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NO. COA06-1375

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

STATE OF NORTH CAROLINA

v.

Wake County
No. 05 CRS 82975

DONALD M. TODD

Appeal by defendant from judgments entered 10 May 2006 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 30 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for the State.

Thorsen Law Office, by Haakon Thorsen, for defendant-appellant.

LEVINSON, Judge.

Donald M. Todd (defendant) pled guilty on 18 October 2005 to breaking or entering and felony larceny and was sentenced to consecutive terms of ten to twelve months imprisonment. The trial court suspended defendant's sentences and placed him on supervised probation for thirty-six months.

On 2 December 2005, a probation violation report was filed alleging that defendant had failed to comply with the terms of his probation in that he failed to make any payments toward his monetary obligations and had absconded.

On 10 May 2006, the trial court held a probation violation hearing at which defendant admitted violating his probation. The State sought revocation of defendant's probation and recommended that defendant's sentences run concurrent with a sentence he was presently serving. However, the trial court declined to adopt the State's recommendation concerning sentencing. The trial court revoked defendant's probation, activated the suspended sentences and ordered that the sentences run consecutive to the sentences defendant was then serving. Defendant appeals.

Defendant's sole argument on appeal is that the trial court failed to exercise its discretion pursuant to N.C. Gen. Stat. § 15A-1344(d) (2005) when it ordered his sentences to run consecutive to a sentence he was already serving. At the sentencing hearing, when the State made its recommendation, the court responded "[c]an't do it." Defendant contends this statement indicates that the trial court believed it lacked authority to exercise any other option and that the trial court did not exercise its discretion. We disagree.

In *State v. Partridge*, 110 N.C. App. 786, 431 S.E.2d 550 (1993), this Court reversed a defendant's probation revocation where the trial court declined to modify defendant's sentences so that they would run concurrently rather than consecutively. In declining to do so, the trial court indicated that it believed it did not have the authority to modify the sentences to run concurrently. *Id.* at 788, 431 S.E.2d at 551-52. Here, however, the trial court did not indicate that it believed it was without

authority or that it had no alternative other than to order defendant to serve his sentences consecutive to the sentence he was already serving. Rather, the trial court ordered that the first activated sentence run at the expiration of the sentence defendant was then serving because it believed that defendant was "not a nice guy." The Court explained:

He's going to skate, is what y'all wanted me to do. He has a prior conviction of breaking and entering. He's got a bunch of stuff. I mean, I just think he ought to get punished for it.

It is apparent that the trial court exercised its discretion and imposed the punishment it believed was appropriate.

Affirmed.

Judges McCULLOUGH and STEELMAN concur.

Report per Rule 30(e).