

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-892

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v.

KYLE MILLER

Mecklenburg County
Nos. 99CRS023223
05CRS072327

Appeal by defendant from judgments entered 16 February 2006 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 March 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Nancy R. Dunn, for the State.

Ewing Law Firm, P.C., by Robert W. Ewing, for defendant-appellant.

HUNTER, Judge.

On 27 May 2003, Kyle Miller ("defendant") pled guilty to felonious larceny in Mecklenburg County (99CRS023223). The trial court sentenced defendant to fourteen to seventeen months imprisonment, suspended the sentence and placed defendant on thirty-six months supervised probation. The trial court also sentenced defendant to a twenty-nine day active sentence as a special condition of his probation and the trial court gave defendant credit for the twenty-nine days spent in confinement when it entered defendant's Judgment Suspending Sentence. On 27 June

2005, defendant pled guilty to attempted felonious larceny and possession of stolen goods in Durham County (04CRS049626). The trial court sentenced defendant to ten to twelve months imprisonment, suspended the sentence and placed defendant on supervised probation for twenty-four months. Defendant's Durham County case was transferred to Mecklenburg County and given file number 05CRS072327.

In November of 2005, defendant's probation officer filed a probation violation report in each case (99CRS023223 and 05CRS072327), alleging that defendant: (1) tested positive and admitted use of marijuana; (2) possessed over thirty items of clothing that had store tags and sensors on them; and (3) possessed a bag containing a "green leafy substance that appeared to be marijuana." A month later, defendant's probation officer filed an addendum to the violation report file number 99CRS023223 further alleging that defendant had been convicted of attempted larceny and possession of stolen goods on 26 June 2005 in Durham County.

Judge James W. Morgan held a probation violation hearing on 16 February 2006. Defendant admitted the violations. Defendant's probation officer testified that he searched defendant's residence after receiving a tip and discovered various clothing items with sensors on them. Defendant testified that he purchased the clothes in New York and had "receipts for some of my stuff." Defendant asked the court to continue his probation so that he could take care of his ailing father. The Court found defendant willfully

violated the terms of his probation, revoked defendant's probation and activated his sentences.

By judgments entered 16 February 2006, the trial court found that defendant willfully and without lawful excuse violated the terms and conditions of probation in each case. In case number 99CRS023223, the trial court found that defendant violated his probation by being convicted of attempted larceny and possession of stolen goods in Durham County Superior Court, as alleged in paragraph 1 in the 21 December 2005 violation report addendum. In case number 05CRS072327, the trial court found that defendant violated his probation by: (1) testing positive and admitted use of marijuana; (2) possessing items of clothing that had store tags and sensors on them; and (3) possessing a bag containing a "green leafy substance that appeared to be marijuana." Defendant appeals.

Defendant contends the trial court erred by concluding that he willfully violated a condition of his probation without lawful excuse and in revoking his probation. We disagree. After a careful review of the record and briefs, we affirm in part and remand in part for resentencing.

It is well settled that "[p]robation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime.'" *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (quoting *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967)).

All that is required in a hearing [to revoke probation] 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 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). A verified probation violation report is competent evidence sufficient to support revocation of probation. *State v. Gamble*, 50 N.C. App. 658, 661, 274 S.E.2d 874, 876 (1981). Once the State meets its burden, the burden then shifts to 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." *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987). "Any violation of a valid condition of probation is sufficient to revoke [a] defendant's probation." *Id.*

Defendant argues the trial court abused its discretion when it revoked his probation based upon findings that he possessed stolen items of clothing and that he possessed a bag of marijuana as set out in the probation violation report. Defendant asserts that the findings were based on insufficient evidence and that the trial court stated in open court that it would not consider the allegation of possessing stolen items of clothing in determining whether to revoke defendant's sentence.

We note that defendant's arguments pertain only to file number 05CRS072327 because the trial court revoked defendant's probation in 99CRS023223 based upon the finding that defendant was convicted

of attempted larceny and possession of stolen goods. Assuming *arguendo* that the trial court erred by making the two findings in file number 05CRS072327 as defendant suggests, defendant has failed to demonstrate prejudice resulting from the alleged error. Our courts have consistently held that violation of a single requirement of probation is sufficient to warrant revocation of that probation. *State v. Seay*, 59 N.C. App. 667, 670-71, 298 S.E.2d 53, 55 (1982) (“[i]t is sufficient grounds to revoke the probation if only one condition is broken”), *appeal dismissed and disc. review denied*, 307 N.C. 701, 301 S.E.2d 394 (1983). After reviewing the record in the instant case, we conclude that sufficient evidence supports the trial court’s findings regarding defendant’s other alleged probation violation that he tested positive for marijuana and admitted use on 18 October 2005. Although defendant offered an explanation regarding some of the alleged violations, we note that substantial evidence exists in the record to reasonably satisfy the trial court that defendant breached the conditions of his probation without lawful excuse. Accordingly, the trial court did not err by revoking defendant’s probation and activating his sentence.

As to file number 99CRS023223, we note that defendant does not challenge the basis upon which the trial court revoked his probation. Rather, defendant contends the trial court erred by entering the Judgment and Commitment Upon Revocation of Probation without giving him twenty-nine days of credit for his previous confinement. Defendant cites to *State v. Farris*, 336 N.C. 552,

554-56, 444 S.E.2d 182, 183-85 (1994), to support his contention. In *Farris*, our Supreme Court held that, upon the revocation of his probation and activation of his suspended sentence, the defendant was entitled to a ninety-day credit for time he previously spent incarcerated for violation of his probation. The Court concluded that "[t]he language of section 15-196.1 manifests the legislature's intention that a defendant be credited with all time [the] defendant was in custody and not at liberty as the result of the charge." *Id.* at 556, 444 S.E.2d at 185.

The State agrees with defendant that under N.C. Gen. Stat. § 15-196.1 defendant should have been given credit for the twenty-nine days when his sentence was activated in file number 99CRS023223. After reviewing the applicable case and statutory law, we conclude that defendant is entitled to a twenty-nine day credit for that time he spent in confinement. Accordingly, we remand the case to the trial court for entry of a new judgment crediting defendant for twenty-nine days of prior confinement.

In light of the foregoing conclusions, we hold that the trial court did not err by revoking defendant's probation and activating his sentence, but we remand the case to the trial court for entry of a new judgment crediting defendant for his prior confinement.

Affirmed in part; remanded in part.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).