

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-206

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

STATE OF NORTH CAROLINA

v.

Moore County
Nos. 07 CRS 53797, 53817,
53819, 53822, 53897

TERRY MUNCHER HOBGOOD,
Defendant.

Appeal by defendant from judgments entered 6 August 2009 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 13 September 2010.

Roy Cooper, Attorney General, by Gaines M. Weaver, Assistant Attorney General, for the State.

Hartsell & Williams, PA, by Christy E. Wilhelm, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from judgments entered revoking his probation. After careful consideration, we affirm.

On 16 October 2007, defendant pleaded guilty to two counts of felonious breaking and entering, four counts of larceny, and three counts of breaking and entering a motor vehicle. The trial court consolidated the charges into six separate judgments, each carrying a sentence of ten to twelve months imprisonment, to run consecutively. The court imposed a split sentence; defendant was ordered to serve one active term of ten to twelve months, and the

remaining five sentences were suspended in favor of a period of thirty-six months supervised probation.

On 26 February 2009, defendant's probation officer filed probation violation reports for each case, alleging (1) defendant had failed to pay \$178.00 in the required court costs and fees; and (2) defendant failed to report to the probation officer in a "reasonable manner" when he reported under the influence of alcohol on 26 February 2009.

On 17 March 2009, a probation violation hearing was held in Moore County Superior Court. Although defendant did not present evidence, his counsel argued that he had problems which hindered his ability to travel to work. He also asserted that defendant had stopped drinking. He then asked that defendant be continued on probation. The trial court found that defendant willfully violated the terms of his probation, but continued the disposition until 30 June 2009. The trial court also stated that "[b]etween this date, March the 17th, 2009, and June the 30th, 2009, if the probation officer has credible evidence of any violation of any condition of probation, the respondent is to be immediately calendared for disposition."

Defendant failed to appear for court on 30 June 2009 and was subsequently arrested. A disposition hearing was held on 3 August 2009, at which time information was provided to the trial court by defendant's probation officer and the prosecutor that since the 17 March 2009 hearing, defendant had been charged with driving while license revoked, driving while impaired, and misdemeanor larceny.

Further information was provided by the probation officer that defendant was in arrears \$4,816.00 in one case and \$238.00 in another case, although he had made one payment of \$150.00. "[H]aving previously found the respondent in willful violation of his probation," the trial court revoked defendant's probation and activated his five suspended sentences, directing three of them to run consecutively with the remaining two sentences to run concurrent to the first three. Defendant appeals.

Defendant first argues that the trial court erred in determining that defendant willfully and without lawful excuse violated the conditions of his probation by failing to pay court costs and fines. We disagree.

It is well established that,

All that is required . . . is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended.

State v. Simpson, 25 N.C. App. 176, 178, 212 S.E.2d 566, 568-69, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975) (citing *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967)). Further, a "sworn probation violation report constitute[s] competent evidence sufficient to support the order revoking [a defendant's] probation." *State v. Gamble*, 50 N.C. App. 658, 661, 274 S.E.2d 874, 876 (1981). A single willful violation is sufficient to

support revocation of probation. *State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973).

Once the State presents evidence that defendant has violated his probation, the burden shifts to defendant to show a lawful excuse for his failure to comply, or a lack of willfulness. *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985). With regard to a violation for failure to pay fines or restitution, the burden is on the defendant to show his inability to pay according to his probation terms. *State v. Jones*, 78 N.C. App. 507, 509, 337 S.E.2d 195, 197 (1985). A court should not revoke probation because of circumstances beyond the defendant's control. *State v. Hill*, 132 N.C. App. 209, 212, 510 S.E.2d 413, 415 (1999). However, if the defendant fails to carry his burden, evidence of failure to comply may justify a finding that the violation was willful or without lawful excuse. *Crouch*, 74 N.C. App. at 567, 328 S.E.2d at 835 (citing *State v. Young*, 21 N.C. App. 316, 320-21, 204 S.E.2d 185, 187 (1974)). Upon finding a defendant to be in willful violation of the conditions of probation, a judge has the authority to terminate, modify, extend, or revoke that probation. N.C. Gen. Stat. §15A-1344(a) (2009).

In the present case, defendant was ordered to pay court costs and fines as part of his probation. One of the violations alleged in the probation violation reports for cases 07 CRS 53797 and 07 CRS 53817 was that defendant violated his payment schedule and was in arrears by a total amount of \$178.00. Although the violation reports are themselves competent evidence of a probation violation,

see *Gamble*, 50 N.C. App. at 661, 274 S.E.2d at 876, defendant also admitted that he willfully violated probation by falling behind in his payments. Defendant offered no formal evidence at the hearing, although his counsel provided some explanation by referring to defendant's general transportation problems in getting to work. The trial court was not required to accept defense counsel's statements as true in determining whether the violation was willful. See *Young*, 21 N.C. App. at 321, 204 S.E.2d at 188. Thus, the evidence was sufficient to support the trial court's determination in its discretion that defendant "has unlawfully, willfully, without legal justification violated the terms and conditions of his probation as alleged in the violation reports dated February the 26th, 2009."

Defendant suggests, however, that the trial court erred in determining he was in willful violation on the basis of the monetary violations where he was in "substantial compliance" by the 3 August 2009 hearing, having then paid \$150.00 of the \$178.00 arrearage, because he expressed a willingness to pay the remainder, and because the trial court impermissibly considered payments due that were not listed in the probation violation reports. Defendant ignores the fact that his monetary violations had already occurred by the 17 March 2009 hearing, when the trial court made its determination that defendant violated probation by failing to make sufficient payments. At the March hearing, the trial court only considered his failure to pay \$178. There was also no evidence at that point that defendant was willing to pay this amount or that he

was in "substantial compliance." Moreover, as previously stated, defendant admitted that his violation was willful. Once the trial court has found at least one willful violation of probation, it has the authority to terminate probation. See N.C. Gen Stat. §15A-1344(a); *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987) ("Any violation of a valid condition of probation is sufficient to revoke defendant's probation.") (citations omitted). Therefore, the trial court did not err by concluding defendant willfully violated his probation.

Defendant next contends the trial court improperly considered defendant's pending criminal charges and his failure to pay restitution at the 3 August 2009 hearing before revoking his probation. We disagree.

As discussed above, at the 17 March 2009 hearing, the trial court heard evidence to support the allegations from the probation violation reports and defendant admitted to violating the conditions as alleged. Based on the evidence and on defendant's admissions, at the conclusion of the March 2009 hearing, the court found as fact that defendant had willfully violated the conditions of his probation. Thus, the purpose of the second hearing on 3 August 2009 was only to determine the consequences of the probation violations that had already been found in March 2009.

The record shows that the trial court chose to delay disposition in March to see if defendant could "stay out of trouble for three months" before determining whether probation should be revoked. As such, at the close of the March hearing, the trial

court continued the disposition to 30 June 2009. When defendant failed to attend the 30 June 2009 hearing, a warrant was issued for his arrest.

While the record reflects that the trial court learned of new violations during the 3 August 2009 hearing, there is no indication that the trial court based its revocation of defendant's probation on these new violations. Rather, the trial court specifically determined that revocation of defendant's probation was appropriate based on the violations it already found at the 17 March 2009 hearing. Although defendant's conduct from 17 March 2009 to 3 August 2009 undoubtably played a role in the court's decision to revoke his probation rather than to enter a different disposition, the record indicates the trial court did not improperly consider this evidence, as defendant suggests, for the purpose of determining that defendant was in violation of the terms of his probation. Accordingly, we overrule this assignment of error.

Finally, defendant contends the trial court abused its discretion in revoking probation where defendant was in substantial compliance with the conditions of his probation and extenuating circumstances existed. Specifically, defendant asserts that the trial court failed to consider numerous factors in support of a disposition other than revocation, including his gainful employment, his role in supporting his two children, and his willingness to undergo further treatment for alcohol abuse. It is well established, however, that upon a finding of at least one probation violation, the trial court has the authority to revoke

probation. N.C. Gen. Stat. § 15A-1344(a); see *State v. Braswell*, 283 N.C. at 337, 196 S.E.2d at 188. Having already correctly found that defendant was in willful violation of the terms of his probation, the trial court's decision to revoke probation was well within its discretion. This argument is overruled.

Affirmed.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).