

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA02-161

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

Alamance County  
No. 00CRS60682

TRAVIS DEONN DIXON

Appeal by defendant from judgment entered 29 November 2001 by Judge James C. Spencer in Superior Court, Alamance County. Heard in the Court of Appeals 30 September 2002.

*Attorney General Roy Cooper, by Associate Attorney General John W. Congleton, for the State.*

*Robert W. Ewing for defendant-appellant.*

McGEE, Judge.

Defendant Travis Deonn Dixon pled guilty on 11 June 2001 to fleeing in a motor vehicle to elude arrest. The trial court entered a judgment suspending defendant's sentence and placed him on supervised probation for thirty-six months, including six months of intensive probation. The terms of defendant's probation were modified on 26 July 2001, at defendant's request, to allow him to serve two days in jail in lieu of performing community service.

Defendant's probation officer filed a probation violation report on 8 November 2001, alleging that defendant violated the

terms and conditions of his probation by testing positive for marijuana use on fourteen occasions between 12 June and 28 October 2001 and by failing to comply with the required counseling program in that he did not report for monthly, scheduled visits in August, September, and October 2001.

At the revocation hearing held on 29 November 2001, defendant admitted to willfully violating the terms and conditions of his probation as alleged in the 8 November 2001 violation report. Defendant's probation officer testified that defendant had complied with most of the terms of his probation, with the exception of the continuous use of marijuana and his failure to enroll and participate in the counseling program. The probation officer recommended that the trial court revoke defendant's probation. After hearing the evidence and arguments of counsel, the trial court revoked defendant's probation, but amended the suspended sentence to require that defendant only serve eight to ten months imprisonment. Defendant appeals.

Defendant argues that the trial court erred in revoking his probation because the revocation was based upon an improperly modified probationary judgment. Specifically, defendant contends that he was never properly informed of his right to counsel prior to the terms of his probation being modified, and that he did not knowingly, voluntarily and intelligently waive his right to counsel before the trial court modified the terms of his probation.

Defendant's attempt to challenge the validity of the underlying 26 July 2001 order, which modified the original terms

and conditions of his probation, in this appeal from the judgment finding and concluding that he had violated those terms and conditions and activating his suspended sentence, is "an impermissible collateral attack." See *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971) (holding that the defendant's questioning of the validity of the original judgment in which his sentence was suspended, on appeal from an order activating the sentence, is an "impermissible collateral attack"). As explained in *Noles*, "[t]he proper procedure which provides [a] defendant adequate opportunity for adjudication of claimed deprivations of constitutional rights is under the Post-Conviction Hearing Act." *Id.* at 678, 184 S.E.2d at 410.

Even assuming *arguendo* that the issue was properly before our Court, defendant cannot show that he was prejudiced by the modification. First, and most significantly, defendant personally wanted the modification of the terms and conditions of his probation to serve two days in jail, inasmuch as he "did not want to perform the community service hours . . . required by intensive probation." Moreover, that particular modification had nothing to do with the subsequent violation report and the trial court's decision to revoke his probation. Indeed, the violation report and the trial court's decision to revoke defendant's probation were based upon defendant's testing positive for marijuana use and his failure to enroll and participate in counseling, terms of probation which were set forth in the original probationary judgment.

It is well settled that "[a]ny violation of a valid condition

of probation is sufficient to revoke [a] defendant's probation." *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987). As defendant admitted that he willfully violated the terms of his probation, as alleged by the violation report, defendant cannot show any error in the trial court's judgment. The judgment of the trial court, revoking defendant's probation and activating, with modification, defendant's suspended sentence, is affirmed.

Affirmed.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).