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NO. COA05-660

NORTH CAROLINA COURT OF APPEALS

Filed: 4 April 2006

STATE OF NORTH CAROLINA

v.

Durham County
Nos. 02 CRS 52609;
04 CRS 16686

THOMAS ANTOINE BLACKWELL

Appeal by defendant from judgment entered 29 November 2004 by Judge J.B. Allen, Jr. in Durham County Superior Court. Heard in the Court of Appeals 1 December 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Diane Martin Pomper, for the State.

William D. Spence, for defendant-appellant.

JACKSON, Judge.

Thomas Blackwell ("defendant") timely appeals from a Judgment and Commitment Upon Revocation of Probation entered 29 November 2004 by the Honorable J.B. Allen, Jr.

Defendant pled guilty to the charge of felony breaking and entering in Duplin County on 19 November 2002. Defendant received a suspended sentence and was placed on supervised probation for thirty-six months. Defendant's probation subsequently was transferred to Durham County. Defendant's probation officer filed a Violation Report on 25 May 2004 alleging that defendant had violated the conditions of his probation by failing to be at his

approved residence during curfew on several enumerated dates; failing to make payments to the court as directed by the conditions of his probation; failing to obtain a TASC evaluation; and by absconding supervision by leaving his approved place of residence. A warrant was issued for defendant's arrest and defendant was arrested 28 October 2004. On 20 November 2004, defendant appeared before the Honorable Orlando Hudson, Jr. who entered an order continuing the case for thirty-five days so that a sentencing plan could be prepared.

A probation revocation hearing in defendant's case was calendared before the Honorable J.B. Allen, Jr. on 29 November 2004. At the calendar call, defendant moved to continue the hearing pursuant to Judge Hudson's 20 November 2004 order. Judge Allen denied defendant's motion.

At the hearing, defendant's probation officer testified that he had received defendant's case in December of 2003 and had not spoken to defendant's previous probation officer. The probation officer testified that on numerous occasions in January 2004 defendant was not at his approved residence during curfew hours, that defendant was in arrears on his court ordered payments, that he had never been in contact with defendant as he could not locate defendant as he had apparently absconded from supervision, and that defendant had failed to make any payments on his probation judgment which had an outstanding balance of \$1,290.00. The probation officer further testified that, subsequent to the filing of the violation report, he had discovered that defendant had completed

the TASC evaluation and the State abandoned that allegation at trial.

Defendant testified that he had moved in with his mother due to financial concerns and had informed his previous probation officer of his change of address. Defendant further testified that he was not at his place of residence during curfew hours due to his work and school schedules. Defendant's previous probation officer allegedly told defendant that it was permissible for him to be away during curfew for those reasons so long as his whereabouts could be confirmed. Defendant also testified that he was paying voluntary child support in the amount of \$300.00 per month and rent to his mother in the amount of \$200.00 per month and that there was insufficient money left to make his court-ordered payments. Since his arrest on the probation violation, however, he had managed to save \$800.00 which he was ready to pay toward his arrears.

Defendant presents three assignments of error on appeal. These assignments of error are: (1) the trial court erred in denying his motion to continue and conducting the revocation hearing prior to the expiration of the thirty-five day continuance granted previously by order of another superior court judge; (2) the trial court abused its discretion in revoking his probation and activating his sentence; and (3) the trial court erred in failing to make sufficient findings of fact in its order revoking defendant's probation.

Defendant first argues that the trial court erred in denying his motion to continue after the revocation hearing erroneously was

scheduled prior to the thirty-five day continuance granted by Judge Hudson's order entered 20 November 2004. "[O]rdinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). However, "a judge has the power to modify an interlocutory order made by another whenever there is a showing of changed conditions which warrant such action." *Id.* at 502, 189 S.E.2d at 488. In the case *sub judice*, Judge Hudson's order of continuance was an interlocutory order subject to modification upon a showing of changed conditions. The State has failed, however, to make any showing of changed conditions which would warrant such a modification. Accordingly, we hold that the trial court erred in denying defendant's motion to continue, effectively overruling Judge Hudson's prior order.

Defendant is not, however, entitled to a new hearing. A showing of error committed at the trial court level, alone, is not sufficient to warrant a new hearing. "[A] defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial." *State v. Hutchinson*, 139 N.C. App. 132, 139, 532 S.E.2d 569, 574 (2000), citing *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983). "Defendant has the burden of showing that he was prejudiced by the admission of the evidence." *Id.* at 139, 532 S.E.2d at 574, citing *State v. Wingard*, 317 N.C. 590, 599-600, 346 S.E.2d 638, 645 (1986). In order to demonstrate that he was prejudiced by an error, other than a

constitutional error, defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached[.]" N.C. Gen. Stat. § 15A-1443(a) (2005). Defendant failed to argue that the error in question was constitutional in nature. In addition, defendant does not argue that there was a reasonable possibility that, but for the error, a different result would have been reached. Accordingly, defendant has failed to demonstrate prejudice as a result of the trial court's error and we hold the error to be harmless.

Defendant next argues that the trial court abused its discretion in revoking his probation as there was insufficient evidence to prove that he had violated the conditions of his probation willfully. An alleged violation of probation need not be proven beyond a reasonable doubt. *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). "All that is required in a hearing [on a probation violation] is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended." *Id.* "[O]nce the State has presented competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms." *State v. Terry*, 149 N.C. App. 434, 437-38, 562 S.E.2d 537, 540 (2002). Absent competent evidence of defendant's inability to comply with the conditions of the probation, evidence

of his failure to comply may justify a finding that the non-compliance was willful and without lawful excuse. *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987).

In the case *sub judice*, defendant's only evidence that he had not violated the conditions of his probation willfully were his bare assertions that he had informed his previous probation officer of his change of address, that his previous probation officer had approved his absence from his residence after curfew for work or school, and that he could not afford to make his payments due to other voluntary financial obligations. Defendant failed to provide evidence to corroborate these assertions. Defendant's new probation officer did, however, testify that he found a notation in the file he received from defendant's prior probation officer indicating that defendant's authorized address was changed to his mother's address. "In determining whether the evidence warrants the revocation of probation or a suspended sentence, the credibility of the witnesses and the evaluation and weight of their testimony are for the judge." *State v. Hewett*, 270 N.C. 348, 356, 154 S.E.2d 476, 482 (1967). Here, there was sufficient evidence in the record for the judge to make such a credibility determination regarding defendant's arrangement with his prior probation officer.

Regarding his failure to make the payments as scheduled pursuant to the conditions of his probation, defendant testified that he earned approximately \$800.00 per month, out of which he paid \$300.00 per month in voluntary child support and \$200.00 per month in rent to his mother. Defendant further testified that he

had not been paying the money ordered by the conditions of his probation because he was paying off other debts. A trial court is not required "to regard as a 'lawful excuse' for failure to comply, [a] defendant's voluntary payments of other expenses in lieu of those which he was under court order to pay." *State v. Butcher*, 10 N.C. App. 93, 96, 177 S.E.2d 924, 927 (1970). Accordingly, even if the judge had found defendant's testimony credible, defendant's payment of other debts does not constitute a lawful excuse for failure to make payments as required pursuant to the terms of defendant's probation.

As defendant failed to present any competent evidence that his failure to comply with the conditions of his probation that required him to be at his approved residence during curfew hours and to make payments was not willful or that he had a lawful excuse for the non-compliance, we hold that the trial court did not abuse its discretion in revoking his probation. Accordingly, this assignment of error is overruled.

Defendant's final assignment of error is that the trial court erred in failing to make sufficient findings of fact in its order revoking his probation. In support of this argument, defendant relies on *State v. Hill*, 132 N.C. App. 209, 510 S.E.2d 413 (1999) and *State v. Sellars*, 61 N.C. App. 558, 301 S.E.2d 105 (1983). Although both of these cases support the contention that the trial court is required to make specific findings of fact, rather than mere conclusions, showing that it considered a defendant's evidence

of lawful excuse, they are factually distinguishable from the case *sub judice*.

In *Hill*, the trial court refused to even consider the evidence offered by the defendant in support of his contention that he had a lawful excuse for not complying with the conditions of his probation prior to revoking his probation and failed to find as fact that the defendant did not have a lawful excuse for his failure to comply. *Hill*, 132 N.C. App. at 211-12, 510 S.E.2d at 414-15. In *Sellars*, the defendant offered extensive evidence of hospitalizations and medical treatments which had prevented her from being able to make payments pursuant to the conditions of her probation. *Sellars*, 61 N.C. App. at 561, 301 S.E.2d at 107. In its order revoking the defendant's probation, the trial court's findings of fact merely restated the allegations of the violation report and do not indicate whether the court considered if there was a lawful excuse for the violations. *Id.*

In the case *sub judice*, the trial court received evidence of defendant's alleged conversations with his previous probation officer and of his inability to make payments due to his payment of other debts. Additionally, at the hearing, the judge specifically stated that defendant had willfully and knowingly violated his probation. On the Administrative Office of the Courts form for Revocation of Probation, the trial court included a finding that the violations were committed willfully and without valid excuse. Here, the trial court accepted the evidence of lawful excuse presented by defendant and, after hearing that evidence,

specifically ruled that defendant's violations were willful and without excuse. Additionally, as discussed *supra*, the evidence presented by defendant, even if deemed credible by the trial court, did not require a finding that defendant had a lawful excuse for his violations. Accordingly, this assignment of error is overruled.

Affirmed.

Judges HUDSON and LEVINSON concur.

Report per Rule 30 (e).