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NO. COA07-1329

NORTH CAROLINA COURT OF APPEALS

Filed: 15 July 2008

STATE OF NORTH CAROLINA

v.

Henderson County  
No. 05 CRS 2258

DAMON LERONE DAVIS,

Defendant.

# Court of Appeals

Appeal by defendant from judgment entered 14 May 2007 by Judge James U. Downs in Henderson County Superior Court. Heard in the Court of Appeals 16 April 2008.

*Attorney General Roy Cooper, by Assistant Attorney General Ebony J. Pittman, for the State.*

# Slip Opinion

*Daniel F. Read for defendant.*

ELMORE, Judge.

After pleading guilty to assault with a deadly weapon with intent to inflict serious injury, Damon Lerone Davis (defendant) was sentenced to a minimum term of eighteen months' and a maximum term of thirty one months' imprisonment in October 2005. However, this sentence was suspended and defendant was placed on probation for thirty months, with the first six months being intensive supervised probation. The terms of defendant's probation included that he obtain his G.E.D., observe a 6 p.m. to 6 a.m. curfew, pass

random drug screening tests, begin substance abuse treatment, not commit any other crimes, and not possess any firearms.

Defendant appeared at a 8 January 2007 hearing pursuant to a probation violation report alleging that he knowingly and willfully violated the terms of his probation. Defendant committed numerous probation violations including testing positive for controlled substances seven times, violating curfew twelve times, failing to pay supervision fees, failing to obtain his G.E.D., failing to begin substance abuse treatment, and failing to comply with a regular condition of probation preventing him from committing any criminal offense. The trial court did not impose judgment at this hearing but instead continued the hearing until May 2007. Just before the continuation hearing on 14 May 2007, defendant's probation officer submitted an addendum to the previous violation report filed for the January hearing. At the continued hearing on 14 May 2007, the court activated defendant's suspended sentence and revoked his probation. It is from this decision that defendant appeals.

Defendant first argues that the trial court erred by proceeding to hearing on 14 May 2007 because the probation violation report addendum was filed just before the hearing began. "The State must give the probationer notice of the hearing, and its purpose, including a statement of the violations alleged. The notice, unless waived by the probationer, must be given at least 24 hours before the hearing." N.C. Gen. Stat. § 15A-1345(e) (2007). Defendant contends that the last minute addendum did not meet the

twenty-four hour notice requirement prescribed by the statute. We disagree. The 14 May 2007 hearing was a continuation of the 8 January 2007 hearing. The notice requirement for the 8 January 2007 hearing was met because the probation violation report was filed on 7 September 2006, three months before the violation hearing took place. The statute only requires twenty-four hours' notice, so the three months' notice defendant received was appropriate. The violation report for the 8 January 2007 hearing was applicable because the 14 May 2007 hearing was a continuation of that hearing. Also, the statute does not require an extra twenty-four hours' notice for an addendum to a report that is already sufficient to bring defendant to court. Additionally, the trial judge did not rely on the addendum when revoking defendant's probation because he states in the record that he was adopting the findings of the previous report in his decision at the 14 May 2007 hearing. Because there is no notice requirement for addenda and the trial judge did not consider the addendum when revoking defendant's probation, defendant's argument lacks merit.

Defendant next argues that the trial court erred by revoking his probation after considering a conviction that defendant had appealed. Defendant cites *State v. Sparrow* in support of this argument: "When an appeal of right is taken to the Superior Court . . . . the judgment appealed from is completely annulled and is not thereafter available for any purpose." 276 N.C. 499, 507, 173 S.E.2d 897, 902 (1970) (citations omitted). Defendant contends that because he is appealing the criminal conviction mentioned in

the 7 September 2006 probation violation report, which in turn was used in the 8 January 2007 violation hearing, the trial court should not have considered the conviction when deciding to revoke his probation. Even assuming *arguendo* that defendant is correct, he has not "show[n] that he suffered prejudice as a result of the error." *State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981) (citation omitted). An error is prejudicial if "a different result would have been reached at the trial if the error in question had not been committed." *State v. Smith*, 87 N.C. App. 217, 222, 360 S.E.2d 495, 498 (1987) (citation omitted). Not only does defendant not offer any evidence that the trial judge considered the conviction in his decision to revoke probation, but he does not explain how this error was prejudicial or indicate that an alternative outcome could have been reached had the error not been committed. Defendant committed several other probation violations, each of which would have warranted a revocation of his probation sentence. These include failing seven drug tests, failing to complete substance abuse treatment, and failing to comply with his curfew requirements on twelve occasions. "[P]robation may be reduced, terminated, continued, extended, modified, or revoked" if the defendant violates the conditions of his probation. N.C. Gen. Stat. § 15A-1344(a) (2007). The trial judge was within his discretion to revoke defendant's probation based on his other willful violations of probation, even without considering the criminal conviction on appeal.

Defendant last argues that the trial court erred and abused its discretion by revoking defendant's probation and activating his sentence even though he had complied with the trial court's directives at the end of the January 2007 hearing. Our Supreme Court has held that a person on probation "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). "[T]he burden is on the defendant to present competent evidence of his inability to comply; and that otherwise, evidence of defendant's failure to comply may justify a finding that defendant's failure to comply was willful or without lawful excuse." *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985). Defendant willfully violated several conditions of his probation numerous times. He tested positive for controlled substances seven times, missed curfew twelve times, failed to pay supervision fees, did not complete substance abuse treatment, and failed to obtain his G.E.D. He did not present any competent evidence of his inability to comply with any of these terms, and therefore the trial court was justified in finding his actions as willful violations.

North Carolina courts also have significant discretion when adjusting probation sentences. See N.C. Gen. Stat. § 15A-1344 (2007) ("Probation may be reduced, terminated, continued, extended, modified, or revoked . . . ."). Because defendant willfully violated conditions of his probation, the trial judge was justified in his decision to revoke the probation sentence. Defendant also

admitted at the January hearing that he used controlled substances and did not adhere to his curfew several times while on probation. He has already conceded that he committed two violations of the specific terms of his probation, which authorized the trial court to activate his suspended sentence. See *Robinson* at 287, 103 S.E.2d at 380 (“[A]ll that is required to revoke a suspension of a sentence in a criminal case, and put the sentence into effect is that the evidence shall satisfy the judge in the exercise of his sound discretion that the defendant has violated, without lawful excuse, a valid condition upon which the sentence was suspended.”). Accordingly, we reject defendant’s argument that the trial judge abused his discretion by activating defendant’s suspended sentence.

We affirm the judgment of the trial court.

Affirmed.

Judges MCGEE and JACKSON concur.

Report per Rule 30(e).