the circumstances of each case. *Id.* "[A] motion for continuance is ordinarily left to the sound discretion of the trial court 'whose

ruling thereon is not subject to review absent an abuse of such discretion.'" *State v. Bunch*, 106 N.C. App. 128, 131, 415 S.E.2d 375, 377 (quoting *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982)), *disc. review denied*, 332 N.C. 149, 419 S.E.2d 575 (1992). Even where the motion raises a constitutional issue, its denial results in a new trial only when the defendant shows "'that the denial was erroneous and also that his case was prejudiced as a result of the error.'" *Id.* at 131-32, 415 S.E.2d at 377 (quoting *Branch*, 306 N.C. at 104, 291 S.E.2d at 656).

In this case, defendant's counsel moved to continue based on the "newness of the case," and not because he was unprepared. Indeed, upon reading the transcript of the hearing, defendant's counsel represented defendant zealously and vigorously cross-examined defendant's probation supervisor. Even if the trial court's denial of the motion to continue was erroneous, defendant cannot show that his case was prejudiced as a result of the error.

All that is needed to support the judgment revoking defendant's probation is evidence which "'reasonably satisf[ies] the judge in the exercise of his 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. Lucas*, 58 N.C. App. 141, 145, 292 S.E.2d 747, 750 (quoting *State v. Hewitt*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967)), *disc. review denied*, 306 N.C. 390, 293 S.E.2d 593 (1982). It is sufficient grounds to revoke the probation if only one condition is

not satisfied. *See State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973). Once the State meets its burden, the burden then shifts to 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." *State v. Tozzi,* 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987). After a defendant presents evidence showing his inability to meet the condition of probation, he is "'entitled to have the trial judge make findings of fact which will clearly show that he has considered and evaluated [the defendant's] evidence.'" *State v. Sellars,* 61 N.C. App. 558, 561, 301 S.E.2d 105, 107 (1983) (quoting *State v. Smith*, 43 N.C. App. 727, 732, 259 S.E.2d 805, 808 (1979)).

Here, McCaffity testified that defendant had only completed thirty-three and one half hours of community service and the individual with the Afton-Elberon Fire Department responsible for monitoring defendant's community service wrote a non-compliance letter on defendant. Defendant admitted on direct-examination that he failed to complete the fifty hours of community service. The evidence offered supports the court's finding that defendant failed to complete his fifty hours of community service, as set out in paragraph five of the probation violation reports.

Affirmed.

Judges MARTIN and BRYANT concur.

Report per Rule 30(e).