NO. COA01-630

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

STATE OF NORTH CAROLINA

v. Durham County
Nos. 96 CRS 22183-89
96 CRS 2207-08

CULTION BURNETTE

Appeal by defendant from judgments dated 16 November 2000 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 26 March 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Susan K. Nichols, for the State.

Miles and Montgomery, by Lisa Miles, for defendant-appellant.

GREENE, Judge.

Cultion Burnette (Defendant) appeals judgments and commitments dated 16 November 2000 revoking her probation and activating her two suspended sentences for forgery and uttering.

On 7 October 1998, Defendant pled guilty pursuant to a plea agreement to nine counts of forgery and nine counts of uttering. The trial court entered judgments dated 7 October 1998 in accordance with the plea agreement and sentenced Defendant to two consecutive terms with minimum sentences of six months and maximum sentences of eight months. The trial court suspended these sentences and placed Defendant on probation for twenty-four months,

including six months of intensive probation. The terms of Defendant's probation required: paying restitution, court costs, and fines; submitting to various drug tests and conditions; committing no additional criminal offenses; remaining within the trial court's jurisdiction; reporting as directed by her probation officer; and, as part of the intensive probation, performing fifty hours of community service as well as adhering to a curfew.

In April 2000, William V. Bell (Bell), Defendant's probation officer, submitted a probation violation report (the violation report) in which he alleged the following probation violations on the part of Defendant, in order listed paragraphs: (1) failure to fulfil the monetary obligations of her probation; (2) commission of the offense of possession of stolen goods; (3) failure to notify her probation officer of her new whereabouts after leaving her place of residence; (4) failure to report at reasonable times and places and in a reasonable manner to her probation officer; and (5) failure to contact her community service worker as instructed. An evidentiary hearing was held on 16 November 2000. Defendant initially moved the trial court to dismiss the violation report on the grounds that it had not been filed and the trial court therefore lacked jurisdiction to hear the matter. The trial court permitted the State to file the violation report whereupon Defendant renewed her motion, stating her "legal argument [wa]s not to notice but as to jurisdiction."

Bell testified he did not have a problem with Defendant reporting for her regular Wednesday appointments with him until

January 1999 when she informed him that "she had an outbreak of scabies," a contagious skin infection. Defendant provided Bell with a doctor's note attesting to her condition. Because Defendant's medical condition kept her from working for approximately six months, Bell gave her an extension on her community service and monetary obligations.

When Bell saw Defendant on 23 February 2000, "she looked like she was doing a lot better." Bell completed a motion to modify Defendant's monetary obligations and to remove her from intensive probation. At this time, Bell considered Defendant's payment arrearage "a thing that [they] could work with" because Defendant did not have any pending charges. Bell further instructed Defendant to come see him again on 8 March 2000, but she did not report for this appointment, nor any future appointments. Sometime after March 8, Bell went to Defendant's home, but she was not there. He left Defendant a note to check in with him on 21 March 2000. When Defendant did not show up on March 21, Bell left her another note, stating she had to report to him on 28 March 2000. Defendant still did not respond. On 30 March 2000, Bell therefore wrote Defendant yet another note telling her to come in on 3 April 2000. By this time, Bell had read in the newspaper about pending charges against Defendant. Bell conducted a record check on Defendant, which confirmed the newspaper report. Bell never received any telephone calls or voice mail messages from Defendant explaining her failure to make the appointments or notifying Bell she had been charged with possession of stolen goods.

By mid-April, Defendant had missed a total of fifteen appointments dating as far back as August 1999, and Bell felt Defendant "had absconded supervision." Bell's supervisor advised him to issue an order for Defendant's arrest and to contact her family regarding her whereabouts. Bell let Defendant's family know that he was seeking a warrant and that it would be in Defendant's best interest to report to him. On 7 June 2000, Defendant finally came to see Bell, at which point she was placed under arrest. Bell explained to Defendant why she was being arrested, including his belief that she had moved from her residence without notifying him. Defendant insisted she continued to live at her residence.

During cross-examination, Defendant attempted to question Bell regarding Defendant's compliance with her curfew requirement. The trial court terminated this line of questioning, telling Defendant it did not want to hear about this and that she should "go to something else." Defendant did not object.

Defendant testified Bell had taken her off intensive probation "by word of mouth" in February 2000 at which time he instructed her she would have to report to him only once a month. Defendant stated she went to see Bell at his office in March, although not March 8, but Bell was not there. Defendant further testified she telephoned Bell several times prior to her arrest and had left messages on his voice mail and with his assistant. The trial court subsequently found Defendant had violated her probation as set out in paragraphs 2, 3, and 4 of the violation report and activated her suspended sentences.

The issues are whether the trial court erred: (I) in denying Defendant's motion to dismiss; (II) in denying Defendant the opportunity to cross-examine Bell regarding Defendant's compliance with her curfew requirement; and (III) in revoking Defendant's probation.

I

Defendant first argues the trial court should have dismissed the probation violation because she was not provided notice prior to the hearing. We note Defendant specifically moved the trial court to dismiss the violation report based on jurisdiction and stated her "legal argument [wa]s not to notice." Accordingly, we do not consider this issue. *See* N.C.R. App. P. 10(b)(1) (1999) ("[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make").

II

Defendant next asserts the trial court erred in denying her the opportunity to cross-examine Bell concerning her compliance with her curfew requirements. We disagree.

It is well established that the scope of cross-examination is within the trial court's sound discretion. *State v. Wrenn*, 316 N.C. 141, 144, 340 S.E.2d 443, 446 (1986). In this case, Defendant's compliance with her curfew requirement was not a basis for the violation report. Accordingly, it was not relevant to the

issue of whether she had willfully failed to comply with the conditions of her probation as alleged in the violation report. Therefore, the trial court did not abuse its discretion in ruling as it did.

III

Defendant further contends the trial court erred in finding Defendant to have been in violation of the conditions of her probation as alleged in paragraphs 2, 3, and 4 of the violation report because the evidence was insufficient to support such a finding.

> A proceeding to revoke probation is not a criminal prosecution but is a proceeding solely for the determination by the [trial] court whether there has been a violation of a valid condition of probation so as to warrant putting into effect a sentence theretofore entered; and while notice in writing to defendant, and an opportunity for him to be heard, are necessary, the [trial] court is not bound by strict rules of evidence, and all that is required is that there be competent evidence reasonably sufficient to satisfy the judge in the exercise of a sound judicial discretion that the defendant had, without lawful excuse, willfully violated a valid condition of probation.

State v. Pratt, 21 N.C. App. 538, 540, 204 S.E.2d 906, 907 (1974) (citations omitted). If the defendant does not present competent evidence of her inability to comply with the conditions of her probation, evidence of the mere fact of non-compliance with the terms of probation is sufficient for a determination that the defendant's failure to comply was willful or without lawful excuse. *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987).

While Defendant claims that after Bell removed her from

intensive probation in February 2000 and reduced her appointments to a monthly basis, her testimony offers no explanation why she did not report to him at least once in April and May 2000 or, if she was in fact still living at the residence known to Bell, why she did not respond to the notes he had left for her. Defendant has therefore failed to present any competent evidence of her inability to comply with the requirements of her probation that she report to Bell and keep him informed of her whereabouts. Bell's testimony that Defendant did not report for scheduled appointments, that she did not respond to the notes he left at her home, and that she appeared to have left her place of residence without notifying him is consequently deemed sufficient to establish Defendant willfully or without lawful excuse failed to comply with the conditions of her probation as stated in paragraphs 3 and 4 of the violation report.[1] *See id.* at 521, 353 S.E.2d at 253; *see also State v. Coffey*, 74 N.C. App. 137, 327 S.E.2d 606 (1985) (the evidence supported the trial court's finding that the defendant failed to report to her probation officer as required, which was sufficient to support the trial court's order revoking her probation). Accordingly, the trial court did not err in revoking Defendant's probation and activating her suspended sentence.

Affirmed.

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[1]Because violation of any one of the conditions of probation is a sufficient basis for revoking probation, *State v. Seay*, 59 N.C. App. 667, 670-71, 298 S.E.2d 53, 55 (1982), *appeal dismissed and disc. review denied*, 307 N.C. 701, 301 S.E.2d 394 (1983), we need not address whether the trial court, which also based its ruling on pending charges against Defendant for possession of stolen goods, erred in this respect.

Judges TIMMONS-GOODSON and HUNTER concur.

Report per Rule 30(e).