NO. COA10-1437
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 10 CRS 24107-10

LEANNE ELIZABETH HAYES

Appeal by defendant from judgments entered 29 June 2010 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 22 August 2011.

Attorney General Roy Cooper, by Associate Attorney General Christina S. Hayes, for the State.

J. Thomas Diepenbrock, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from the trial court's judgments activating four suspended consecutive sentences upon revocation of her probation. After careful review, we affirm.

On 14 October 2008, defendant pled guilty to one count of felony larceny and eleven counts of common law forgery. The trial court sentenced defendant to four consecutive terms of eight to ten months imprisonment, suspended the sentences and

placed defendant on thirty-six months supervised probation. Defendant was present at the sentencing hearing.

On 29 January 2010, defendant's probation officer issued a violation report alleging that defendant violated conditions of her probation: (1) failing to pay monies owed; (2) being discharged unsuccessfully by Summit House Residential Program after failing to return after a home visit; and (3) failing to remain within the jurisdiction of the court unless granted written permission by failing to return on time to Summit House.

On 10 May 2010, defendant's probation officer issued a second violation report, alleging three violations of defendant's conditions of probation: (1) that, on 8 March 2010, defendant's probation officer told her not to return to Guilford County except for a scheduled appointment with her attorney or for her probation violation hearing, but, on 6 May 2010, she was seen in Greensboro; (2) that, on 3 May 2010, defendant tested positive for cocaine and marijuana; and (3) that, on 30 April 2010, defendant failed to report to a scheduled office visit with her probation officer.

On 14 June 2010, a probation revocation hearing was held. The trial court began the hearing by summarizing the underlying judgments: "I see there's four judgments . . . . [The sentencing trial court] gave three consecutive judgments consolidated, let two run concurrent, all eight to 10 month

sentences."

The State proceeded on the three violations in the 29 January 2010 report and only on the positive drug test violation in the 10 May 2010 report. Defendant admitted to the violations and admitted that the violations were willful and without lawful excuse. She explained, through her attorney, that the residential program where she had been enrolled during the period of her probation "did not spend very much time with the drug rehab and the drug counseling" and "as a result, the first time she had some temptation, . . . she had some problems." She then requested that the court continue her on probation and transfer her to Halifax County where her family lived. A fellow resident of the residential program where defendant lived during her probation testified that the program did not offer "a lot of drug treatment" which was, in her opinion, what defendant needed. She also testified that she did not "think sending [defendant] away to incarceration any longer will help with that." Finally, defendant herself testified

> Your Honor, I do have a drug problem. I have been in custody before in Raleigh. I tried to go to Mary Frances. I wasn't qualified. I did the 90 day DART treatment, but it goes a lot further beyond that, a person in addiction. I don't think a lot of people understand how severe it really is. I did stay clean for 16 months, but it was just -- my disease just manifested inside until I got the opportunity to use. I have been in prison. I think what I -- I need

> something more. I need help. I've asked that lady to help me. She won't help me. I know I have a problem. Nobody would help me out of probation here. I've asked probation in Halifax. I don't know what more that I have to do other than to flunk a drug test to get attention from them.

The State asked that probation be revoked, stating that the "defendant is not helping herself" and "revocation is the only position left for her." At the conclusion of the hearing, the trial court told defendant that her "probation is revoked in all four cases. The judgments are to stand. However, the revocation order—these are three eight to [ten] month sentences—is to include an order that [defendant] be considered and be transferred to Mary Frances." The written judgments indicate that the trial court activated four consecutive sentences of eight to ten months.

A second hearing was held on 2 July 2010, at which time defendant requested that the trial court credit her for the time she spent at Summit House while on probation. Her request was denied.

Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred by issuing *in absentia* judgments that substantially changed the sentences announced by the trial court at the probation revocation hearing. We disagree.

We begin our analysis by noting that this Court has held that a "substantive change in the [defendant's] sentence [shall] only be made in the [d]efendant's presence, where he and/or his attorney would have an opportunity to be heard." *State v. Crumbley*, 135 N.C. App. 59, 67, 519 S.E.2d 94, 99 (1999). However, a parole revocation hearing "is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." *Morrissey v. Brewer*, 408 U.S. 471, 480, 33 L. Ed. 2d 484, 494 (1972); *see also State v. Sparks*, 362 N.C. 181, 189, 657 S.E.2d 655, 660 (2008).

Here, defendant was present at her original sentencing hearing. She was notified that her original four consecutive terms of imprisonment could be activated if she violated the terms of her probation. She subsequently violated her probation and a revocation hearing was held, which she attended.

Nevertheless, defendant argues that because the written judgments activating the four sentences were not entered in her presence, they constitute *in absentia* judgments that substantially changed the trial court's announcement of "three eight to [ten] month sentences" at the probation revocation hearing. She analogizes the present case to *Crumbley*, 135 N.C. App. at 67, 519 S.E.2d at 99, in which this Court held that, where a trial court rendered sentences in the presence of

defendant and did not indicate whether the sentences were to run concurrently or consecutively but later imposed consecutive sentences in a written judgment, the legal effect was to substantively change the sentence and therefore remand was appropriate.

The State concedes that there was a discrepancy between the trial court's oral pronouncement at the probation revocation hearing activating "three eight to [ten] month sentences" and the written judgments activating four sentences. The present case differs, however, from *Crumbley* in a notable way; *Crumbley* involved a modification of the original sentence. Here, the "substantial change" which defendant claims occurred was during the activation of suspended sentences upon the revocation of probation—and not at the original sentencing.

Furthermore, a trial court may correct an error in its oral findings, or *lapsus linguae*, by conforming its written judgment to the court's actual intent. *See State v. Wilson*, 354 N.C. 493, 523, 556 S.E.2d 272, 291 (2001), *overruled on other grounds by State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002). Furthermore, a *lapsus linguae* not called to the attention of the trial court does not constitute prejudicial error when it is clear from a contextual reading of the transcript that the defendant reasonably should not have been misled by the misstatement. *See State v. Baker*, 338 N.C. 526, 565, 451 S.E.2d

574, 597 (1994) (noting that "a lapsus linguae not called to the attention of the trial court when made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled by the instruction."). Here, at the revocation hearing, the trial court repeatedly noted that there were four judgments against defendant. The court revoked defendant's probation "in all four cases" and also stated that "the judgments are to stand." Defendant did not call the discrepancy to the trial court's attention or ask for clarification.

We hold that, from a contextual reading of the transcript, the trial court clearly intended to activate all four sentences, and that defendant should not reasonably have been misled by the court's erroneous reference to "three." The written judgment merely corrects the trial court's *lapsus linguae* and expresses the court's real intent. Therefore, the trial court's activation of all four sentences was proper. Accordingly, we affirm.

No error.

Judges HUNTER, JR. and THIGPEN concur.

Report per Rule 30(e).