

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-271

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

STATE OF NORTH CAROLINA

v.

Harnett County
Nos. 05 CRS 51519-20

OTIS CLAY ANDERSON

Appeal by defendant from judgment entered 8 December 2005 by Judge Franklin F. Lanier in Harnett County Superior Court. Heard in the Court of Appeals 24 July 2006.

Attorney General Roy Cooper, by Assistant Attorney General Vaughn Monroe, for the State.

Paul T. Cleavenger for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from the revocation of his probation and activation of his suspended sentence. The only question raised by this appeal is whether there is sufficient evidence to sustain the order revoking probation. Based on our review of the record, we find no error and affirm.

On 26 September 2005, defendant pled guilty to two counts of uttering a forged instrument. The court sentenced defendant to ten to twelve months incarceration, which was suspended, placed defendant on twenty-four months supervised probation, and ordered

defendant to provide a DNA sample on a date chosen by the Harnett County Sheriff's Office.

On 22 November 2005, Probation Officer Kathi D. Winslow filed a probation violation report alleging defendant violated the conditions of his probation by (1) providing her with an incorrect home address at the time his probation was processed and (2) by failing to provide a DNA sample. The violation report stemmed from efforts to locate the defendant at the address provided in Fayetteville (and through other exhaustive searches) and from the failure of defendant to appear at the Harnett County jail on 5 October 2005 for the DNA testing.

At the probation hearing, Winslow testified defendant was placed on probation on 26 September 2005 and processed at the Harnett County jail. At that time, defendant informed Winslow he would be residing at 2724 Providence Road, Fayetteville, Cumberland County, North Carolina during his probationary period. Thereafter, Winslow transferred the case from Harnett County to Annette Kingston of the Cumberland County Probation Office. On 5 October 2005, Kingston rejected the case because when she went to the address given to Winslow by defendant, she was informed by the residents of the home that defendant did not reside there. On 27 October 2005, Winslow telephoned defendant's aunt in an attempt to locate defendant but his aunt did not know where he was living. Winslow also telephoned a barber shop where defendant stated he was employed and was informed that defendant had not worked there since April 2005 and the individual at the barber shop did not know where

defendant was living.

Winslow further testified defendant was scheduled to go to the Harnett County jail on 5 October 2005 at 9:00 a.m. to provide his DNA sample. Winslow contacted the Harnett County jail on 27 October 2005 to determine the status of defendant's DNA sample and was advised defendant never went to the jail to provide his DNA sample. When asked at the hearing whether she had talked to defendant to determine why he had not provided a DNA sample, Winslow responded that she had not seen or heard from defendant since she had initially processed him at the Harnett County jail. Because of defendant's probation violations, Winslow recommended defendant's probation be revoked.

Defendant testified at the hearing he stayed with family members for three or four days after being released from jail on 26 September 2005 and before going to live at 2724 Providence Road, the address he had given to Winslow. Defendant further testified he spoke with an officer at the Cumberland County probation office at some point about the status of the transfer of his paperwork from Harnett County to Cumberland County and she sent him to a blood bank to provide a DNA sample during the first week of October 2005. No official from the Cumberland County Probation Office testified at the hearing.

The trial court found defendant willfully violated conditions of his probation. Accordingly, the trial court revoked defendant's probation and activated his suspended sentence.

Defendant argues there is insufficient evidence to support the

trial court's finding. Once the State presents evidence defendant has violated conditions of his probation, the burden shifts to defendant to present competent evidence of his inability to comply with the conditions. *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987). In a criminal proceeding to revoke probation such as the present one, if defendant fails to offer evidence of his inability to comply, evidence "establishing his non-compliance is sufficient to justify a finding that the failure was willful or without lawful excuse." *State v. Bryant*, 73 N.C. App. 647, 648, 326 S.E.2d 910, 911 (1985).

Defendant has offered no evidence contradicting Winslow's testimony or showing his inability to comply with the conditions of probation. Therefore he has failed to carry his burden of non-compliance with the probation requirements. We conclude there was competent evidence in the record to support the trial court's finding defendant willfully violated conditions of his probation.

Affirmed.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).