

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-338

NORTH CAROLINA COURT OF APPEALS

Filed: 3 January 2006

STATE OF NORTH CAROLINA

v.

PATRICIA ANN BOYKIN

Cumberland County
Nos. 00 CRS 26295
00 CRS 26296
00 CRS 26297
00 CRS 51849

Appeal by defendant from judgments entered 14 December 2004 by Judge James F. Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 30 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General Laura J. Gendy, for the State.

Sue Genrich Berry for defendant.

BRYANT, Judge.

Patricia Ann Boykin (defendant) appeals from judgments entered 14 December 2004 revoking her probation and sentencing her to a term of forty to forty-eight months imprisonment.

On 6 November 2000, defendant was indicted on four felony counts of embezzlement in violation of N.C. Gen. Stat. § 14-90 (2003). On 8 February 2001, defendant pleaded guilty to all four counts of embezzlement. Defendant's active sentences of ten to twelve months imprisonment in each of the four counts were suspended, and she was placed on supervised probation for a period

of sixty months on the condition she provided repayment of costs and fines totaling \$30,069.25.

On 6 March 2002, defendant's probation was modified to require payments of \$635.00 per month, effective 1 April 2002. On 8 November 2004, defendant's probation officer filed probation violation reports alleging that defendant willfully violated the monetary terms of her probation. Defendant was tried at the 13 December 2004 session of Cumberland County Superior Court before the Honorable James F. Ammons, Jr. After a hearing on the merits, the trial court found a willful violation of defendant's probation and activated defendant's sentences. Defendant appeals.

The dispositive issue on appeal is whether the trial court erred in revoking defendant's probation for failure to comply with the monetary conditions of her probation in violation of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution. Defendant argues the trial court erred as a matter of law or, in the alternative, abused its discretion by revoking her probation for her failure to comply with monetary conditions. Defendant further alleges the trial court erred when it revoked her probation with respect to both the U.S. and North Carolina Constitutions. Specifically, defendant contends that because (1) she was an indigent and (2) the trial court failed to consider whether she made bona fide efforts to pay, there were insufficient grounds to warrant probation revocation. We disagree.

In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent. The complaining party must also obtain a ruling upon his request, objection or motion. N.C. R. App. P. 10(b)(1) (2003); *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). In the present case, defendant did not make an exception or lodge an objection at the trial court level. Thus, she has failed to preserve this issue for appellate review in the manner dictated by N.C. R. App. P. 10(b)(1).

Defendant now seeks to convince this Court that her probation was wrongfully activated by making federal and state constitutional arguments. However, constitutional issues which are not raised and passed upon at the trial court level will be deemed as waived and will not be considered for the first time on appeal. *State v. Smith*, 352 N.C. 531, 557-58, 532 S.E.2d 773, 790 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001). "Defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal." *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). Here, defendant did not raise constitutional issues during the course of her probation violation hearing and may not do so for the first time on appeal. Accordingly, defendant has not preserved this issue for review on constitutional grounds and we will not consider this issue.

However, defendant also challenges the trial court's ruling was is violation of N.C. Gen. Stat. § 15-1345(e). While defendant's allegation of a statutory violation is encompassed in her only assignment of error, such violation is not specifically argued in her brief, and is therefore deemed abandoned. N.C. R. App. P. 28(b)(6). Even if defendant had properly argued this matter, we determine defendant's assignment of error lacks merit.

N.C.G.S. § 15-1345(e) provides that "[b]efore revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings." The State bears the burden of showing that the defendant has violated one of the conditions of his probation. *State v. Tennant*, 141 N.C. App. 524, 527, 540 S.E.2d 807, 808 (2000). "In a probation revocation proceeding based upon defendant's failure to pay a fine or restitution which was a condition of [her] probation, the burden is upon 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) (quoting *State v. Williamson*, 61 N.C. App. 531, 534, 301 S.E.2d 423, 426 (1983)). The trial court's judgment will not be disturbed unless there is a showing of abuse of discretion, procedural conduct prejudicial to the defendant, or circumstances which manifest inherent unfairness. *State v. Wilkins*, 297 N.C. 237, 246, 254 S.E.2d 598, 604 (1979).

Defendant argues she was indigent and did not have the means to pay her obligations, and that the trial court incorrectly focused on the cancellation of her first debt rather than determining whether she made bona fide efforts to pay restitution to her victims. The trial court had ample evidence to support its findings that defendant willfully violated the monetary conditions of her probation. Despite the fact defendant earned approximately \$8,000.00 per year and received at least \$6,000.00 in gifts from family members over the past three years, she made absolutely no restitution payments for months, and even years, at a time. Defendant's probation officer testified that "[e]very month I have practically begged [defendant] to make some type of payment, even a good-faith payment, to pay 10, 20, or 30 dollars just to show good-faith." These "good-faith" payments were significantly less than \$635.00 per month, yet defendant repeatedly refused to take steps to reduce her debt and never attempted to work with her probation officer to construct a payment plan. Furthermore, it is clear from the record defendant had previously been involved in probation revocation hearings for other embezzlement crimes. Since the mid-1990's, she had been placed on probation for no less than seven separate counts of embezzlement. At the present revocation hearing, defendant testified she was familiar with the probation system and the mechanism of a probation revocation hearing and had been absolved of having to pay restitution on other embezzlement convictions. These facts show that the trial court carefully considered the evidence. There was no abuse of the trial court's

discretion when it activated defendant's sentences. *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987) ("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.") (citations omitted). Here, the trial court had ample evidence from which to find that defendant willfully violated a valid condition of probation, without lawful excuse.

Affirmed.

Judges TYSON and CALABRIA concur.

Report per Rule 30(e).