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NO. COA06-26

NORTH CAROLINA COURT OF APPEALS

Filed: 7 November 2006

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 03 CRS 252301

SYLVESTER STEWART MILLER

Appeal by defendant from judgment entered 25 August 2005 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 October 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Lauren M. Clemmons, for the State.

Anne Bleyman for defendant appellant.

JACKSON, Judge.

On 17 November 2003, the Mecklenburg County Grand Jury issued an indictment charging Sylvester Miller ("defendant") with one count of conspiracy to commit robbery with a dangerous weapon. Thereafter, on 5 January 2004, the grand jury issued an amended indictment for that charge, adding the names of defendant's co-conspirators and correcting the spelling of the victim's name. On that same date, the grand jury also issued two separate indictments each charging defendant with one count of robbery with a dangerous weapon.

On 7 June 2004, defendant pled guilty to common law robbery and conspiracy to commit robbery with a dangerous weapon pursuant to a plea arrangement with the State. Pursuant to the terms of the plea agreement, the State dismissed one of the charges against defendant for robbery with a dangerous weapon. The trial court sentenced defendant to twelve to fifteen months imprisonment for common law robbery and to a consecutive term of twenty-nine to forty-four months imprisonment for conspiracy to commit robbery with a dangerous weapon. The trial court suspended the sentence for the conspiracy conviction, placed defendant on supervised probation for thirty-six months, and ordered defendant to pay court costs, a fine, and restitution. The trial court also imposed regular conditions of probation, including requiring that defendant remain suitably employed, report to his probation officer at reasonable times, and remain within the jurisdiction of the court unless given permission to leave. Further, the trial court imposed special conditions of probation, including requiring defendant to pass the General Education Development Test during the first eighteen months of probation, report for initial evaluation by a licensed local agency within thirty days for further treatment or counseling, and submit to the intensive supervision program for a period of six months.

After serving his sentence for common law robbery, defendant began his probationary period. He reported for intensive probation on one occasion in December 2004, but failed to report again. On 11 February 2005, Probation Officer Katherine Williams ("Officer

Williams") filed a probation violation report alleging defendant violated six conditions of his probation in that he: (1) failed to report as directed to the probation officer by missing scheduled office visits on 22 December 2004, 29 December 2004, 5 January 2005, and 12 January 2005; (2) missed curfew on eight separate dates from 15 December 2004 through 11 January 2005 in violation of a special condition of his probation; (3) failed to make the monetary payments in the sum of \$778.16, as ordered by the trial court; (4) failed to make any of the monthly probation supervision fees, totaling \$210.00 at the time the probation violation report was filed; (5) failed to notify his probation officer of his change in address; and (6) failed to notify his probation officer that he failed to obtain or retain employment.

A probation violation hearing was held on 25 August 2005 in Mecklenburg County Superior Court. At the beginning of the hearing, the trial court asked defense counsel if defendant admitted the six allegations contained in the probation violation report and if defendant waived a formal reading of it. Defense counsel replied, "We waive a formal reading. My client has authorized me to tender an admission to the allegations."

Thereafter, at the request of the trial court, Probation Officer Williams commented about the allegations in the probation violation report, stating the last time she saw defendant was in December 2004 when he reported once for intensive probation. Officer Williams further stated that defendant moved from his residence without informing her. Based upon his violations,

Officer Williams recommended defendant's probation be revoked.

Defense counsel represented to the trial court that when defendant began his probation after serving his sentence for the common law robbery conviction, he was homeless and unemployed, he did not have any money and he did not know what to do to prevent himself from immediately going back into custody. Defense counsel further represented that at the time of the probation violation hearing, defendant had a place to live and his mother and girlfriend were supporting him. Defense counsel stated that defendant routinely had called him to update him on defendant's living arrangements and attempts to find work. Accordingly, defense counsel requested the trial court allow defendant an opportunity to continue with an intensive period of probation or electronic house arrest.

The trial court found defendant willfully had violated conditions of his probation. Accordingly, the trial court revoked defendant's probation and activated his suspended sentence. Defendant appeals from the revocation of his probation. Based upon our review of the record, we hold the trial court did not err and, therefore, we affirm.

Defendant first contends the indictment charging him with conspiracy to commit robbery with a dangerous weapon is deficient in that it fails to allege the elements of the conspired offense, robbery with a dangerous weapon. This Court has explained that "a conspiracy indictment need not describe the subject crime with legal and technical accuracy because the charge is the crime of

conspiracy and not a charge of committing the subject crime." *State v. Nicholson*, 78 N.C. App. 398, 401, 337 S.E.2d 654, 657 (1985). "'A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means.'" *State v. Jackson*, 103 N.C. App. 239, 244, 405 S.E.2d 354, 357 (1991) (citation omitted), *aff'd*, 331 N.C. 113, 413 S.E.2d 798 (1992).

Here, the amended indictment charged that defendant:

did unlawfully, willfully, and feloniously conspire with Allison Reece, Richard Long, Darius Coaldwell, and Kevin Marvelis to commit the felony of robbery with a dangerous weapon, G.S. 14-87, against Michel Fernald.

The indictment sufficiently charged that an agreement between two or more persons existed to commit an unlawful act. Accordingly, we overrule this assignment of error.

Next, defendant contends there was insufficient evidence to support the trial court's finding and conclusion that defendant's failure to comply with the conditions of probation was willful or without lawful excuse because he purportedly offered competent evidence that he was unable to comply with the conditions immediately after his release from prison. We disagree.

"[E]vidence at a probation revocation hearing 'need be such that reasonably satisfies the trial judge in the exercise of his sound discretion that the defendant has violated a valid condition on which the sentence was suspended.'" *State v. Tozzi*, 84 N.C. App. 517, 520-21, 353 S.E.2d 250, 252-53 (1987) (citation omitted). This Court has stated:

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.

Id. at 521, 353 S.E.2d at 253 (internal citations omitted).

Here, defendant admitted he violated the conditions of his probation as set forth in the probation violation report. Further, Officer Williams' written report of defendant's probation violations was admissible into evidence. See *State v. White*, 129 N.C. App. 52, 58, 496 S.E.2d 842, 846 (1998), *aff'd in part, disc. review dismissed in part*, 350 N.C. 302, 512 S.E.2d 424 (1999); *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.") (citing *State v. Duncan*, 270 N.C. 241, 154 S.E.2d 53 (1967)). Thus, there was competent evidence in the record to support the trial court's finding and conclusion that defendant violated his probation.

Once the State presented evidence that defendant had violated conditions of his probation, the burden shifted to defendant to present competent evidence of his inability to comply with the conditions. *Tozzi*, 84 N.C. App. at 521, 353 S.E.2d at 253. If a defendant fails to carry this burden, evidence of failure to comply

may justify a finding the violation was willful or without lawful excuse. *Id.*

Here, defendant presented no evidence. Rather, his position with respect to his inability to comply immediately with the conditions of his probation was related through the statements of his counsel. This Court previously has held that defense counsel's statements in a probation revocation hearing were not competent evidence. *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985) (stating "[o]ur review of representative cases discloses no circumstances where statements of counsel have been treated as evidence, while the cases repeatedly state that the findings and conclusions of the trial court in such hearings must be based on competent evidence.") In reaching that decision, this Court explicitly stated it was aware that formal rules of evidence did not apply at revocation hearings. *Id.* Because defendant admitted the allegations in the probation violation report and failed to present any competent evidence of his inability to comply with the conditions of his probation, we overrule this assignment of error.

Accordingly, we conclude the trial court did not abuse its discretion in revoking defendant's probation.

Affirmed.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).