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NO. COA08-752

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STATE OF NORTH CAROLINA

v.

Cumberland County
No. 07 CRS 5856

BRANDON J. CLARK

Appeal by Defendant from judgment entered 17 March 2008 by Judge Jack A. Thompson in Superior Court, Cumberland County. Heard in the Court of Appeals 4 February 2009.

Attorney General Roy Cooper, by Assistant Attorney General Charles Richardson, for the State
Mercedes G. Chitt for Defendant-Appellant

Slip Opinion

McGEE, Judge.

Brandon J. Clark (Defendant) appeals from a judgment revoking his probation. Defendant pled guilty to two counts of conspiracy to commit armed robbery and was sentenced to a term of twenty to thirty-three months in prison on 8 July 2003. The trial court suspended Defendant's sentence and placed him on supervised probation for thirty-six months. Defendant's period of probation began on 24 April 2006 upon his release from prison on other charges. Subsequently, Defendant's probation was transferred to Cumberland County.

Probation violation reports were filed on 9 January 2007 and

17 September 2007, alleging that Defendant had absconded. The trial court held a probation violation hearing on 17 March 2008.

Pursuant to the Regular Conditions of Probation, N.C. Gen. Stat. § 15A-13543(b), Defendant was required to "obtain prior approval from the [probation] officer for, and notify the officer of, any change in address or employment." Defendant, through counsel, admitted to violating his probation. Defendant's counsel then addressed the trial court and argued that Defendant violated his probation through a "lack of understanding." Defendant's counsel further stated that Defendant had been residing at his mother's home, but had to leave because his mother and her boyfriend were "taking his rent money, buying drugs, and were using it. And he knew he had to get out of the house."

The trial court also heard from Defendant's probation officer who testified he had informed Defendant of the terms of his probation. Defendant's probation officer also testified that he went to Defendant's residence on 2 January 2007 and found it to be in foreclosure. Defendant's probation officer then attempted to locate Defendant by calling Defendant's employer, Smithfield Chicken and Barbecue, in Hope Mills, but was informed that Defendant no longer worked there.

The trial court found that Defendant willfully violated the terms of his probation without lawful excuse. Accordingly, the trial court revoked Defendant's probation and activated his suspended sentence. Defendant appeals.

Defendant first argues that the trial court erred by revoking his probation without first conducting a hearing as required by N.C. Gen. Stat. § 15A-1345 when he did not formally waive a hearing. We disagree.

"A proceeding to revoke probation is not a criminal prosecution, and we have no statute in this State requiring a formal trial in such a proceeding. Proceedings to revoke probation are often regarded as informal or summary." *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 479 (1967). The "minimum requirements of due process in a final probation revocation hearing" require:

(1) a written notice of the conditions allegedly violated;

(2) a court hearing on the violation(s) including:

(a) a disclosure of the evidence against him, or,

(b) a waiver of the presentation of the State's evidence by an in-court admission of the willful or without lawful excuse violation as contained in the written notice (or report) of violation,

(c) an opportunity to be heard in person and to present witnesses and evidence,

(d) the right to cross-examine adverse witnesses;

(3) a written judgment by the judge which shall contain

(a) findings of fact as to the evidence relied on,

(b) reasons for revoking probation.

State v. Williamson, 61 N.C. App. 531, 533-34, 301 S.E.2d 423, 425

(1983) (citations omitted). In the case before us, Defendant received notice of his alleged probation violations and, despite his contentions to the contrary, a hearing was held. At the hearing, Defendant admitted to violating his probation, and Defendant's counsel made arguments on Defendant's behalf for leniency. Therefore, we conclude there was no violation of Defendant's right to due process or any statutory violation.

II.

Defendant next argues that there was insufficient evidence to support a finding that he willfully violated his probation without lawful excuse.

Our Court has stated that:

Any violation of a valid condition of probation is sufficient to revoke [a] defendant's probation. All that is required to revoke probation is evidence satisfying the trial court in its discretion that the defendant violated a valid condition of probation without lawful excuse. The burden is on [the] defendant to present competent evidence of his inability to comply with the conditions of probation; and that otherwise, evidence of [the] defendant's failure to comply may justify a finding that [the] 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) (citations omitted).

In this case, the State alleged that Defendant absconded. Defendant admitted to violating his probation. Additionally, the State presented evidence from Defendant's probation officer. The probation officer testified that he had informed Defendant of the terms of his probation, which required Defendant obtain approval

for and notify the probation officer before changing address or employment. N.C. Gen. Stat. § 15A-13543(b) (2007). The probation officer further testified that he went to Defendant's residence on 2 January 2007 and found it was in foreclosure. The probation officer attempted to locate Defendant by calling Defendant's employer, Smithfield Chicken and Barbecue, in Hope Mills, but was advised that Defendant no longer worked there. Thus, there was competent evidence in the record to support the trial court's conclusion that Defendant violated his probation.

Once the State presented evidence that Defendant had violated his probation, the burden shifted to Defendant to show excuse or lack of willfulness. If a defendant fails to carry this burden, evidence of failure to comply may justify a finding that the violation was willful or without lawful excuse. See *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985) (citing *State v. Young*, 21 N.C. App. 316, 204 S.E.2d 185 (1974)).

In this case, Defendant offered no competent evidence to explain or to excuse his probation violation. Defendant's explanation for why he failed to comply was presented to the trial court solely through the statements of Defendant's counsel. Defendant's counsel claimed that Defendant had to leave his residence because Defendant's mother and her boyfriend were using Defendant's rent money to purchase illegal drugs. However, our Court held in *Crouch* that "counsel's statements were not competent evidence" and that the Court's "review of representative cases disclose[d] no circumstances where statements of counsel have been

treated as evidence, while the cases repeatedly state that the findings and conclusions of the trial court in such hearings must be based on competent evidence." *Id.*

Thus, because Defendant presented no competent evidence showing excuse or lack of willfulness as to the alleged probation violation, Defendant failed to carry his burden. Accordingly, we hold the trial court did not abuse its discretion in revoking Defendant's probation.

Affirmed.

Judges HUNTER and JACKSON concur.

Report per Rule 30(e).