

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-260

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

STATE OF NORTH CAROLINA

v.

Richmond County  
No. 04 CRS 4650

TERRY GLENN TAYLOR,  
Defendant.

Appeal by defendant from a judgment dated 8 September 2005 by Judge W. Erwin Spainhour in Richmond County Superior Court. Heard in the Court of Appeals 30 October 2006.

*Attorney General Roy Cooper, by Special Deputy Attorney General Donald R. Teeter, for the State.*

*Brannon Strickland, PLLC, by Anthony M. Brannon, for defendant-appellant.*

BRYANT, Judge.

Terry Glenn Taylor (defendant) appeals the revocation of his probation and activation of his sentences by judgment dated 8 September 2005, entered after a hearing before the Honorable W. Erwin Spainhour. We affirm the trial court's judgment.

*Facts and Procedural History*

Defendant pled guilty in Scotland County District Court on 6 May 2004 to driving while impaired. The court sentenced defendant to a term of imprisonment of six months. The court suspended the sentence and placed defendant on supervised probation for twenty-

four months. The Richmond County Probation Office subsequently assumed supervision of defendant as a resident of that county.

On 12 July 2004 and 7 December 2004, defendant's probation officer filed violation reports. The Richmond County District Court on 24 February 2005 conducted a hearing on both reports and found that defendant committed the violations alleged in the report dated 12 July 2004. The court revoked probation and activated defendant's sentence.

Defendant appealed to the Richmond County Superior Court for a hearing *de novo*. At the conclusion of the hearing on 8 September 2005, the Richmond County Superior Court found that defendant willfully committed the violation alleged in the 7 December 2004 violation report. The court revoked probation and activated defendant's sentence. Defendant appeals.

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Defendant contends the court abused its discretion by revoking probation because the evidence showed that defendant's failure to comply with the terms of his probation was not willful. The violation report filed 7 December 2004 charged that defendant willfully violated the regular condition of probation requiring he "[r]emain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer" in that on 7 October 2004, "defendant failed to appear in Richmond County District Court for a probation violation hearing[,], defendant has eluded supervision and is unable to be located within the jurisdiction[, and] defendant's whereabouts are unknown." The

court found that defendant willfully and without lawful excuse committed the foregoing violation.

A suspended sentence may be activated if "the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967). Evidence of the defendant's failure to comply with a term or condition of probation is sufficient to support a finding that the violation was willful or without lawful excuse unless the defendant can successfully carry his burden of showing lawful excuse or lack of willfulness. *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985). The trial judge, as the fact finder, is not required to accept the defendant's testimony or evidence as true. *State v. Young*, 21 N.C. App. 316, 321, 204 S.E.2d 185, 188 (1974). Evidence which contradicts or disputes the prosecution's evidence merely creates credibility issues for the trial judge to resolve. *State v. Darrow*, 83 N.C. App. 647, 649, 351 S.E.2d 138, 140 (1986).

A decision addressed to the discretion of a trial judge will not be disturbed unless it is shown that the ruling "could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985) (citation omitted). "Judicial discretion implies conscientious judgment, not arbitrary or willful action. It takes account of the law and the particular

circumstances of the case, and 'is directed by the reason and conscience of the judge to a just result.'" *Hewett*, 270 N.C. at 353, 154 S.E.2d at 480 (quoting *Langnes v. Green*, 282 U.S. 531, 541, 75 L.E. 520, 526 (1931)). Probation in lieu of an active sentence is an act of grace extended to one convicted of a crime. *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). A probationer "carries the keys to his freedom in his willingness to comply with the court's sentence." *State v. Robinson*, 248 N.C. 282, 285, 103 S.E.2d 376, 379 (1958).

The record shows that following imposition of the probationary judgment by the Scotland County District Court on 6 May 2004, supervision of defendant was transferred to Richmond County based upon defendant's stating his residence address as 301 Vance Street in Hamlet located in Richmond County. Defendant's probation officer made several unsuccessful attempts to contact defendant at this address and on 12 July 2004 filed the first violation report. This report ordered defendant to appear in Richmond County District Court on 9 September 2004. Defendant appeared in court on 9 September 2004 and executed a waiver of counsel. The court continued the probation violation hearing to 7 October 2004. Defendant's probation officer testified that defendant failed to appear for this hearing. On 12 October 2004 a magistrate issued a warrant for defendant's arrest due to defendant's failure to appear in court on 7 October 2004. The warrant listed defendant's address as "301 Vance S. Hamlet NC 28345." The return of service of this warrant indicates that it was not served because the officer making

return was told defendant was living with his mother in Laurinburg, located in Scotland County.

A probation surveillance officer located defendant on 16 December 2004 and transported defendant from the Scotland County Jail to Richmond County on 19 December 2004 to appear before a magistrate. The magistrate assigned a date for defendant to appear for a hearing on the charge the next month. On 31 January 2005 a Richmond County magistrate issued another warrant for defendant's arrest, alleging defendant failed to appear for a hearing on 27 January 2005. The return of service, dated 5 February 2005, indicated that defendant was residing in Laurinburg with his mother. On 24 February 2005 the Richmond County District Court revoked defendant's probation and defendant appealed to the superior court. A Richmond County magistrate issued yet another warrant for defendant's arrest on 12 August 2005 alleging defendant failed to appear in court on 8 August 2005.

The foregoing shows that defendant persistently failed to appear for court hearings and failed to be at the address of record when his probation officer visited. There is no evidence that defendant ever notified his probation officer of his change of address or that defendant ever received the prior permission of the court or of his probation officer to move from Richmond County to Scotland County. The foregoing conduct is not consistent with that of a person who wants to retain his freedom.

We hold the court did not abuse its discretion in revoking defendant's probation.

Affirmed.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).