

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-517

NORTH CAROLINA COURT OF APPEALS

Filed: 22 December 2009

STATE OF NORTH CAROLINA

v.

Madison County
Nos. 04CRS2440-41

DARRELL WINFRED ROBERTS,
Defendant.

Appeal by defendant from judgments entered on or about 10 November 2008 by Judge William Z. Wood, Jr. in Superior Court, Madison County. Heard in the Court of Appeals 14 December 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Shawn C. Troxler, for the State.

Christy E. Wilhelm, for defendant-appellant.

STROUD, Judge.

Darrell Winfred Roberts ("defendant") appeals from judgments entered revoking his probation and activating his suspended sentences for assault inflicting serious bodily injury and common law robbery. We affirm.

On 14 March 2005, defendant pled guilty to assault inflicting serious bodily injury and common law robbery. Pursuant to the plea agreement, the State dismissed another charge of assault with a deadly weapon inflicting serious injury. The agreement established the amount of restitution at \$31,100.00, stated that defendant is a prior record level III based on seven points and that he agreed

to probationary sentence, and left sentencing in the discretion of the trial court. The trial court sentenced defendant to two consecutive sentences: 21 to 26 months for the assault and 16 to 20 months for the common law robbery. The trial court suspended the sentences, imposed supervised probation for sixty months, and ordered defendant to pay restitution and court costs. The special conditions of defendant's probation required him to: (1) submit to drug tests; (2) submit to warrantless searches for stolen goods or controlled substances; (3) refrain from using, possessing, or controlling a controlled substance; and (4) complete a ninety-day Dart Cherry program.

On 21 August 2008, defendant's probation officer filed two probation violation reports, one in each of defendant's cases. Both reports recite the following violations: (1) positive test for marijuana on 28 July 2008; (2) failure to report on 25 July 2008 as directed by the probation officer; and (3) on 2 June 2008, defendant was charged in Buncombe County with four misdemeanors. The probation violation report in case 04 CRS 2441 listed an additional violation, that defendant was \$5,282.00 in arrears on his restitution payments.

The matter came on for hearing on 10 November 2008. Defense counsel moved to continue the matter to 17 November 2008 to allow him time to confer with defendant. The trial court denied the motion. Except for the pending criminal charges, defendant admitted to the violations. He waived the need to have the probation officer's testimony sworn. Probation officer Timothy

Cantrell related that defendant tested positive for marijuana on 28 July 2008, he failed to report on 25 July 2008, and he was in arrears in the amount of \$5,282.00. Defendant had only paid \$135.00 since 22 August 2007. The trial court found that defendant wilfully violated the terms of his probation based on the violations listed in each report, and activated his sentences. The trial court determined that the sentences are to run consecutively. From the judgments entered, defendant appeals.

Defendant argues the trial court: (1) erred in relying on unsworn testimony to make its probation violation findings; (2) abused its discretion in denying defendant's motion to continue; and (3) erred by sentencing defendant to consecutive terms of imprisonment.

Defendant first argues the trial court erred in basing its judgment upon unsworn testimony, thereby violating his right to procedural and substantive fairness as guaranteed by federal constitutional due process rights. We do not agree.

A trial court has the discretion to revoke probation upon evidence which is sufficient to satisfy the court that a defendant has violated a condition of his probation. *State v. Darrow*, 83 N.C. App. 647, 648-49, 351 S.E.2d 138, 139 (1986). It is well established that a single wilful violation is sufficient to support revocation of probation. *State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973). It is defendant's burden to present sufficient competent evidence that he was unable to comply with the conditions of his probation. *State v. Tozzi*, 84 N.C. App. 517,

521, 353 S.E.2d 250, 253 (1987). Absent such evidence, failure to comply "may justify a finding that defendant's failure to comply was wilful or without lawful excuse." *Id.* (citation omitted). Trial courts are not bound by strict rules of evidence in probation hearings, and the alleged probation violation need not be proved beyond a reasonable doubt. *Id.*

In the instant case, defendant admitted three of the four violations. He presented no evidence to show that he was unable to comply with the conditions of his probation. Therefore, the trial court did not err in considering the unsworn testimony of the probation officer, or in finding that defendant wilfully violated at least one condition of his probation. This assignment of error is overruled.

Next, defendant contends the trial court erred by denying his motion to continue, and that such denial deprived him of the effective assistance of his counsel. We are not persuaded by defendant's arguments.

A trial court may allow or deny a motion to continue in its sound discretion, and its decision will not be overturned absent a gross abuse of discretion. *State v. Jones*, 172 N.C. App. 308, 311-12, 616 S.E.2d 15, 18 (2005). To establish a constitutional violation, a defendant must show "'both that the denial was erroneous and that he suffered prejudice as a result of the error.'" *Id.* at 312, 616 S.E.2d at 18 (quoting *State v. Taylor*, 354 N.C. 28, 33-34, 550 S.E.2d 141, 146 (2001)). To show prejudice, a defendant must demonstrate that he did not have

adequate time to confer with his attorney and to prepare a defense, as well as show how his defense would have been better prepared if he had been granted the continuance. *Id.*

Here, defense counsel argued for a continuation by stating that the hearing was the first time he had been to court with defendant, and defendant was facing a lot of time. However, defense counsel was appointed to the case in September 2008, over a month prior to the probation revocation hearing. Moreover, defendant admitted to the probation violations, aside from his pending criminal charges, obviating the need for any kind of defense. Defendant provides no assertion for why he did not have ample time to prepare his case, or how additional time might have allowed for better preparation. In light of these considerations, we do not find that defendant has demonstrated that his case would have been better prepared had the continuance been granted or that he was prejudiced as a result of the denial of his motion. Therefore, the trial court did not abuse its discretion in denying the motion to continue. This assignment of error is overruled.

Finally, defendant contends the trial court erred in sentencing him to consecutive terms of punishment. He contends that his sentences are not proportional to his crimes in violation of the Eighth Amendment to the United States Constitution. We do not agree.

Under the Eighth Amendment, punishment must be proportionate to the criminal offense for which a defendant has been convicted. *State v. Ysaguirre*, 309 N.C. 780, 786, 309 S.E.2d 436, 440 (1983).

"Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *Id.* at 786, 309 S.E.2d at 441. Further, if the sentences do not "exceed the limits fixed by statute, [they] cannot be considered cruel and unusual in a constitutional sense." *State v. White*, 129 N.C. App. 52, 58, 496 S.E.2d 842, 847 (1998) (citation and quotation marks omitted), *aff'd in part, review dismissed in part*, 350 N.C. 302, 512 S.E.2d 424-25 (1999).

Defendant specifically objects to the imposition of consecutive sentences. Pursuant to statutory authority, trial courts may apply consecutive sentences when multiple sentences are imposed on a defendant at the same time. N.C. Gen. Stat. § 15A-1354(a) (2007). In revocation of probation cases, section 15A-1344(d) has been interpreted to allow a trial court "to impose a consecutive sentence when a suspended sentence is activated upon revocation of a probationary judgment without regard to whether the sentence previously imposed ran concurrently or consecutively." *State v. Paige*, 90 N.C. App. 142, 143, 369 S.E.2d 606, 606 (1988).

The trial court in the instant case did not err in imposing consecutive sentences as allowed by law. We also note that the offenses are based on a violent assault on the victim in which the victim incurred medical costs of over \$30,000.00. This assignment of error is overruled.

Affirmed.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).