

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-266

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

STATE OF NORTH CAROLINA

v.

Alleghany County
Nos. 07 CRS 50123-24

MARK ROBERT RICHARDSON

Appeal by defendant from judgments entered 17 November 2008 by Judge W. Erwin Spainhour in Alleghany County Superior Court. Heard in the Court of Appeals 15 June 2009.

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

William D. Auman, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Mark Robert Richardson appeals from judgments revoking his probation. After careful review, we affirm.

On 17 April 2007, defendant pled guilty pursuant to a plea agreement to two counts of assault by strangulation. Defendant's sentences were suspended and he was placed on probation.

On 19 May 2008, probation violation reports were filed alleging that defendant had failed to comply with the terms of his probation in that he: (1) had failed to report to his probation officer; (2) was in arrears on his monetary obligations; (3) did not obtain court-ordered counseling; and (4) had been convicted of

driving while intoxicated on 8 April 2008. At his 17 November 2008 probation violation hearing, defendant admitted to pleading guilty to driving while intoxicated, but did not admit or deny as to the remaining allegations. The trial court found that defendant willfully violated the terms of his probation. Accordingly, the trial court revoked defendant's probation and activated his suspended sentences.

Defendant argues that there was insufficient evidence for the trial court to determine that his probation violations were willful. We are not persuaded.

This Court has stated that:

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) (citations omitted).

In the case *sub judice*, the State presented evidence that defendant violated his probation by being convicted of driving while intoxicated on 8 April 2008. Once the State presented evidence that defendant had violated his probation, the burden shifted to defendant to show a lawful excuse for his failure to

comply, or a lack of willfulness. If the defendant fails to carry this burden, evidence of failure to comply may justify a finding that the violation was willful or without lawful excuse. *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, 320-21, 204 S.E.2d 185, 187 (1974)). It is doubtful that a defendant can offer any evidence sufficient to carry this burden where the violation is a criminal conviction. Nevertheless, here, defendant testified that "[w]ith the DUI, that was a case of the wrong place at the wrong time, so to speak." Defendant explained that "[a] friend of mine had an altercation with his girlfriend, and I was trying to get him out of there. I got into the vehicle." Defendant explained that he then failed an Intoxilyzer test. The court apparently concluded that defendant's testimony did not satisfy his burden of showing lawful excuse or lack of willfulness. See *State v. Williamson*, 61 N.C. App. 531, 535, 301 S.E.2d 423, 426 (1983) ("The trial judge, as the finder of the facts, is not required to accept defendant's evidence as true.") (citation omitted). Thus, we conclude that the trial court did not abuse its discretion in revoking defendant's probation.

Affirmed.

Judges BRYANT AND ELMORE concur.

Report per Rule 30(e).