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NO. COA07-1461

NORTH CAROLINA COURT OF APPEALS

Filed: 06 May 2008

STATE OF NORTH CAROLINA

v.

Cumberland County
No. 07 CRS 15781

CARL LEE CROSS, II

Court of Appeals

Appeal by defendant from judgment entered 13 August 2007 by Judge James Floyd Ammons, Jr., in Cumberland County Superior Court.

Heard in the Court of Appeals 28 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Harper, for the State.

Slip Opinion

Anne Bleyman, for defendant-appellant.

STEELMAN, Judge.

The trial court did not abuse its discretion in revoking defendant's probation.

On 27 February 2006, defendant entered pleas of guilty to assault with a deadly weapon upon a government official, assault on a government official, driving while license revoked, failure to heed a warning light or siren, injury to personal property, and reckless driving to endanger. In accordance with his plea agreement, the trial court consolidated the offenses for judgment, imposed a sentence of sixteen to twenty months, which was

suspended, and placed defendant on supervised probation for thirty months. In September of 2006, the trial court modified the terms of defendant's probation by remitting his monetary obligation except for the \$3,395.63 owed as restitution.

In a probation violation report filed 7 May 2007, defendant was cited with willfully violating the terms and conditions of his probation by (1) failing to pay his \$148.00 monthly payment obligation, resulting in an arrearage of \$884.00 and total restitution payments of only \$300.00 in fourteen months; (2) failing to obtain employment. A hearing on the violation report was scheduled for 21 May 2007, but was continued until 13 August 2007, to allow defendant the opportunity to pay an additional \$500.00 in restitution and obtain employment.

At the beginning of the revocation hearing, defense counsel acknowledged that defendant had not paid the \$500 but claimed he had been working for two weeks at a Wendy's restaurant. Counsel advised the court that, "as far as the money's concerned, we will admit that - the violations, but we will deny the willfulness because [defendant] has had a hard time finding a job -, or getting a job because he doesn't have a car."

The probation officer reported that defendant was "\$1,422.00 behind" in his restitution, having made a single payment of \$40.00 on 25 July 2007. Prior to 25 July 2007, defendant had paid nothing since "January of [20]07, and it was probably about [\$]20 or \$30."

After noting that defendant had multiple criminal charges dismissed with leave due to his failure to appear in court in 2001,

2002, 2004, and 2005, see N.C. Gen. Stat. § 15A-932 (2007), the trial court addressed defendant, as follows:

THE COURT: What did you want to say, Mr. Cross?

[DEFENDANT]: I just want to say that I - we just moved, my mother, my brother. I live out in the country. [My probation officer] knows, one time, I had to walk almost 3, 4 miles just to use the phone, just to be in contact with her. She knows that.

[PROBATION OFFICER]: I don't know anything about that.

[DEFENDANT]: I didn't have no phone. I told her. I told him [pointing]. I called him. My mother's car broke down. She's sick. I'm the only person there, sir; and, I've been trying. I've got a job. I'm 26.

THE COURT: Okay. Anything else you want to say?

[DEFENDANT]: No, sir.

THE COURT: I find that he's willfully violated the terms and conditions of his probation, having paid only \$40 since his last time in this court and only \$40 since January. The Court finds that he could have picked up plastic cans on the side of the road to make more than a \$40 payment in a year.

The court revoked defendant's probation and activated his suspended sentence. Its written judgment includes findings that defendant committed each of the violations alleged in the 7 May 2007 report "willfully and without valid excuse[,] " and that "each violation is, in and of itself, a sufficient basis" to support revocation.

Defendant contends that the court abused its discretion in revoking his probation, absent competent evidence that his violations were willful. Taking exception to the court's

suggestion that he "could have picked up plastic cans . . . to make more than a \$40 payment in a year[,] " he notes that North Carolina does not have a bottle deposit law. Defendant further argues that the court's "conclusory" findings are insufficient to show that it "considered and evaluated [his] evidence of lack of willfulness." We disagree.

We review a trial court's decision to revoke probation only for "manifest abuse of discretion." *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (quoting *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960)). To support revocation, "[a]ll that is required is that the evidence be sufficient to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation." *State v. White*, 129 N.C. App. 52, 58, 496 S.E.2d 842, 846 (1998), *aff'd in part and disc. review improvidently allowed in part*, 350 N.C. 302, 512 S.E.2d 424 (1999). In exercising its discretion, however, the court must allow defendant an opportunity to "present relevant information" regarding the alleged violations and must "make findings to support [its] decision[.]" N.C. Gen. Stat. § 15A-1345(e) (2005). Where a defendant presents competent evidence that he was unable to comply with the conditions of probation, the court's findings must reflect its consideration thereof. *State v. Hill*, 132 N.C. App. 209, 213, 510 S.E.2d 413, 415 (1999). However, the court need not accept the defendant's evidence as true. *State v. Young*, 21 N.C. App. 316, 321, 204 S.E.2d 185, 188 (1974).

We find no abuse of discretion by the trial court. By admitting to the violations alleged by his probation officer, defendant assumed the burden of proving his lack of willfulness or other lawful excuse. See *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985). Based on our review of the transcript, we do not take the court's reference to picking up cans by the roadside literally, but as an expression of incredulity regarding defendant's proffered explanation. It was the province of the court to assess defendant's credibility and to "decide[] what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom." *Wiseman Mortuary v. Burrell*, __ N.C. App. __, __, 649 S.E.2d 439, 444 (2007) (quotation omitted). Moreover, defendant's claim that he had "just moved" at the time of the 13 August 2007 hearing, and that his mother's car "broke down[,]"" did not explain his failure to obtain employment or pay more than \$300 in restitution during the fourteen-month period that preceded the filing of the violation report on 7 May 2007. His counsel's arguments were not evidence. See *Crouch*, 74 N.C. App. at 567, 328 S.E.2d at 835.

The trial court also made adequate findings of fact to support revocation. Its written judgment includes findings that defendant violated the conditions of his probation as alleged in the violation report, and that he committed each violation "willfully and without valid excuse[.]" The judgment further states that the court considered the evidence and arguments of the parties. Although these findings are printed on the judgment form, they

suffice to comply with N.C. Gen. Stat. § 15A-1345(e). *State v. Henderson*, 179 N.C. App. 191, 197, 632 S.E.2d 818, 822 (2006) (“conclud[ing that] the completed form, together with the probation violation report which was incorporated by reference, contained sufficient findings of fact to support revocation”); *State v. Belcher*, 173 N.C. App. 620, 625, 619 S.E.2d 567, 570 (2005) (“[A]lthough we encourage trial courts to be ‘explicit in [their] findings by stating that [they] ha[ve] considered and evaluated [the] defendant's evidence . . . and found it insufficient to justify breach of the probation condition, [a] failure to do so does not constitute an abuse of discretion.’”) (quoting *State v. Williamson*, 61 N.C. App. 531, 535, 301 S.E.2d 423, 426 (1983) (alterations in original)).

The record on appeal includes additional assignments of error not addressed in defendant's appellate brief. Pursuant to N.C.R. App. P. 28(b)(6), we deem them abandoned.

AFFIRMED.

Judges HUNTER and McCULLOUGH concur.

Report per Rule 30(e).