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NO. COA09-1600

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

STATE OF NORTH CAROLINA

v.

Iredell County
Nos. 07 CRS 60281;
07 CRS 60284;
08 CRS 55013-14;
08 CRS 55016

JOHNSINER MARIE MOCK

Appeal by defendant from judgments entered 20 May 2009 by Judge Clifton E. Johnson in Iredell County Superior Court. Heard in the Court of Appeals 19 August 2010.

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

Gilda C. Rodriguez, for defendant-appellant.

JACKSON, Judge.

Johnsiner Marie Mock ("defendant") appeals the 20 May 2009 revocation of her probation. For the following reasons, we affirm.

On 1 December 2008, defendant pled guilty to four separate counts of felony sale of cocaine and one count of felony sale of Schedule II morphine pursuant to a plea arrangement with the State. Defendant was sentenced to a minimum of fifteen months and a maximum of eighteen months imprisonment for each count. The trial

court suspended the sentence, and defendant was placed on thirty-six months of supervised probation.

On 17 March 2009, Probation Parole Officer Jeffrey Settle ("Officer Settle") filed probation violation reports alleging that defendant willfully had violated the terms of her probation. According to the reports, defendant: (1) was not at her home during curfew hours on 5 December 2008, 12 January 2009, and 10 February 2009, in violation of a special term of her probation; (2) was found in possession of a "taser" on 11 February 2009, in violation of a regular condition of her probation that she "[p]ossess no firearm, explosive device or other deadly weapon"; and (3) was charged with additional criminal offenses on or about 15 March 2009, in violation of a regular condition of her probation that she "[c]ommit no criminal offense in any jurisdiction."

During defendant's 20 May 2009 probation violation hearing, Officer Settle testified for the State. He stated that during curfew hours on 5 December 2008, 12 January 2009, and 10 February 2009, defendant was not at her home when he or Officer Jonathan Rogers checked on her, and she did not provide justification for her absences. Officer Settle also stated that on 11 February 2009, during a routine warrantless search of defendant's home, a taser was located inside a purse in a closet. According to Officer Settle, defendant's probation was modified on 19 February 2009, when the State entered into an agreement with defendant. The modification provided that "[i]n exchange for not being returned to court for a formal probation violation hearing, the offender

consents to allow the taser to be destroyed. Further, probation reserves the right to include the finding of this deadly weapon in any probation violation proceeding which may become necessary in the future."

Officer Settle further testified that on 15 March 2009, defendant was charged with possession of marijuana with intent to sell; maintaining a vehicle, dwelling or place for controlled substance; possession of drug paraphernalia; and possession or selling of alcohol with no permit. Officer Settle had spoken with the leader of the police team that had searched defendant's home and brought the charges against her. Officer Settle testified that his "conversation with that Sergeant . . . indicated that [defendant] was found to be in possession of 241 grams of marijuana and several half gallon bottles of liquor." Officer Settle recommended that defendant's probation be revoked. Defendant did not testify or present evidence at the hearing.

At the conclusion of the hearing, the trial court found that defendant willfully and intentionally had violated the conditions of her probation as alleged in the probation violation reports. The trial court revoked defendant's probation and activated her suspended sentences to be served consecutively. Defendant appeals.

Defendant's second contention, which we address first, is that the trial court abused its discretion by finding that defendant's possession of a taser, or stun gun, violated a condition of her probation prohibiting her from possessing a deadly weapon. We disagree.

This Court reviews the holdings of the trial court in a probation revocation hearing for abuse of discretion:

> Any violation of a valid condition of probation is sufficient to revoke 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 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) (internal citations omitted).

It is well-settled that the violation of any single valid condition of probation is sufficient to support the activation of a suspended sentence. *State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973) (citing *State v. Seagraves*, 266 N.C. 112, 113, 145 S.E.2d 327, 329 (1965)). *See also State v. Belcher*, 173 N.C. App. 620, 625, 619 S.E.2d 567, 570 (2005) ("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) ("It is sufficient grounds to revoke the probation if only one condition is broken."), *disc. rev. denied*, 307 N.C. 701, 301 S.E.2d 394 (1983).

A person on probation "is said to 'carr[y] the keys to his freedom in his willingness to comply with the court's sentence.'" *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808

(2000) (quoting *State v. Robinson*, 248 N.C. 282, 285, 103 S.E.2d 376, 379 (1958)) (alteration in original). If a probationer violates any condition of probation, the court is authorized to "reduce[], terminate[], continue[], extend[], modif[y], or revoke[]" that probation. N.C. Gen. Stat. § 15A-1344(a) (2007).

Here, as a regular condition of defendant's probation, she was ordered to "[p]ossess no firearm, explosive device or other deadly weapon listed in G.S. 14-269 without the written permission of the court." N.C. Gen. Stat. § 15A-1343(b)(5) (2007). The weapons listed in North Carolina General Statutes, section 14-269 include "any bowie knife, dirk, dagger, slung shot, loaded cane, metallic knuckles, razor, shurikin, *stun gun*, or other deadly weapon of like kind[.]" N.C. Gen. Stat. § 14-269(a) (2007) (emphasis added).

Nonetheless, defendant argues that a stun gun is not a deadly weapon and that "the dangerousness of the weapon can only be determined by the context in which it is used." Defendant contends that, because she was not holding or using the stun gun in a threatening manner, she was not in violation of this regular condition of her probation. However, a stun gun is contained in the list of weapons enumerated in North Carolina General Statutes, section 14-269(a), all of which were forbidden to defendant absent prior written permission by the court.

The State presented testimony by Officer Settle that a stun gun, called a "taser" by the officer, was located in defendant's home on 11 February 2009; that there was no identifying information in the purse in which the taser was discovered; that there were no

other persons living with defendant; that defendant consented to the destruction of the weapon in exchange for not initiating a formal probation violation hearing; and that probation modification orders reserving "the right to include the finding of this deadly weapon in any probation violation proceeding which may become necessary in the future" were completed for the incident. Defendant signed these probation modification orders. The evidence presented by the State was sufficient for the trial court to determine "in the exercise of [its] sound discretion that the defendant ha[d] violated a valid condition on which the sentence was suspended." *State v. Freeman*, 47 N.C. App. 171, 175, 266 S.E.2d 723, 725, *disc. rev. denied*, 301 N.C. 99, 273 S.E.2d 304 (1980). Accordingly, the trial court did not abuse its discretion in concluding that defendant's possession of the stun gun was in violation of the regular condition of her probation that she "[p]ossess no . . . deadly weapon listed in G.S. 14-269."

Defendant also argues that the trial court erred in revoking her probation based upon the pending criminal charges against her, because, absent those charges, the curfew violations and possession of a taser issue would not have been brought for a hearing. We disagree.

As discussed *supra*, this Court reviews the holdings of the trial court in a probation revocation hearing for abuse of discretion. *See Tozzi*, 84 N.C. App. at 521, 353 S.E.2d at 253. Further, this Court has held that "[i]n a probation revocation hearing[,] the court is not bound by strict rules of evidence."

State v. Coleman, 64 N.C. App. 384, 384, 307 S.E.2d 207, 207 (1983) (citations omitted).

Our Supreme Court has held that "when a criminal charge is pending in a court of competent jurisdiction, which charge is the *sole* basis for activating a previously suspended sentence, such sentence should not be activated unless there is a conviction on the pending charge or there is a plea of guilty entered thereto." *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960) (emphasis added). Similarly, "a revocation of suspension cannot be bottomed solely upon a pending criminal charge; a conviction or a plea of guilty is required." *State v. Causby*, 269 N.C. 747, 749, 153 S.E.2d 467, 469 (1967) (citations omitted).

In *Causby*, a probationer had been found in possession of alcohol and charged with a criminal offense based upon that incident. *Id.* at 748-49, 153 S.E.2d at 468. After he was acquitted of the criminal charges based upon the same evidence, the probationer challenged the decision to activate his suspended sentence. *Id.* Our Supreme Court upheld the activation of the probationer's suspended sentence, because "the judge did not activate defendant's suspended sentence because he had been charged with violating the prohibition law but because he had breached the condition that he not have any alcoholic beverages on his premises during the period of suspension." *Id.* at 749, 153 S.E.2d at 469 (emphasis removed). The *Causby* Court concluded that "[t]he judge was not precluded from revoking the suspension because he acted on the same evidence upon which defendant had been acquitted of the

criminal charges involved" and that no inconsistency existed between those decisions because "[d]efendant could well be guilty of violating the terms of his suspended sentence — as the judge found — and not guilty of violating any criminal law[.]" *Id.* It is clear, therefore, that pending criminal charges based upon certain evidence do not prohibit a judge's conclusion that the same evidence is sufficient to determine that a probationer has violated a condition of her probation.

However, other decisions by this Court appear to conclude that a judge may make independent findings that a probationer committed a criminal offense, thereby also violating a condition of her probation that she commit no crime, notwithstanding the probationer's being found not guilty in a criminal trial. *See, e.g.*, *State v. Monroe*, 83 N.C. App. 143, 145, 349 S.E.2d 315, 317 (1986) ("[Whether the defendant had been charged with the criminal offense] is irrelevant in the case *sub judice* where the judge upon revoking defendant's probation made independent findings of his own as to the commission of these crimes."), *State v. Debnam*, 23 N.C. App. 478, 481, 209 S.E.2d 409, 411 (1974) ("It may not be desirable for a judge to activate a suspended sentence upon conduct where a jury has found the defendant not guilty of a charge arising out of that conduct, but it appears to be within the power of the judge to do so."). Nonetheless, this distinction — whether the facts underlying the pending criminal charge must violate a separate condition of probation, *see Causby*, *supra*, and *State v. Coffey*, 255 N.C. 293, 301, 121 S.E.2d 736, 742 (1961); or whether a judge can

find facts and conclude that those facts constitute a crime, thereby violating the condition that a probationer commit no criminal offense, *see Monroe*, *supra*, and *Debnam*, *supra* — does not affect the outcome of the instant case.

Here, the conditions of defendant's probation were modified following three curfew violations and the probation officer's discovery of a taser in defendant's home. The modification provided that, "[i]n exchange for not being returned to court for a formal probation violation hearing, the offender consents to allow the taser to be destroyed. Further, probation reserves the right to include the finding of this deadly weapon in any probation violation proceeding which may become necessary in the future." Defendant then was charged with several drug-related criminal offenses. Regardless of whether Officer Settle's testimony, in addition to the pending criminal charges, allowed the trial court to conclude that defendant had violated the condition of her probation that she commit no crime, the pending charges permitted the State to initiate a probation violation hearing. In light of the fact that they were based upon conduct that would have violated another condition of defendant's probation,[1] these criminal charges were sufficient to require a probation violation hearing. At that point, evidence of defendant's three curfew violations and the violation based upon the discovery of a taser were available to the

[1] One condition of defendant's probation was that she "[n]ot use, possess or control any illegal drug or controlled substance[.]" However, the State did not allege a violation of that condition in its probation violation reports.

State when it presented its case, and as discussed *supra*, the revocation of defendant's probation based upon her possession of a taser was proper. Accordingly, the trial court did not abuse its discretion in concluding that defendant had violated at least one condition of her probation.

For the foregoing reasons, we affirm the judgment and commitment of the trial court revoking defendant's probation and activating her suspended sentence.

Affirmed.

Judges GEER and BEASLEY concur.

Report per Rule 30(e).