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NO. COA06-352

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v.

Harnett County
No. 05 CRS 51455

TERRY ANTWAIN DOUGLAS

Appeal by defendant from judgments entered 7 November 2005 by Judge Franklin F. Lanier in Harnett County Superior Court. Heard in the Court of Appeals 11 December 2006.

Attorney General Roy Cooper, by Assistant Attorney General Scott T. Stroud, for the State.

William B. Gibson, for defendant-appellant.

LEVINSON, Judge.

Terry Antwain Douglas (defendant) pled guilty on 28 April 2005 to two counts of discharging a firearm into occupied property. The court imposed consecutive terms of imprisonment of a minimum of 23 months and a maximum of 37 months. The court suspended the sentences and placed defendant on supervised probation for thirty months, including intensive probation for six months.

On 21 October 2005 a violation report was filed alleging defendant violated "special condition of probation 'not to be away from the defendant's place of residence between the hours of 6 pm and 6 am' in that defendant was not at his place of residence on

10/21/05 at 6:10 p.m. Defendant was at his cousin's house next door. He had been instructed on Wednesday 10/19/05 during his weekly office contact to remain at his home during curfew hours and not at his cousin's or grandmother's house. Defendant had a strong odor of alcohol on his person and was dressed in 'gang clothing.'"

Intensive Probation Officer Kathi D. Winslow testified at the revocation hearing that she had been supervising defendant since 28 April 2005. Defendant was placed on intensive probation and was assigned a curfew of 6:00 p.m. to 6:00 a.m. during which he was to be in his house. She advised defendant during his regular office visit on 19 October 2005 that he was to be at his residence, not at his cousin's or grandmother's, and that he would be arrested the next time he was not home. At 6:10 p.m. on 21 October 2005 she went to defendant's residence and found him standing at Lamont Moore's residence. She subsequently arrested defendant that night for violating curfew. She noted the strong odor of alcohol on defendant's person when she handcuffed him. She also observed that defendant was dressed in gang attire, all in the color of red, including a red hat, red bandana, red headband in his pocket, red shirt, red striped pants, and red shoes. Defendant also had tattoos associated with a gang. Defendant was with Lamont Moore, a certified member of a gang, that evening. The judgments entered by the court on 28 April 2005 prohibited defendant from wearing any gang paraphernalia or associating with any gang members.

Defendant testified that he was walking back to his house from his grandmother's house, where he had helped her with her

television and where Lamont Moore also resided, when Ms. Winslow arrived.

The court found that defendant committed the violations alleged in the violation report. It revoked probation and activated the sentences.

Defendant first contends the court erred in revoking probation because "curfew" was not listed as a condition of probation in the judgment suspending sentence. We initially note that defendant did not raise this issue in the trial court. Consequently, he did not preserve the issue for our consideration on appeal. *State v. Cooper*, 304 N.C. 180, 183, 282 S.E.2d 436, 439 (1981); *State v. Tozzi*, 84 N.C. App. 517, 520, 353 S.E.2d 250, 252 (1987).

Even if defendant had properly preserved the issue, he cannot prevail. Defendant correctly notes that the express term "curfew" is not used in the judgments establishing the terms and conditions of probation. However, we also note that the judgments list as a special condition of probation that defendant "Comply with the Special Conditions of Probation - Intermediate Punishments - Contempt which are set forth on AOC-CR-603, Page Two." As a special condition of probation listed on page two of that form, the court assigned defendant to the Intensive Supervision Program and required him to submit to supervision by officers assigned to the Intensive Probation Program and to "comply with the rules adopted by that program." By its statutory definition, intensive supervision "requires . . . a specific period each day during which the offender must be at his or her residence" N.C. Gen.

Stat. § 15A-1340.11(5) (2005). Thus, although the term "curfew" is not expressly used, the judgments do contain compliance with a curfew as a special condition of probation. Ms. Dawson testified that a curfew was in fact established for defendant. This assignment of error is overruled.

Defendant next contends that the court erred by overruling his objection to hearsay testimony of the probation officer that defendant was wearing gang attire, and by implication, was a gang member. "Our appellate courts have consistently held that proceedings to revoke probation are informal in nature such that the trial court is not bound by the strict rules of evidence." *State v. Terry*, 149 N.C. App. 434, 437, 562 S.E.2d 537, 540 (2002). "Because formal rules of evidence do not apply at a probation revocation hearing, a probation officer's written report of a probation violation is admissible in evidence." *State v. White*, 129 N.C. App. 52, 58, 496 S.E.2d 842, 846 (1998), *affirmed in part and discretionary review improvidently allowed in part*, 350 N.C. 302, 512 S.E.2d 424 (1999). The court therefore properly admitted Ms. Winslow's testimony that defendant was wearing gang attire at the time of his arrest. This assignment of error is overruled.

Defendant's next contention is that the evidence is insufficient to show defendant violated any of the terms and conditions of his probation as alleged in the violation report. "[A]ll that is required to revoke a suspension of a sentence in a criminal case, and to put the sentence into effect is that the evidence shall satisfy the judge in the exercise of his sound

discretion that the defendant has violated, without lawful excuse, a valid condition upon which the sentence was suspended and that the judge's findings of fact in the exercise of his sound discretion are to that effect." *State v. Robinson*, 248 N.C. 282, 287, 103 S.E.2d 376, 380 (1958). "The breach of any single valid condition upon which the sentence was suspended will support an order activating the sentence." *State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973).

One of the conditions of probation, as noted above, was that defendant comply with curfew. Defendant acknowledged that he was not in his residence when the probation officer arrived after 6:00 p.m. on the date in question. That violation alone supports the revocation of probation and activation of the sentences.

The judgments are therefore affirmed.

Affirmed.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).