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NO. COA06-609

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v.

Lee County
Nos. 02CRS054325-27

BOBBY DARYL MCGIRT

Appeal by defendant from judgments entered 12 December 2005 by Judge Franklin F. Lanier in Lee County Superior Court. Heard in the Court of Appeals 23 January 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Floyd M. Lewis, for the State.

Michael J. Reece for defendant-appellant.

HUNTER, Judge.

Bobby Daryl McGirt ("defendant") appeals the revocation of his probation and the activation of his suspended sentences. Defendant presented the following issues for our consideration: (1) did the trial court abuse its discretion in revoking defendant's probation, and (2) did defendant receive ineffective assistance of counsel when his trial counsel admitted a probation violation. After careful consideration, we affirm.

Defendant was alleged to have violated each of his three probationary judgments by: (1) failing to report to the Wake County Probation and Parole office within twenty-four hours of his

release from jail, (2) failing to pay restitution, and (3) failing to contact Wake County Probation and absconding. His trial counsel denied the first and third allegations but admitted to the second, specifically that defendant had willfully failed to make restitution on each case.

Defendant testified that while still in jail he called the Wake County Probation office several times in order to be processed out and released from jail. He also testified that jail staff had called Wake County Probation on his behalf but there was still no contact. Before he could make contact, his Wake County charges were concluded on 30 June 2002, and he was finally released from the Wake County jail on 29 July 2002. Defendant, who gave a Wake County address, was told to report to a Wake County Probation office within twenty-four hours of his release from jail. Defendant never made contact with Wake County Probation after his release from jail, and was eventually arrested for violating probation.

During defendant's probation violation hearing, he testified that he was prepared to pay all restitution owed immediately. On cross, defendant stated that he would not have contacted probation again had he not been picked up on 31 October 2005. Defendant also acknowledged that he had been on probation before.

Judge Lanier found that defendant had willfully and without lawful excuse violated each of the conditions of his probation, revoked probation, and activated defendant's suspended sentences.

Defendant first argues that the State failed to independently prove defendant's alleged probation violation. We disagree and hold that the trial judge did not err in revoking defendant's probation and reactivating his suspended sentence.

To determine whether the State has produced sufficient evidence "[a]ll that is required . . . is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated" or violated without legal 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). A verified probation violation report is competent evidence to activate a sentence. *State v. Duncan*, 270 N.C. 241, 246, 154 S.E.2d 53, 58 (1967); see also *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987) (evidence beyond a reasonable doubt not required).

Once the State has met this burden, the burden then shifts to the defendant "to present competent evidence of his inability to comply with the conditions of probation; . . . 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. When the defendant presents evidence, "[t]he trial judge . . . is not required to accept [the] defendant's evidence as true." *State v. Young*, 21 N.C. App. 316, 321, 204 S.E.2d 185, 188 (1974). If the defendant fails to present evidence, then evidence of failure to comply is sufficient to support a finding that the violation was willful or without lawful

excuse. *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985). If the trial judge's finding is supported by competent evidence, it will not be disturbed on appeal absent a manifest abuse of discretion. *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960). Finally, "[t]he breach of *any single valid condition* upon which the sentence was suspended will support an order activating the sentence." *State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d. 185, 188 (1973) (emphasis added).

A.

At the outset, the State has met its burden by producing a violation report which was verified as to all three alleged violations. As stated above, this constitutes competent evidence to revoke probation. *Duncan*, 270 N.C. at 246, 154 S.E.2d at 58. Thus, the burden now shifts to defendant to show an inability to comply with the probation conditions.

B.

Defendant was alleged to have violated probation by (1) failing to report to Wake County Probation within twenty-four hours of his release from jail, (2) failing to pay restitution, and (3) failing to make contact with Wake County Probation and absconding. As stated above, a finding of breach of any one of these conditions, so long as it is supported by competent evidence, will support an order activating sentences. *Braswell*, 283 N.C. App. at 337, 196 S.E.2d at 188. Importantly, the trial judge made a finding that defendant had willfully violated each of the valid conditions of the probation judgment. Thus, in order to uphold the

trial court's decision, we need only find competent evidence to support the finding of one of the alleged three violations. We hold that such evidence exists.

Specifically, there is competent evidence to support a finding that defendant failed to report to probation and absconded. First, the record contains sworn and verified probation violations. Second, there is testimony from a probation officer that defendant never reported to the Wake County Probation office and the first time the officer saw defendant was after he was arrested for violating probation. Third, defendant stated on cross that he would not have contacted the probation office again had he not been captured. In all, this is competent evidence to support the judge's finding that defendant had violated his first (failure to contact) and third (absconding) probation judgements.

Defendant counters that it cannot be said that he had absconded or failed to report because he had made repeated efforts to contact the probation office. The trial judge, as fact-finder, is not required to accept his testimony as true. *State v. Williamson*, 61 N.C. App. 531, 535, 301 S.E.2d 423, 426 (1983). The credibility of any witness and the evaluation and weight of their testimony is for the judge. *State v. Robinson*, 248 N.C. 282, 286, 103 S.E.2d 376, 379 (1958). Given the evidence against defendant, it cannot be said that the trial judge abused his discretion in finding a probation violation and reactivating defendant's sentences.

Finally, as to defendant's alleged failure to pay restitution, he argues that he received ineffective assistance of counsel. Specifically, defendant alleges that his trial counsel committed a *Harbison* error by admitting that defendant had failed to pay restitution without defendant's consent. See *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). Because we find competent evidence to support the trial judge's findings regarding absconding and failure to report, we need not reach this issue. See *Braswell*, 283 N.C. App. at 337, 196 S.E.2d at 188 (requiring a finding of only one violation to uphold a determination to revoke probation). Therefore, the judgment of the trial court is affirmed.

Affirmed.

Judges WYNN and STEELMAN concur.

Report per Rule 30(e).