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NO. COA01-134

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

STATE OF NORTH CAROLINA

v.

DAVID BENJAMIN TURNER

Randolph County  
Nos. 98 CRS 18152  
00 CRS 111  
00 CRS 112  
00 CRS 113

Appeal by defendant from judgments and order entered 29 September 2000 by Judge James M. Webb in Randolph County Superior Court. Heard in the Court of Appeals 29 January 2002.

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General James A. Wellons, for the State.*

*Ottway Burton for defendant-appellant.*

HUNTER, Judge.

David Benjamin Turner ("defendant") appeals from judgments entered in three cases and an order entered in a fourth case by the trial court following a probation violation hearing on 28 September 2000. The trial court concluded that defendant had violated the terms and conditions of his probation in all four cases. The trial court ordered that the sentences in three of the cases be activated, and that probation be continued in the fourth case. We hold that the trial court failed to make sufficient findings, and we therefore vacate and remand.

At the probation violation hearing on 28 September 2000, the State alleged that defendant had violated probation in four cases arising in four different counties. The following is a summary of these cases.

In 98 CRS 17749 (Davidson County), defendant pled guilty on 18 February 1999 to felonious larceny. The court sentenced defendant to six to eight months in the custody of the Department of Corrections. The court suspended the sentence and placed defendant on supervised probation for forty-eight months, including six months of intensive probation. The court ordered defendant to pay court costs of \$146.00, restitution of \$200.00, attorney's fees of \$450.00, and a community service fee of \$100.00. The Davidson County Superior Court subsequently modified the sentence as follows: "That the Defendant shall enroll in and complete the drug treatment program, Teen Challenge International in Newport News, Virginia."

In 98 CRS 32151 (Alamance County), defendant pled guilty on 3 March 1999 to larceny of a firearm and possession of stolen goods. The court sentenced defendant to five to six months in the custody of the Department of Corrections. The court suspended the sentence and placed defendant on supervised probation for twelve months, ordering defendant "to follow any and all recommendations of the probation officer regarding substance abuse treatment, including but not limited to Teen Challenge." The court also ordered defendant to pay \$469.00 in court costs in \$50.00 monthly installments. The Alamance County Superior Court subsequently

modified the conditions of defendant's probation in 98 CRS 32151, ordering that defendant's probationary period be tolled while he was enrolled in the Teen Challenge program, and that defendant's payments for court costs not begin until thirty days after his release from the Teen Challenge program. The Alamance County Superior Court subsequently further modified the conditions of defendant's probation in 98 CRS 32151, ordering that defendant's court costs be reduced from \$469.00 to \$189.00 because the original amount had included \$280.00 in jail fees that were charged to defendant in another case.

In 98 CRS 98179 (Guilford County), defendant pled guilty on 29 November 1999 to feloniously breaking and entering a motor vehicle. The court sentenced defendant to five to six months in the custody of the Department of Corrections. The court suspended the sentence and placed defendant on supervised probation for thirty-six months, ordering defendant to "[a]ttend or reside in Teen Challenge . . . residential program for a [sic] of 8 months, and abide by all rules and regulations of that program." The court also ordered defendant to pay \$436.00 in court costs and \$375.00 in attorney's fees.

In 98 CRS 18152 (Randolph County), defendant pled guilty on 13 December 1999 to eight consolidated charges, including breaking and entering a motor vehicle, breaking and entering a residence, felonious larceny, and felonious financial card theft. The court sentenced defendant to ten to twelve months in the custody of the Department of Corrections. The court suspended the sentence and placed defendant on supervised probation for thirty-six months,

including six months of intensive probation. The court ordered defendant to pay court costs of \$629.00, restitution of \$520.00, and attorney's fees of \$840.00. Although the court did not order defendant to attend the Teen Challenge Program, the court ordered that defendant's probation not begin until he "is finished with Teen Challenge," presumably based upon the fact that defendant had previously been ordered to attend the Teen Challenge program. The Randolph County Superior Court subsequently modified the sentence and ordered defendant to pay \$80.00 per month beginning thirty days after his release from the Teen Challenge program.

By probation violation reports dated 6 September 2000, Officer Tony Greene moved for a probation violation hearing in Randolph County Superior Court. The reports alleged the following violations: (1) in 98 CRS 17749 (renumbered 00 CRS 113 in Randolph County), defendant was in arrears on court-ordered payments and had been "discharged from the Teen Challeng[e] Program on 4-14-00 without successfully completing the Program"; (2) in 98 CRS 32151 (renumbered 00 CRS 111 in Randolph County), defendant had been "discharged from the Teen Challeng[e] Program on 4-14-00 without successfully completing the Program"; (3) in 98 CRS 98179 (renumbered 00 CRS 112 in Randolph County), defendant was in arrears on court-ordered payments and had been "discharged from the Teen Challeng[e] Program on 4-14-00 without successfully completing the Program"; and (4) in 98 CRS 18152 (in Randolph County), defendant was in arrears on court-ordered payments.

On 25 September 2000, defendant appeared before the Randolph County Superior Court. The court appointed attorney Ottway Burton to represent defendant at the probation violation hearing, which was calendared for 28 September 2000. On the day of the hearing, defendant moved for a continuance until the next term of court, which motion was denied. At the conclusion of the hearing, the trial court found that defendant had violated the terms and conditions of his probation. The court activated the suspended sentences in 98 CRS 17749 (six to eight months), 98 CRS 32151 (five to six months), and 98 CRS 98179 (five to six months). The court apparently intended that the sentences in 98 CRS 98179 and 98 CRS 32151 be served concurrently, followed by the sentence in 98 CRS 17749, followed by a probation period of two years corresponding to the suspended sentence in 98 CRS 18152. The court also recommended substance abuse treatment, psychological counseling, and work release in the three activated sentences, with work release conditioned upon defendant's payment of all outstanding court-ordered payments, plus \$250.00 in each of the three cases as attorney's fees resulting from the revocation hearing. Defendant appeals from the judgments and order entered by the trial court.

I.

On appeal, defendant first argues that the trial court erred in denying his motion to continue.

In determining whether to grant a continuance, the trial court should consider, *inter alia*, the following factors:

- (1) Whether the failure to grant a continuance would be likely to result in a miscarriage of justice;
- (2) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that more time is needed for adequate preparation.

N.C.G.S. § 15A-952(g) (1999). In most circumstances, a motion to continue is addressed to the sound discretion of the trial court, and absent a manifest abuse of that discretion, the trial court's ruling is not reviewable. However, when a motion to continue raises a constitutional issue, . . . the trial court's ruling is "fully reviewable by an examination of the particular circumstances of each case." Generally, the denial of a motion to continue, whether a constitutional issue is raised or not, is sufficient grounds for the granting of a new trial only when the defendant is able to show that the denial was erroneous and that he suffered prejudice as a result of the error.

*State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 674-75 (2000) (citations omitted). On appeal, defendant argues that the motion to continue should have been granted to allow defendant's attorney time to investigate and prepare defendant's defense, and that the denial of the motion to continue violated defendant's constitutional rights by depriving him of effective assistance of counsel. Thus, defendant argues, the trial court's ruling is "fully reviewable."

However, a review of the transcript belies defendant's contention. At the hearing, defendant's attorney asked the court to continue the case

at least until the next term because this is a straight voluntary violation, alleged

violation, and he brought in this morning the evaluation here of Mr. Alvis Chandler. . . .

. . .

This is what it evolves around. I believe that the time on that will produce some results but I'm not able to evaluate it at this time, and he's got to find work. That is answer to the violation here. And if you can't find the work, of course, the sentence will have to go into effect. That's the only thing I can say. . . .

. . .

He's about four thousand dollars (\$4,000.00) behind.<sup>1</sup>

Thus, the motion to continue was based only upon the contention that, if given more time, defendant might find employment, earn wages, and be able to pay the court-ordered payments on which defendant was allegedly in arrears.

In order to be entitled to a continuance, the burden is upon the defendant to fully establish the reasons for the continuance. See, e.g., *State v. Jones*, 342 N.C. 523, 531, 467 S.E.2d 12, 17 (1996). Because defendant's motion here was clearly not based upon an assertion that defendant's attorney needed additional time to investigate and prepare a defense in order to provide effective assistance of counsel, we decline to apply the "fully reviewable" standard applicable "when a motion to continue raises a constitutional issue." *Rogers*, 352 N.C. at 124, 529 S.E.2d at 675.

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<sup>1</sup> Mrs. Avis Chandler is a Vocational Rehabilitation Counselor with the North Carolina Department of Health and Human Services ("DHHS"), and the evaluation to which Burton alluded at the hearing is a vocational rehabilitation plan developed by Chandler and intended to assist defendant in finding employment.

Because we do not apply the "fully reviewable" standard, the trial court's denial of the motion to continue is not reviewable absent a manifest abuse of discretion. See *id.* The record indicates that defendant's attorney requested a continuance in order to provide defendant additional time to try to find a job, earn income, and make the court-ordered payments. This is not a proper basis for continuing a probation violation hearing. The hearing is held to determine whether defendant has violated the terms of his probation. Whether defendant would be able to find employment and make court-ordered payments in the future is simply irrelevant to that determination.

Had defendant's attorney argued at the hearing that he needed more time to review the four separate cases involved, or that, if given more time, he would be able to gather evidence to show that defendant had not violated the terms of his probation, such argument would have constituted a strong basis for a continuance, given that defendant's attorney had only three days to prepare defendant's case. However, based upon the grounds actually argued to the trial court, we hold that the trial court's denial of the motion to continue did not constitute a manifest abuse of discretion. We affirm this ruling.

## II.

Defendant next assigns error to the following conclusion reached by the trial court and declared in open court at the end of the hearing: "The Court finds in all cases the Respondent has unlawfully, willfully, and without justification violated the terms

and conditions of his probation as alleged in the violation reports." "Probation or suspension of sentence is not a right guaranteed by either the federal or state constitutions but is a matter of grace conferred by statute." *State v. Hunter*, 315 N.C. 371, 376, 338 S.E.2d 99, 103 (1986) (citing *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476, (1967)). Nonetheless, "at stake in a revocation of probation proceeding is individual liberty, and the substantiality of this right may not be disputed." *Hewett v. State of North Carolina*, 415 F.2d 1316, 1322 (4th Cir. 1969); see also *Hewett*, 270 N.C. at 352, 154 S.E.2d at 479.

Section 15A-1345 of the North Carolina General Statutes "guarantees full due process before there can be a revocation of probation and a resulting prison sentence." *Hunter*, 315 N.C. at 377, 338 S.E.2d at 104. The crucial question in a probation violation hearing is whether the defendant has willfully "violated a valid condition of probation *without lawful excuse*." *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987) (emphasis added). If the defendant does not present competent evidence of an inability to comply with the conditions of probation, then evidence of the mere fact of defendant's failure to comply is sufficient to justify a determination that defendant's failure to comply was without lawful excuse. *Id.* However, "where a defendant has presented competent evidence of his inability to comply with the terms of his probation, he is entitled to have that evidence considered and evaluated before the trial court can properly order revocation." *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d

833, 834 (1985). "Whether [a] defendant has violated valid conditions of probation . . . is a question of fact for the judge to be determined in the exercise of his sound discretion." *Hewett*, 270 N.C. at 352, 154 S.E.2d at 479. N.C. Gen. Stat. § 15A-1345(e) requires that, "[a]t the revocation hearing, the trial judge must make findings to support his decision on whether to revoke or extend probation," as well as "a summary record of the proceedings." *Hunter*, 315 N.C. at 377, 338 S.E.2d at 104.

In this case, the State's motion for a probation violation hearing was predicated upon two allegations: (1) that defendant was in arrears on his court-ordered payments in three of the four underlying cases; and (2) that defendant had been "discharged from the Teen Challeng[e] Program on 4-14-00 without successfully completing the Program" in three of the four underlying cases. The trial court concluded that defendant violated his probation based upon both of these allegations. Thus, we address each of these allegations in turn.

A.

The State alleged that defendant was in arrears on his court-ordered payments in 98 CRS 17749 (\$135.00), 98 CRS 98179 (\$105.00), and 98 CRS 18152 (\$240.00). In addition to the general due process requirements established by N.C. Gen. Stat. § 15A-1345(e), that section states: "When the violation alleged is the nonpayment of fine or costs, the issues and procedures at the hearing include those specified in G.S. 15A-1364 for response to nonpayment of

fine." N.C. Gen. Stat. § 15A-1345(e) (1999). Section 15A-1364 provides, in pertinent part:

(a) Response to Default. -- When a defendant who has been required to pay a fine or costs or both defaults in payment or in any installment, the court, upon the motion of the prosecutor or upon its own motion, may require the defendant to appear and show cause why he should not be imprisoned or may rely upon a conditional show cause order entered under G.S. 15A-1362(c) . . . .

(b) Imprisonment; Criteria. -- Following a requirement to show cause under subsection (a), *unless the defendant shows inability to comply and that his nonpayment was not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment*, the court may order the suspended sentence, if any, activated . . . .

N.C. Gen. Stat. § 15A-1364(a), (b) (1999) (emphasis added).

"In a probation revocation proceeding based upon [a] defendant's failure to pay a fine or restitution which was a condition of his probation the burden is upon the defendant to 'offer evidence of his inability to pay money according to the terms of the [probationary] judgment.'" *State v. Jones*, 78 N.C. App. 507, 509, 337 S.E.2d 195, 197 (1985) (citation omitted). Pursuant to N.C. Gen. Stat. § 15A-1364(b), "a convicted defendant ordered to pay a fine or costs *may not* be imprisoned for failure to comply if the delinquency in paying was 'not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment.'" *State v. Johnson*, 124 N.C. App. 462, 474-75, 478 S.E.2d 16, 24 (1996) (emphasis added) (quoting N.C. Gen. Stat. § 15A-1364(b) (1988)), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997).

Defendant presented evidence at the hearing showing that his default in payments was due to the fact that he is unable to work due to chronic back injuries, and the State did not offer any evidence to the contrary. Defendant underwent back surgery in 1996 as a result of scoliosis. During that surgery, two metal rods were implanted in defendant's back. When defendant first left the Teen Challenge program in mid-April of 2000, he immediately got a job and worked ten hours per day for a month "changing truck tires" at "Thomas Tire," during which time he made his court-ordered payments. After working for a month, defendant re-injured his back and started suffering significant back pain. On 17 July 2000, defendant gave his probation officer a letter from his doctor which instructed defendant to engage in only "light duties" for four weeks. On 21 August 2000, defendant gave his probation officer a second letter from his doctor instructing defendant not to work at all for four weeks. Thus, the uncontroverted evidence established that, as of the date upon which the probation violation reports were filed (6 September 2000), defendant was unable to work and earn wages due to his back injuries.

The probation officer acknowledged that defendant is currently unable to work due to his back injuries. He also acknowledged that the arrearage amounts are "not real significant," and that he filed a motion for a probation violation hearing only because of the fact that defendant was discharged from the Teen Challenge program. Defendant testified that he would be able to make the court-ordered payments only if he were employed, and that, currently, he relies

upon food stamps, help from the Department of Social Services, and money from his mother because he is unable to work.

The evidence also tended to show that defendant was making a good faith effort to secure employment for himself so that he could obtain the necessary funds for payment once his back injuries allowed him to work again. Defendant applied for vocational rehabilitation services with DHHS in August of 2000. DHHS prepared an "Individualized Plan for Employment" for defendant, with a projected job placement date of October of 2000. The probation officer testified that he had spoken by phone to Mrs. Avis Chandler from DHHS and that she had confirmed these facts.

At the close of the hearing, the court stated the following conclusion of law:

The Court finds in all cases the Respondent has unlawfully, willfully, and without justification violated the terms and conditions of his probation as alleged in the violation reports, and the Court incorporates those herein.

Other than adopting the allegations set forth in the probation violation reports, the court did not make any findings of fact. As noted above, a trial court is required, at the revocation hearing, to make findings to support its decision on whether to revoke or extend probation, and to make a summary record of the proceedings. See N.C. Gen. Stat. § 15A-1345(e); *Hunter*, 315 N.C. at 377, 338 S.E.2d at 104. Furthermore, "[w]hen a defendant does put on evidence of his inability to pay, . . . he is entitled to have his evidence considered and evaluated by the trial court, and the trial judge has a duty . . . to make findings of fact which

clearly show that he did consider and did evaluate the defendant's evidence.'" *Jones*, 78 N.C. App. at 509, 337 S.E.2d at 197 (citations omitted). Because the mere fact of failure to comply does not, without more, support revocation of probation, the trial court must give some indication that it "considered defendant's evidence and found that defendant had offered no evidence worthy of belief to justify a finding of a legal excuse for failure to comply with the judgment." *State v. Young*, 21 N.C. App. 316, 321, 204 S.E.2d 185, 188 (1974). It is insufficient for the court to simply conclude, without making any findings, that the defendant has willfully violated the terms and conditions of probation in failing to make the court-ordered payments. *Id.* at 318, 204 S.E.2d at 186. The trial court here gave no indication that it had considered defendant's evidence tending to show that his delinquency was "not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment." N.C. Gen. Stat. § 15A-1364(b). Where it appears that the court has failed to consider a defendant's evidence and to determine whether it is worthy of belief, the order revoking probation must be vacated and the cause remanded for a new probation violation hearing. *Young*, 21 N.C. App. at 321, 204 S.E.2d at 188.

However, in this particular case, a review of the transcript reveals that all of the testimony at the hearing, including the testimony of the probation officer, established that defendant's delinquency in payments was attributable to his back injuries and his inability to work, and not "to a failure on his part to make a

good faith effort to obtain the necessary funds for payment." N.C. Gen. Stat. § 15A-1364(b). Because there was absolutely no evidence to the contrary, we hold, as a matter of law, that defendant's delinquency was not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment, and that defendant may not be imprisoned on the grounds that he failed to comply with the monetary conditions of his probation. *Johnson*, 124 N.C. App. at 474-75, 478 S.E.2d at 24; N.C. Gen. Stat. § 15A-1364(b).

B.

The State also alleged that defendant had been "discharged from the Teen Challeng[e] Program on 4-14-00 without successfully completing the Program" in three of the four underlying cases: 98 CRS 17749, 98 CRS 32151, and 98 CRS 98179. The court concluded, again without making any findings, that the State had proven this allegation. This conclusion is troubling for three reasons. First, in one of the three cases (98 CRS 98179), defendant was specifically ordered to participate in the Teen Challenge program for only eight months, and all of the evidence established that defendant participated in the program for over a year. Second, in the other two cases (98 CRS 17749 and 98 CRS 32151), the original conditions of probation did not indicate the length of time that defendant was to participate in the program, and all of the witnesses at the hearing, including the probation officer, testified that Teen Challenge is normally intended to be a one-year program. As noted, it is undisputed that defendant attended for

over one year. Third, defendant presented some evidence that the real reason he was "terminated" from the program was because of an inability to pay the costs of the program, and the only evidence to the contrary was hearsay testimony offered by the probation officer that defendant was "terminated" because of inappropriate behavior.

Defendant's probation officer testified that "[i]n the first three cases [defendant] was ordered to enroll in and successfully complete the Teen Challenge Program." This statement is incomplete at best because, as noted above, in one case defendant was ordered to participate in the program for only eight months. The probation officer also testified that the Teen Challenge Program "was set up to be a year-long program," and that defendant participated in the program for "one year and one week." Defendant similarly testified that he was supposed to participate in the program for one year.

The probation officer also testified that defendant had done well during his time in the program. Defendant testified that, during the one year and one week that he attended the program, he "excelled," was placed on the honor roll, and received an award for "most improved" student. Defendant testified that, after twelve months had passed, he expected that he would leave the program. The probation officer offered hearsay testimony that someone from the program told him that defendant was discharged on 14 April 2000 because of inappropriate behavior. Defendant acknowledged that he "was horse-playing" but he testified that he believes he was dismissed because his mother was behind in her payments to the

program by \$4,500.00. No documentation was presented to the court indicating the reason that defendant left the program.

Defendant's mother testified as follows. The cost of the Teen Challenge Program was \$1,000.00 per month. She originally agreed to pay for defendant to participate in a "twelve month program." After a year, defendant's mother was \$4,500.00 behind in her payments. There were some "disagreements" about the circumstances under which defendant was allegedly terminated, but defendant's mother agreed not to dispute the termination in return for the program cancelling her debt. She further testified:

It was a blessing in disguise for David to go there, to be a part of [the program], to change his life, to have an opportunity to get back into school, to realize his self worth and his value, and . . . he exceeded their expectations in those twelve months, and all of the paper work and all of the indications show that . . . he did very well in that program. There was absolutely no notice. They put that kid on a bus and called me and left me a message that said he's on his way home, we've dismissed [him] from this program. . . . The only thing that had happened, prior to them sending him home . . . on . . . Friday night, that Monday they called me and said Melissa, you're forty-five [hundred] dollars behind . . . and this was the first time that they had ever asked me and put any pressure on me. . . . All I can say is that when we further investigated this and when we inquired all the way to the top, they simply said that David had requested like he felt like he had finished the program and that he had gone as far as he could with it, that he knew that my financial burden was a burden on me, and that as a Christian organization, the only way that they could go ahead and let him out was to release him. . . . [I]t's a twelve month program, and the reason why he wasn't graduated is because . . . he had been disciplined over smoking a "black and mild" and he had been given a three month addition

to his time there. I was in disagreement with that, but let the authorities do their thing as far as, you know, if they wanted to keep him three more months, I probably wasn't going to pay for it, and they understood that. So what I'm saying is that when they did not receive a payment and David had requested that he felt that he had gone as far in the program as he could go, they put him on a bus. There was a little confrontation, and David does rough-house. He's a big boy and he picked up a little kid and the little kid felt threatened by him, and David doesn't deny that there was something that they could use to use that for their reasoning to go ahead and send him on home.

The evidence regarding defendant's discharge from the Teen Challenge program was both conflicting and of questionable reliability. The only evidence that defendant was "terminated" from the Teen Challenge program for inappropriate behavior was the probation officer's hearsay testimony that some unidentified individual at the program told him so. Although a court is not bound by the strict rules of evidence during a probation violation hearing, see *Hewett*, 270 N.C. at 353, 154 S.E.2d at 480, it is nonetheless improper for the court to consider and rely upon hearsay evidence as the sole basis for making a factual determination, see *id.* at 356, 154 S.E.2d at 482.

Further, defendant offered evidence that he was "terminated" from the Teen Challenge program after over a year because his mother was unable to continue to pay \$1,000.00 per month. "[W]here a defendant has presented competent evidence of his inability to comply with the terms of his probation, he is entitled to have that evidence considered and evaluated before the trial court can

properly order revocation." *Crouch*, 74 N.C. App. at 567, 328 S.E.2d at 834.

In summary, the evidence clearly established that defendant did comply with the order in 98 CRS 98179 that he participate in the Teen Challenge program for eight months. The evidence as to whether defendant complied with the conditions of his probation in 98 CRS 17749 and 98 CRS 32151 was conflicting, and the court failed to make findings resolving the following crucial issues: the length of time defendant was supposed to have attended Teen Challenge in order to comply with the terms of his probation; the time defendant actually spent at Teen Challenge; the reasons for defendant's alleged "termination"; and whether defendant had "successfully completed" the Teen Challenge program. The trial court was required to make findings to support its decision on whether to revoke or extend probation, which findings may be made orally at the revocation hearing. See N.C. Gen. Stat. § 15A-1345(e); *Hunter*, 315 N.C. at 377, 338 S.E.2d at 104.

Although a defendant has no constitutional right to probation, once he is granted probation, he has a right to continue his probation and avoid imprisonment as long as he complies with the conditions of the probation. Our Supreme Court has stated:

When a sentence of imprisonment in a criminal case is suspended upon certain valid conditions expressed in a probation judgment, defendant has a right to rely upon such conditions, and as long as he complies therewith the suspension must stand. In such a case, defendant carries the keys to his freedom in his willingness to comply with the court's sentence.

*Hewett*, 270 N.C. at 352-53, 154 S.E.2d at 479. It would be a violation of this right, and an abuse of discretion, to deprive a defendant of his freedom without first resolving significant conflicts in the evidence as to whether defendant has, in fact, complied with the stated conditions of his probation. In a violation of probation hearing, the evidence must be such as to

reasonably satisfy 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. *Judicial discretion implies conscientious judgment, not arbitrary or willful action. It takes account of the law and the particular circumstances of the case, and "is directed by the reason and conscience of the judge to a just result."*

*Id.* at 353, 154 S.E.2d at 480 (citation omitted) (emphasis added). Because the trial court failed to make findings of fact at the revocation hearing resolving the conflicts in the evidence on crucial factual matters, we are unable to determine whether the trial court properly considered the law and the particular circumstances of this case.

We hold that the evidence established as a matter of law: (1) that defendant's delinquency in the court-ordered payments in all cases was not attributable to a failure on defendant's part to make a good faith effort to obtain the necessary funds for payment; and (2) that defendant complied with the conditions of his probation regarding the Teen Challenge program in 98 CRS 98179 (participation for eight months). We, therefore, vacate the trial court's judgment activating defendant's sentence in 98 CRS 98179 because we

hold, as a matter of law, that defendant did not violate the conditions of his probation in that case. We also vacate the trial court's order in 98 CRS 18152 because that order was based solely upon the determination that defendant had willfully and without valid excuse violated the monetary condition of his probation, and we hold that he did not.

We further vacate the judgments in 98 CRS 17749 and 98 CRS 32151, and we remand to the trial court to make findings and conclusions as to whether defendant willfully and without justification violated the terms of his probation pertaining to participation in the Teen Challenge program. If the trial court, after making sufficient factual findings based upon reliable evidence, determines that defendant violated the terms of his probation related to participation in the Teen Challenge program, then the trial court may enter judgments in those two cases in accordance with such a determination.

Vacated and remanded.

Judge TYSON concurs.

Judge GREENE dissents in a separate opinion.

Report per Rule 30(e).

NO. COA01-134

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

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v.

Randolph County  
Nos. 98 CRS 18152  
00 CRS 111-13

DAVID BENJAMIN TURNER

GREENE, Judge, dissenting.

I agree with the majority that the trial court did not abuse its discretion in denying defendant's motion to continue the hearing. The majority, however, also considered whether the trial court's conclusion that defendant had unlawfully, willfully, and without justification violated the terms and conditions of his probation was based on sufficient factual findings. I would not address this issue based on the following reasons.

First, in assignment of error no. 2, defendant objected and excepted to the trial court's conclusion that defendant had violated his probation and referred to this conclusion as "findings of fact." This assignment of error fails to state any legal basis on which the error was assigned. See N.C.R. App. P. 10(c)(1) ("[e]ach assignment of error . . . shall state plainly, concisely and without argumentation the legal basis upon which error is assigned"). Second, defendant simply restates this assignment of error in his brief, offering no argument whatsoever. See N.C.R. App. P. 28(b)(6) (an appellant's brief shall include "[a]n

argument, to contain the contentions of the appellant with respect to each question presented"). It is not the duty of this Court to search the record in an attempt to discern a legal basis for defendant's assignment of error or to determine possible arguments defendant could have raised in his brief.

As defendant has blatantly disregarded the Rules of Appellate Procedure, I would deem defendant's assignment of error abandoned. See N.C.R. App. P. 10(a) ("the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10"); N.C.R. App. P. 28(b)(6) ("[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned"). Accordingly, I would affirm the trial court's revocation of defendant's probation.