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NO. COA02-355

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

Guilford County
Nos. 00 CRS 23535, 96300

ANGELA MICHELLE HARRIS

Appeal by defendant from judgments entered 20 September 2001 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 7 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Harriet F. Worley, for the State.

George E. Kelly, III, for defendant appellant.

McCULLOUGH, Judge.

On 24 June 1998, defendant Angela Michelle Harris pled guilty to fourteen counts of embezzlement and one count of attempted embezzlement. Pursuant to the plea agreement, defendant was sentenced to five consecutive terms of six to eight months' imprisonment. Defendant's sentence was suspended and she was placed on supervised probation for thirty-six months. As terms of her probation, defendant was ordered to pay \$175,135 in restitution and costs and placed on curfew. At the end of defendant's probation period, the unpaid balance of restitution was to become

a civil judgment against her.

On 9 and 16 August 2001, probation violation reports were filed alleging that defendant had violated her probation. Specifically, it was alleged that defendant: (1) was in arrears on the monetary conditions of her probation; (2) did not notify her probation officer that she had been fired from her employment; (3) made misrepresentations to her probation officer regarding her employment and the monetary conditions of her probation; (4) failed to remain gainfully employed; (5) failed to report for scheduled office visits; (6) violated curfew and failed to make her whereabouts known to her probation officer; and (7) had committed the offense of embezzlement on 24 May 2001.

On 17 September 2001, a probation violation hearing was held in Guilford County Superior Court. Defendant denied violating her probation. The trial court found that defendant had willfully violated the terms of her probation without legal justification and revoked her probation in part, and modified her probation in part. The trial court activated three of defendant's suspended sentences, sentencing defendant to two consecutive terms of six to eight months' imprisonment, and an additional consecutive term of five to six months' imprisonment. The trial court also modified probation in defendant's remaining cases, ordering that defendant be continued on probation for a period of five years upon her release from prison. Defendant appeals.

Defendant brings forth three assignments of error: The trial court erred in (1) finding willful violations and revoking

defendant's probation on the ground that the trial court's factual findings are erroneous and do not match the allegations; (2) any finding that defendant willfully failed to make restitution on the ground that this finding was unsupported by evidence and enforcing this condition would violate the plea agreement and be an unlawful condition of probation; and (3) failing to enter confinement credit of 91 days on its judgment on the ground that the trial court found defendant was entitled to it.

I.

Defendant first argues that the paragraph numbers in her violation report cited in the judgments are inconsistent with the paragraphs in the report, and that the findings of fact were insufficient to support revocation of her probation. Defendant further notes that the trial court's reassignment of case numbers created confusion in regard to her actual sentence. We are not persuaded.

It is well settled that in a probation revocation hearing, all that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that defendant has willfully violated a valid condition of probation or that 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, *disc. review denied*, 306 N.C. 390, 293 S.E.2d 593 (1982).

The transcript of the probation revocation hearing indicates that the trial court found that defendant had "unlawfully, willfully and without legal justification violated the terms and

conditions of her probation as alleged herein" For instance, the probation officer testified that defendant had failed to obtain prior approval for and notify the officer of a change in her employment; was not truthful in informing the officer about her employment and her failure to make required restitution payment; failed to make monetary payments as required, although defendant had paid all her restitution at the time of the hearing; and that defendant had committed a subsequent criminal offense of embezzling while on probation. The officer further testified that defendant twice failed to report for scheduled office visits, and was twice found to be away from her place of residence during curfew hours. Defendant had also left town without contacting the officer.

Further, defendant testified that she had gotten behind on her restitution payments and that she had pled guilty to embezzlement charges while on probation. When asked why she did not contact her probation officer when she left town, she stated that "it totally slipped my mind." It is clear to this Court that the findings and conclusions of the trial court are based on competent evidence. *State v. Crouch*, 74 N.C. App. 565, 328 S.E.2d 833 (1985). There was no abuse of discretion by the trial court in finding that defendant violated her probation.

As to the inconsistency between the paragraph numbers in the violation reports and the judgments and the seeming confusion it created around defendant's sentence, the record and transcript reveal that the trial court properly considered the evidence before it. While there may have been some confusion in the transferring

of judgment numbers, any errors were merely clerical in nature and had no effect on defendant's due process rights. See *State v. Gell*, 351 N.C. 192, 524 S.E.2d 332, cert. denied, 531 U.S. 867, 148 L. Ed. 2d 110 (2000). Accordingly, this assignment of error is overruled.

II.

We next consider whether the trial court erred in revoking her probation because there was insufficient evidence and no findings of fact that she willfully failed to make her ordered restitution. Defendant notes that the evidence shows that she was current on her payments at the time of the hearing. Additionally, defendant contends that the order for her to pay \$175,135 as part of her probation is unreasonable and denied her constitutional right against cruel and unusual punishment. Defendant asserts that it was error for the trial court to impose a condition of probation with which she clearly cannot comply.

After careful review of the record, briefs and contentions of the parties, we find no error. This Court has stated:

Any violation of a valid condition of probation is sufficient to revoke defendant's probation. All that is required to revoke probation is evidence satisfying the trial court in its discretion that the defendant violated a valid condition of probation without lawful excuse. The burden is on defendant to present competent evidence of his inability to comply with the conditions of probation; and that 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).

Here, defendant violated the condition of her probation that she attend regularly scheduled meetings with her probation officer. Defendant admitted that she failed to attend on at least one occasion. Defendant offered no lawful excuse, stating only that she missed the appointment because it "slipped my mind." Defendant's admission that she missed the appointment, without offering any evidence to justify the absence, was sufficient within itself to sustain the trial court's finding that her failure to comply was without lawful excuse. See *State v. Alston*, 139 N.C. App. 787, 794-95, 534 S.E.2d 666, 671 (2000). Additionally, we note that defendant pled guilty to charges of embezzlement on 24 May 2001. The offense was committed on 21 April 2000, while defendant was on probation. Thus, defendant violated the regular condition of probation that she "[c]ommit no criminal offense in any jurisdiction." N.C. Gen. Stat. § 15A-1343(b)(1). Accordingly, we conclude it was within the trial court's discretion to revoke defendant's probation.

Additionally, we decline to review defendant's argument that the condition of probation that she pay \$175,135 in restitution was unreasonable and constituted cruel and unusual punishment. Our Supreme Court stated in *Tozzi* that "defendants may not raise an initial objection to a condition of probation . . . on appeal, but must first object no later than the revocation hearing." *Tozzi*, 84 N.C. App. at 520, 353 S.E.2d at 252. Neither the record or transcript in this case contains written or oral objections by defendant raising this issue. Accordingly, the issue has not been

preserved for appeal.

III.

Finally, defendant argues the trial court erred by failing to give defendant credit for 91 days served towards her sentence. We agree. The transcript of the revocation hearing reflects that defendant was to receive credit for ninety-one days spent in custody. However, the judgment only credited defendant for one day spent in custody. Accordingly, the matter is remanded for correction of the judgment to reflect that defendant should be credited with ninety-one days of prior confinement.

No error; remanded for correction of a clerical error in the judgment.

Chief Judge EAGLES and Judge HUDSON concur.

Report per Rule 30(e).