

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1358

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v.

Yadkin County
Nos. 03 CRS 2054-60

DANNY FRANK TALLEY

Appeal by defendant from judgments entered 28 March 2005 by Judge James M. Webb in Yadkin County Superior Court. Heard in the Court of Appeals 29 May 2006.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

Michael E. Casterline; and the Law Offices of J. Darren Byers, P.A., by J. Darren Byers, for defendant appellant.

McCULLOUGH, Judge.

On 7 June 2004, defendant pled guilty pursuant to a plea agreement to twenty-eight counts of obtaining property by false pretenses. The convictions were consolidated into eight judgments. Defendant was sentenced to one active term of six to eight months' imprisonment, and seven consecutive suspended terms of six to eight months' imprisonment. Defendant was placed on supervised probation for sixty months and ordered to pay restitution in excess of \$500,000.

On 8 March 2005, probation violation reports were filed

alleging that defendant: (1) was in arrears on his monetary obligation, and (2) had admitted taking a pain medication that had not been prescribed to him by a physician.

The trial court held a hearing on 28 March 2005. Defendant admitted violating the conditions of his probation. Defendant did not testify at the hearing. Counsel argued that defendant did not have sufficient income to meet the monetary obligation of his probation. The trial court found that defendant willfully violated the conditions of his probation as alleged in the violation reports. The trial court revoked defendant's probation and activated his suspended sentences. Defendant appeals.

Counsel appointed to represent defendant has been unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has also shown to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising defendant of his right to file written arguments with this Court and providing him with the documents necessary for him to do so.

Defendant has not filed any written arguments on his own behalf with this Court and a reasonable time in which he could have done so has passed. However, defendant, through attorney J. Darren Byers, has filed a motion for appropriate relief. Counsel argues

that the original judgment was in error because the trial court set restitution at an amount greater than defendant's ability to pay. This motion for appropriate relief is meritless.

At the outset, we note that defendant's motion for appropriate relief presents impermissible collateral attack on the judgment of the court. See *State v. Rush*, 158 N.C. App. 738, 741, 582 S.E.2d 37, 39 (2003). Defendant has neither moved to withdraw his plea nor sought a writ of certiorari to review the original judgment. He, therefore, has waived any challenge to the original judgment, and may not attack it via a motion for appropriate relief. *Id.*

Furthermore, we note that failure to pay restitution was only one of the grounds for revocation. The probation violation report also alleged that defendant had admitted to taking medication that was not prescribed for him by a physician. This Court has stated that:

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) (citations omitted).

The probation officer's written report of the probation violation was admissible in evidence. *State v. White*, 129 N.C.

App. 52, 58, 496 S.E.2d 842, 846 (1998), *aff'd in part and disc. review dismissed in part*, 350 N.C. 302, 512 S.E.2d 424 (1999); see also *State v. Dement*, 42 N.C. App. 254, 255, 255 S.E.2d 793, 794 (1979) ("Sufficient evidence was presented in the verified and uncontradicted violation report served upon the defendant to support the trial court's findings and conclusions."). Once the State presented evidence that defendant had violated his probation, the burden shifted to defendant to show excuse or lack of willfulness. If the defendant fails to carry this burden, evidence of failure to comply may justify a finding that the violation was willful or without lawful excuse. *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985). Here, defendant admitted the violation, but offered no competent evidence to explain or to excuse his probation violation. Thus, because defendant presented no competent evidence showing excuse or lack of willfulness as to his illegal use of medication, he failed to carry his burden. Therefore, because there was sufficient grounds to revoke defendant's probation, consideration of his remaining probation violations are moot.

Moreover, in accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom. We have been unable to find any possible prejudicial error and conclude that the appeal is wholly frivolous.

No error.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).

