NO. COA06-1459

NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2007

STATE OF NORTH CAROLINA

v. Stanly County
Nos. 04 CRS 050129 - 050130

VINCENT TODD CARPENTER

Appeal by defendant from judgments entered 22 June 2006 by Judge Kimberly S. Taylor in Stanly County Superior Court. Heard in the Court of Appeals 20 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, and Kirby H. Smith, III, for defendant-appellant.

TYSON, Judge.

Vincent Todd Carpenter ("defendant") appeals from judgments entered revoking his probation and activating his suspended sentences for attempted assault with a deadly weapon on a government official pursuant to N.C. Gen. Stat. § 14-34.2, speeding to elude arrest with two aggravating factors pursuant to N.C. Gen. Stat. § 20-141.5(b), and impaired driving pursuant to N.C. Gen. Stat. § 20-138.1. We affirm.

I. Background

On 8 July 2005, defendant pled guilty to felony fleeing to elude arrest, attempted assault with a deadly weapon on a

government official, and impaired driving. Defendant admitted and stipulated to two aggravating factors regarding felony fleeing to elude arrest and attempted assault with a deadly weapon on a government official: (1) the offense was committed for the purpose of avoiding or preventing a lawful arrest; and (2) defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. The trial court made no findings of the existence of any mitigating factors.

The trial court sentenced defendant in the aggravated range to fourteen to seventeen months imprisonment for felony fleeing to elude arrest. Defendant received a consecutive sentence in the aggravated range of twenty-five to thirty months imprisonment for attempted assault with a deadly weapon on a government official. Defendant was also sentenced to a concurrent six month term of imprisonment for impaired driving. The trial court suspended defendant's sentences and placed him on probation.

On 11 April 2006, probation violation reports were filed in the fleeing to elude arrest and impaired driving cases. The report alleged defendant: (1) tested positive for cocaine on four occasions; (2) failed to make payments toward court fines, restitution, and community service fees; (3) failed to make payments toward supervision fees; and (4) failed to properly complete a drug treatment program.

On 22 June 2006, a probation violation hearing was conducted. Due to a missing witness, the State dismissed the fourth allegation

regarding defendant's failure to complete the drug treatment program. Probation Officer Tony Gibson ("Officer Gibson") testified: (1) about defendant's prior sentences; (2) defendant had tested positive for cocaine on four separate occasions; and (3) defendant had failed to make any payments on any case while on probation. Defendant testified he had used cocaine and failed to make payments required to maintain his probation.

The trial court found that defendant "willfully and without lawful excuse violated conditions of his probation . . . by testing positive for cocaine on four separate occasions in 2005, and by being in arrears on both his court debt and supervision fees." The trial court revoked defendant's probation and activated all three of his suspended sentences. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) revoking his probation for attempted assault with a deadly weapon on a government official without a probation violation report having been filed alleging a violation of this particular conviction; (2) activating his sentences in the aggravated range because the aggravating factors found were inherent in the crimes for which he was convicted; and (3) activating the aggravated sentences previously imposed where the aggravating factors were found by the initial trial judge in violation of *Blakely v. Washington*.

III. Revocation of Defendant's Probation for Attempted Assault with a Deadly Weapon on a Government Official

A. Plain Error

Defendant argues it was "plain error" to revoke his probation for attempted assault with a deadly weapon on a government official without a probation violation report having been filed alleging a violation of this particular conviction. We disagree.

Plain error review applies only to challenges of jury instructions and to evidentiary matters. *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003); *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). Here, defendant has not asserted error to either jury instructions or evidentiary matters as a basis for plain error review. This assignment of error is dismissed.

B. No Notice and Violation Report Filed

Defendant argues the trial court lacked jurisdiction to hear and rule on the attempted assault violation in the absence of prior notice and a filed probation violation report. Since jurisdiction can be raised at any time and for the first time on appeal, we review defendant's assignment of error. *See Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 421, 248 S.E.2d 567, 571 (1978) ("The question of subject matter jurisdiction may properly be raised for the first time on appeal."), *cert. denied*, 296 N.C. 583, 254 S.E.2d 32 (1979).

N.C. Gen. Stat. § 15A-1345(e) (2005) provides, in relevant part:

> (e) Revocation Hearing. -- Before 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 must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged*. The notice, *unless waived by the probationer*, must be given at least 24 hours before the hearing.

(Emphasis supplied).

Defendant acknowledged at the probation revocation hearing that although the attempted assault on a government official conviction was not referenced in the probation violation report, he waived hearing on that matter, admitted the violation, and agreed for that sentence to be activated. The following exchange occurred:

> [Defense Counsel]: Your Honor, in regards to the -- believe it was attempted assault with a deadly weapon on a government official, which was a 25 to 30 month suspended sentence, there was no violation filed for that. *[Defendant] would agree to waive hearing in regard to that and would admit the violation and agree for that sentence to be activated*. . . .
>
> . . . .
>
> The Court: All right. I'll note for the record that [defendant] is present on the matter, apparently was not formally served with a violation report, that he has spoken with his attorney and has agreed that the violation would be heard today in conjunction with the matters that were previously heard for which the violation report is specifically addressed. *Note that [defendant] has agreed that his probation be revoked and his active sentence be placed in effect.* Is that correct, [defendant]?
>
> [Defendant]: Yes, ma'am.

(Emphasis supplied). Defendant expressly waived prior notice and a hearing, admitted his violations, and consented to his probation

being revoked before the trial court. N.C. Gen. Stat. § 15A-1345(e). This assignment of error is overruled.

IV. Aggravating Factors Numbered Three and Eight

Defendant argues the trial court erred by activating his suspended sentences in the aggravated range because: (1) aggravating factors numbered three and eight where inherent in the crimes for which he was convicted and (2) those sentences were unconstitutionally aggravated in violation of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). We disagree.

> When appealing from an order activating a suspended sentence, inquiries are permissible only to determine whether there is evidence to support a finding of a breach of the conditions of the suspension, or whether the condition which has been broken is invalid because it is unreasonable or is imposed for an unreasonable length of time.

State v. Noles, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971). "'Questioning the validity of the original judgment where sentence was suspended on appeal from an order activating the sentence is . . . an impermissible collateral attack.'" *State v. Holmes*, 361 N.C. 410, 412, 646 S.E.2d 353, 354 (2007) (quoting *Noles*, 12 N.C. App. at 678, 184 S.E.2d at 410).

Our Supreme Court has recognized one exception to the rule prohibiting collateral attacks on a sentence upon activation, involving a constitutional violation not at issue here. "[W]hen a court activates a suspended prison sentence, defendant may, upon appeal of such activation, raise the claim that he was unconstitutionally denied counsel at his original trial." *State v. Neeley*, 307 N.C. 247, 250, 297 S.E.2d 389, 392 (1982).

Here, defendant does not argue he was unconstitutionally denied effective assistance of counsel at trial. Defendant's argument that the original trial court erred by sentencing him in the aggravated range: (1) because the aggravating factors were inherent in the crimes for which he was convicted or (2) is *Blakely* error are "'impermissible collateral attack[s].'" *Holmes*, 361 N.C. at 412, 646 S.E.2d at 354 (quoting *Noles*, 12 N.C. App. at 678, 184 S.E.2d at 410)). Such a challenge must be sought through review of the sentences imposed in the original judgments. *Id.* Defendant also admitted and stipulated to these aggravating factors under N.C. Gen. Stat. § 15A-1340.16(d) in his plea agreement. This assignment of error is dismissed.

V. Conclusion

While defendant was entitled to notice and a hearing before his probation could be revoked, he expressly waived these requirements before the trial court, admitted his violations, and consented to the revocation of his probation. Defendant's argument that the original trial court erred by sentencing him in the aggravated range are "impermissible collateral attack[s]," not reviewable in an appeal from the order revoking his probation. *Id.* The trial court's judgment is affirmed.

Affirmed.

Chief Judge MARTIN and Judge MCCULLOUGH concur.

Report per Rule 30(e).