

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-528
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Moore County
No. 09 CRS 52522

PATRICIA ANN BROWN

Appeal by defendant from judgment entered 13 October 2010
by Judge James M. Webb in Moore County Superior Court. Heard in
the Court of Appeals 23 January 2012.

*Attorney General Roy Cooper, by Assistant Attorney General
Donna D. Smith, for the State.*

Paul Y.K. Castle for defendant-appellant.

ERVIN, Judge.

Defendant Patricia Ann Brown appeals from a judgment
revoking her probation, modifying the sentence that was
originally imposed upon her based upon her conviction for
obtaining property by false pretense, and activating her
suspended sentence as modified. On appeal, Defendant contends
that the trial court erred by failing to properly consider the
explanation that she offered for her violations of the terms and
conditions of her probation and by improperly considering facts

other than the violations that she was alleged to have committed in revoking her probation and activating her modified suspended sentence. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should be affirmed.

I. Factual Background

On 11 January 2010, Defendant entered a plea of guilty to obtaining property by false pretenses. Based upon Defendant's plea, the court sentenced Defendant to a term of ten to twelve months, suspended Defendant's sentence for a period of twenty-four months, and placed Defendant on probation. Among other things, Defendant was required to pay total fees and costs of \$4,070.93, including \$350.93 in restitution to the victim, and to serve an active term of seventy-five days as a term and condition of probation.

On 14 June 2010, Defendant's probation officer filed a violation report alleging that Defendant (1) had failed to make any payment towards her \$350.93 restitution obligation; (2) had failed to make any payment toward her \$3,720.00 court cost obligation; (3) was \$150.00 in arrears on her obligation to pay monthly probation supervision fees; and (4) had failed to serve any part of her seventy-five day active term of imprisonment.

The allegations set out in the violation notice came on for hearing before the trial court on 13 October 2010. After hearing evidence from Defendant's probation officer, Defendant, and two other witnesses, the trial court determined that Defendant had willfully violated the terms and conditions of her probation as alleged in the violation report and that Defendant's probation should be revoked. As a result, the trial court entered a judgment that reduced Defendant's active sentence to ten months imprisonment and activated Defendant's modified suspended sentence. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Lawful Excuse

In her first challenge to the trial court's judgment, Defendant contends that the trial court erred by failing to properly consider evidence tending to show that she had a lawful excuse for her failure to comply with her probation-related monetary obligations. More particularly, Defendant argues that the trial court failed to consider her child care obligations, her inability to find employment, and the fact that money had been stolen from her by members of her family, all of which constituted circumstances that were allegedly "beyond her

ability and control," in deciding that her probation should be revoked. We do not find this argument persuasive.

In seeking to have a convicted criminal defendant's probation revoked, "the State must show that the defendant, without lawful excuse, willfully violated a condition of probation." *State v. Alston*, 139 N.C. App. 787, 789-90, 534 S.E.2d 666, 668 (2000). Any violation of a term or condition of probation is sufficient to support a revocation decision. *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987). In the event that the State shows that the defendant violated one or more terms or conditions of probation, the defendant must then establish that he or she had a lawful excuse for his or her non-compliance. *Alston*, 139 N.C. App. at 790, 534 S.E.2d at 668. The trial court's findings of fact and judgment revoking a defendant's probation will not be overturned absent an abuse of discretion. *Id.*

At the revocation hearing, Defendant's probation officer testified that he had arranged for Defendant to serve part of her seventy-five day active sentence on five separate occasions. On each such occasion, Defendant failed to report or give advance notice that she would not be able to do so. In addition, Defendant's probation officer stated that Defendant had paid "zero" on her financial obligations and, despite

claiming to have employment taking care of a disabled youth, Defendant had never provided any verification that she was actually employed in that fashion. Later, Defendant worked for a month or two at a chicken plant; however, this job ended when Defendant got into a fight with her sister at the plant. Even though Defendant claimed to have sent her sister to the courthouse with \$2,000.00 to be utilized for the purpose of reducing the amount of her court-ordered payment obligation, the money was never received. Although Defendant attended and completed a culinary course at a local college in 2010, her probation officer had never received verification that Defendant had graduated from this program. As a result, the record contained ample evidence tending to show that Defendant violated the terms and conditions of her probation.

As an initial matter, we note that Defendant has not argued that she had a lawful excuse for failing to serve any of her seventy-five days of active confinement. Although Defendant testified that she had to care for her nephew's children and that this fact prevented her from serving her active time, Defendant does not contend that the trial court erred by determining that her failure to serve the active sentence set out in the probationary judgment was willful. As a result, we could properly uphold the trial court's judgment on the basis of

this violation alone. Even so, we will address Defendant's challenge to the trial court's conclusion that her probation was subject to revocation based upon her failure to make required monetary payments as well.

At the revocation hearing, Defendant testified that she was unable to comply with the monetary conditions of her probation because her sisters stole more than \$7,000.00 from her, with this amount consisting of child support payments made by her ex-husband and money that Defendant had received in settlement of an accident-related claim. As we understand Defendant's testimony, one of her sisters began collecting child support after Defendant had been sentenced to prison and after Defendant's children had been left in the sister's care. The child support payments continued to go to Defendant's sister after Defendant had been released from prison and resumed caring for her children. Upon learning that her sister was still receiving child support payments, Defendant contacted the child support enforcement agency in order to begin receiving the support payments herself. However, as of the date of the revocation hearing, Defendant had not completed the process of having the support payments sent to the proper recipient. In addition, Defendant claimed that she had received a settlement check stemming from an accident in which she had been involved,

but that one of her sisters had cashed the check and taken the money herself. Finally, Defendant asserted that, although she had sent her sister to the courthouse with \$2,000.00 for use in reducing her probation-related indebtedness, the payment in question was never received.

After carefully reviewing the evidentiary record, we conclude that the trial court did not err by failing to conclude that Defendant had a lawful excuse for her failure to comply with the monetary terms set out in her probationary judgment. Defendant acknowledged that she had not reported any of the stolen money to the police and did not claim to have made any attempt to recoup the stolen money from her sisters. Furthermore, Defendant made the decision to trust her sister with the \$2,000.00 instead of making the contemplated payment herself. Defendant failed to adequately explain her efforts to seek and maintain employment. For example, Defendant lost a job because she fought with her sister at her work place. Although Defendant claimed that she had to care for both her own children and those of her nephew, Defendant made the decision to assume these additional child care responsibilities instead of complying with her probation-related obligations. Finally, Defendant's child care responsibilities did not appear to have prevented Defendant from obtaining employment or obtaining her

culinary degree. All of these factors tend to show that Defendant did not, in fact, have a lawful excuse for her failure to make required probation-related payments. As a result, we conclude that the trial court did not err by failing to find that Defendant had a lawful excuse for non-compliance with the monetary terms set out in her probationary judgment.

B. Consideration of Impermissible Evidence

Secondly, Defendant contends that the trial court erred by basing its decision to revoke her probation and activate her modified suspended sentence on the fact that she had committed the offense on which the original probationary judgment had been predicated within one month after being released from prison following service of a sentence imposed in connection with an earlier conviction. According to Defendant, she was not given proper notice that this fact would be used against her at the probation revocation hearing as required by N.C. Gen. Stat. § 15A-1345(e). We do not agree.

After receiving the evidence offered on behalf of the State and Defendant at the revocation hearing, the trial court determined that Defendant had willfully violated the terms and conditions of her probation. Having made that determination, the trial court asked when Defendant had been released from incarceration and was informed that Defendant had been freed on

5 May 2009. At that point, the trial court ordered that Defendant's sentence be reduced to eight to ten months' imprisonment and activated. When Defendant objected to being returned to prison, the trial judge stated, "Well, as you know, I have modified the judgment of Judge Wilkins and reduced it a little bit. The records reflect that you were released from prison May the 5th, 2009. You committed this offense on May the 29th, 2009."

The first problem with Defendant's argument is that N.C. Gen. Stat. § 15A-1345(e) has no relevance to the present issue. The fact that Defendant's crime was committed a few weeks after her release from prison after serving a sentence imposed as the result of the commission of an earlier offense was not alleged by the State or used by the trial court as a basis for determining that Defendant violated the terms and conditions of her probation. Secondly, the trial court has the authority pursuant to N.C. Gen. Stat. § 15A-1344(d) to extend a defendant's probation, to impose special probation, or to revoke a defendant's probation and activate the defendant's suspended sentence based upon a determination that the defendant has violated a term or condition of his or her probation. After properly finding that Defendant had violated the terms and conditions of her probation, the trial court exercised its

discretionary authority to activate Defendant's sentence. The trial court appears to have considered the short time between Defendant's release from her prior incarceration and the commission of the offense for which she was presently being sentenced in deciding to modify Defendant's sentence in a manner that benefitted Defendant. As a result, we are unable to conclude that the trial court committed an error of law based upon its reference to the length of time between Defendant's release from prison and the commission of the offense which eventually led to the entry of the trial court's judgment.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgment revoking Defendant's probation, modifying the judgment originally entered in this case, and activating Defendant's modified suspended sentence have merit. As a result, the trial court's judgment should be, and hereby is, affirmed.

AFFIRMED.

Judges ROBERT C. HUNTER and STEPHENS concur.

Report per Rule 30(e).