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State v. Tozzi

Full Name: State v. Tozzi

Citation: 353 S.E.2d 250

Docket Number: 869SC825

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353 S.E.2d 250 (1987)

STATE of North Carolina v. Russell Jerome TOZZI

No. 869SC825.

Court of Appeals of North Carolina.

March 3, 1987.

*252 Atty. Gen. Lacy H. Thornburg by Asst. Atty. Gen. David Ray Blackwell, Raleigh, for the State.

Hubbard, Galloway, and Cates by Mark Galloway, Roxboro, for defendant-appellant.

JOHNSON, Judge.

Defendant presents five Assignments of Error on the part of the trial court for revoking his probation and activating an amended fifteen year suspended sentence. We find no error in the trial court's judgment.

Defendant's first two Assignments of Error raise the issue of whether the original judgment stands fatally defective pursuant to G.S. § 15A-1301 because the caption on the original filed judgment misstated the file number in the indictment for breaking and entering, larceny,

and possession of stolen goods. The file number on the indictment in question is 83-CRS-8053. The judgment suspending sentence shows the file number of the indictment as 84-CRS-8053.

G.S. § 15A-1301, which requires, inter alia, that an order of commitment include identification of the offense, provides "a blanket authorization for the preparation of orders of commitment when there is no other specific authorization," see Official Commentary to G.S. § 15A-1301. The trial court, in its 11 July 1984 judgment, imposed a suspended sentence and probation pursuant to G.S. § 15A-1342 and § 15A-1343(b)(1). The judgment, therefore, was based on "other specific authorization," making G.S. § 15A-1301 inapplicable.

Furthermore, defendant waived this exception by failing to object to the misstatement at the revocation hearing. G.S. § 15A-1342(g) provides, inter alia, that defendant's failure to object to a condition of probation imposed pursuant to § 15A-1343(b)(1) does not constitute a waiver of the right to object at a later time to that condition. In *State v. Cooper*, 304 N.C. 180, 183, 282 S.E.2d 436, 439 (1981), the North Carolina Supreme Court held that defendants may not raise an initial objection to a condition of probation (here, that sentencing and probation were based on a defective judgment) on appeal, but must first object no later than the revocation hearing. The record on appeal in this case contains no written or oral objections by defendant raising the issue of a defect in the original judgment at the revocation hearing. Defendant waives on appeal any issues not presented at trial. *State v. Brown*, 33 N.C.App. 84, 234 S.E.2d 32 (1977). *Cooper*, supra, therefore, requires us to reject defendant's first Assignment of Error as waived.

Defendant's next Assignment of Error raises the issue of whether the evidentiary standard and the State's burden of proof in probation revocation hearings as per G.S. § 15A-1345(e) are indeterminate and therefore unconstitutional.

Defendant has waived appellate review of this issue by failing to contest the constitutionality of G.S. § 15A-1345(e) at the probation revocation hearing. See *State v. Cooper*, supra. Nevertheless, we have held that evidence at a probation revocation hearing "need be such that reasonably satisfies the trial judge in the exercise of his sound discretion that the defendant has violated a valid condition on which the *253 sentence was suspended." *State v. Freeman*, 47 N.C.App. 171, 175, 266 S.E.2d 723, 725 (1980). In *Freeman*, supra, we held further that probation matters are "not governed by the rules of a criminal trial. Consequently, a jury is not required ... nor must the proof of violation be beyond a reasonable doubt." *Id.* (citing *State v. Ducan*, 270 N.C. 241, 154 S.E.2d 53 (1967)). Because probation revocation hearings are not formal criminal proceedings requiring proof

beyond a reasonable doubt, and the evidentiary standard therein is clear, we find that the State's burden of proof during probation revocation hearings is to present evidence that reasonably satisfies the trial court in its discretion that defendant has violated a valid condition of probation. We hold that the evidentiary standard and State's burden of proof applied to probation revocation hearings pursuant to G.S. § 15A-1345(e) are not unconstitutionally indefinite.

Defendant's last two Assignments of Error raise the issue of whether the trial court erred by failing to make findings of fact concerning the defendant's necessity to leave his authorized residence in order to find work.

Any violation of a valid condition of probation is sufficient to revoke defendant's probation. *State v. Freeman*, supra, 47 N.C.App. at 176, 266 S.E.2d at 725 (citing *State v. Braswell*, 283 N.C. 332, 196 S.E.2d 185 (1973)). 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. *State v. Robinson*, 248 N.C. 282, 287, 103 S.E.2d 376, 380 (1958). 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. Crouch*, 74 N.C.App. 565, 567, 328 S.E.2d 833, 835 (1985).

Defendant does not challenge the validity of the conditions of his probation. He testified in essence that the reason he left his authorized residence in Vance County permanently without first seeking permission from his probation officer as required was because he could not find gainful employment there, but could find such employment in Wake County. He further testified that the reason he missed some of the required probation meetings was because he was job-hunting in other counties at these times.

Defendant's evidence shows that he was indeed able to appear for the required meetings as instructed, but instead chose to be elsewhere without notifying his probation officer. He failed to show why he was unable to first notify his probation officer that he wanted to move to Raleigh to find work. Defendant's choices are not lawful excuses; he could have been at the meetings as instructed, and could have requested permission to move to Raleigh, but chose to do otherwise. A person on probation "carries the keys to his freedom in his willingness to comply with the court's sentence." *State v. Robinson*, supra, 248 N.C. at 285, 103 S.E.2d at 379. Defendant has failed to meet his burden of putting on competent evidence of his inability to comply with certain conditions of probation in order to justify such noncompliance. The evidence shows he chose not to seek permission from his probation officer as required before moving permanently from his authorized residence

and chose not to appear at required probation meetings that he was otherwise able to attend. We hold that the trial court did not err by finding as fact that defendant had violated valid conditions of his probation despite defendant's proffered reasons for his non-compliance. The trial court's judgment is

Affirmed.

BECTON and PHILLIPS, JJ., concur.

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