

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-1337

NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2009

STATE OF NORTH CAROLINA

v.

Cabarrus County
No. 04 CRS 54915

RONALD DARRELL CARR

Appeal by defendant from judgment entered 26 June 2008 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 23 February 2009.

Roy Cooper, Attorney General, by Ann Stone, Assistant Attorney General, for the State.

Michèle Goldman, for defendant-appellant.

Slip Opinion

MARTIN, Chief Judge.

Defendant appeals from a judgment revoking his probation and activating a suspended sentence of imprisonment. The judgment was entered fifty-seven days after defendant's probationary period expired. We vacate.

On 3 May 2005, defendant was sentenced to a term of 14 to 17 months in prison upon his guilty plea to possession of a firearm by a felon. N.C. Gen. Stat. § 14-415.1 (2005). Defendant's sentence was suspended and he was placed on supervised probation until 30 October 2007. As a condition of probation, defendant was required to pay \$1,622.00 in court costs, fines, and attorney fees.

On 4 October 2007, defendant's probationary period was extended to 30 April 2008 in order to give defendant time "to complete [CJPP program] and pay-off case."

On 19 March 2008, defendant's probation officer signed a probation violation report in which he alleged that defendant changed his residence without prior approval and provided the officer with a false address. The report stated that the officer "requests . . . a hearing on the charge(s) contained in [the] report . . . on the date and at the time and place set forth below," but no date, time, or place was so set forth. At the time the officer signed the report, defendant had satisfied the financial condition of his probationary sentence. The trial court signed an order for arrest the next day. Defendant was arrested for the violation on 21 April 2008 and released on bond the same day. In the release order, a magistrate ordered defendant to appear at the Concord courthouse at 10:00 a.m. on the "next term" of court.

On 27 May 2008, defendant executed an affidavit of indigency, and the trial court assigned defendant counsel. The trial court conducted a probation violation hearing on 26 June 2008. At the hearing, defendant's probation officer testified that defendant's probationary period expired on 30 April 2008. The officer also testified that defendant's whereabouts were unknown at the time he filed the report and, thus, that defendant had absconded from supervision. Defendant testified that the address he gave his probation officer after he moved was his landlord's address, not

the address of the apartment he rented, but that the address he provided was "on [his] lease agreement." Defendant further testified that he stopped reporting to his probation officer after he satisfied the financial condition of his probationary sentence because his probation officer "told [him] once [he] paid all [his] money that [he] wouldn't have to come see him no more."

In an order entered 26 June 2008, the trial court found that defendant was in willful violation of the conditions of his probation, revoked defendant's probationary sentence, and imposed an active term of 13 to 16 months in prison. The trial court also found:

Beyond a reasonable doubt that before the expiration of the period of probation, the State filed a written motion with the clerk indicating its intent to conduct a revocation hearing and the State made a reasonable effort to notify the probationer and to conduct the hearing during the period of probation set out in the judgment and commitment.

Defendant timely filed a written notice of appeal.

On appeal, defendant contends the judgment revoking his probation must be vacated because (1) there is no evidence to support the trial court's finding that the State made a reasonable effort to conduct the revocation hearing before the probationary period expired, and (2) the State did not file, prior to the expiration of the probationary period, a written motion indicating its intent to conduct a revocation hearing. See N.C. Gen. Stat. § 15A-1344(f) (2005).¹ The State concedes that there is no

¹This statute was amended in 2008, but the revised statute does not apply to this case. 2008 N.C. Sess. Laws ch. 129, § 4;

evidence to support the trial court's finding that the State made a reasonable effort to conduct the hearing before the probationary period expired and asks this Court to "vacate the judgment revoking probation[.]" We oblige. *State v. Bryant*, 361 N.C. 100, 102-05, 637 S.E.2d 532, 534-36 (2006) (vacating judgment revoking probation entered after probationary period expired where the trial court did not make a finding that the State made a reasonable effort to conduct a hearing before the probationary period expired and where the record lacked sufficient evidence to support such a finding had one been made); *State v. Hall*, 160 N.C. App. 593, 593-94, 586 S.E.2d 561, 561 (2003) (same).

VACATED.

Judges WYNN and ERVIN concur.

Report per Rule 30(e).