

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellant*,

v.

MICHAEL JERMAINE MOORE, *Appellee*.

No. 1 CA-CR 21-0459
FILED 12-20-2022

Appeal from the Superior Court in Maricopa County
No. CR2014-102199-001
The Honorable Roger L. Hartsell, Judge, *Pro Tempore*

REVERSED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Quinton S. Gregory
Counsel for Appellant

Maricopa County Public Defender's Office, Phoenix
By Damon A. Rossi
Counsel for Appellee

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OPINION

Presiding Judge Brian Y. Furuya delivered the decision of the Court, in which Judge Jennifer B. Campbell and Judge Paul J. McMurdie joined.

FURUYA, Judge:

¶1 The State appeals from the superior court’s order granting Michael Moore’s motion to vacate a stipulated extension of his probation. We hold the court lacked jurisdiction to vacate the probation extension, and reverse.

FACTS AND PROCEDURAL HISTORY

¶2 In January 2014, Moore was homeless and not taking his psychotropic medication despite his designation as Seriously Mentally Ill under Arizona Revised Statutes (“A.R.S.”) § 36-550(4).¹ One day, a witness observed Moore “ramble” incoherently before he stole and drove off in the witness’s golf cart. Moore then crashed the golf cart into a fence, was arrested, and then taken to a hospital because of his delusional state.

¶3 Moore was indicted for theft, a Class 5 felony, and criminal damage, a Class 1 misdemeanor. He entered a plea agreement and pled no contest to theft, a Class 6 designated felony. The court suspended the imposition of Moore’s sentence and placed him on three years’ probation with mental health terms beginning in July 2015. Per stipulation, the court ordered him to pay \$699 in restitution to the victim as a term of probation.

¶4 Near the end of his three-year probation term, Moore had not satisfied his restitution obligation. In May 2018, Moore’s probation officer presented him with a petition to modify his probation because of the failure to pay restitution. The officer asked him to agree “there remain[ed] an unpaid balance for restitution owed to the victim” and to extend probation for five years pursuant to A.R.S. § 13-902(C). The petition read:

¹ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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I, MICHAEL JERMAINE MOORE, have read the above petition (and/or) had the petition explained to me and fully understand probation will be extended to provide me with an opportunity to complete the payment of restitution. In addition, I voluntarily waive my right to counsel and/or a Court hearing regarding this matter.

Moore signed the petition, and later that month, without a hearing, the court ordered a five-year extension starting in July 2018. At the time, it was not the court's practice to inform the Public Defender's Office, which still represented Moore, of a petition to modify probation.

¶5 Moore made some restitution payments during the extension but still owed \$524 in May 2021, when, because he had been found guilty of a new misdemeanor charge, the State petitioned to revoke his probation. His attorney thereby learned of the probation extension and moved to terminate probation as of July 2018 and dismiss the petition to revoke. The court granted the motion, finding Moore's due process rights to counsel and a hearing had been violated when he signed the waiver and extension.

¶6 The State timely appealed.

DISCUSSION

¶7 The State argues the court lacked jurisdiction to vacate Moore's probation extension, Moore had no right to counsel or a hearing for the extension, and he had no right to counsel or a hearing concerning his waiver of a hearing and counsel. Moore argues we do not have jurisdiction over the State's appeal. We review such questions of law de novo. *See State v. Korzuch*, 186 Ariz. 190, 192 (1996).

I. Appellate Jurisdiction.

¶8 In a criminal case, among other things, the State may appeal "[a]n order made after judgment affecting the substantial rights of the state." A.R.S. § 13-4032(4). Moore contends his probation does not implicate any substantial rights of the State, as the State did not file the petitions to extend and to revoke and therefore "cared little about [his] probation or the extension." That argument, however, misinterprets the meaning of "substantial rights of the state."

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¶9 The State has authority to prosecute petitions to revoke and to request extensions for failure to pay restitution. Ariz. R. Crim. P. (“Rule”) 27.3(b)(1)(A), (2); 27.6. And we have previously found appellate jurisdiction for a State appeal of a probation termination, declaring probation affects substantial rights of the State. *See State v. Lewis*, 224 Ariz. 512, 514 ¶¶ 9–11 (App. 2010) (citing A.R.S. § 13-4032(4) to find jurisdiction). The mere fact that it was the probation office and not the State that moved for the extension and revocation does not negate the State’s substantial rights in probation. Therefore, we hold that we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4032(4).

II. Superior Court’s Jurisdiction to Vacate Probation Extension.

¶10 We next address whether the superior court had jurisdiction to grant Moore’s motion to vacate approximately three years after the probation extension. The State argues Moore was required to appeal the order extending his probation within 20 days of entry of that order, pursuant to Rule 31.2(a)(2)(A), and failure to do so deprived the superior court of jurisdiction to vacate it. We agree.

¶11 An order extending probation affects a defendant’s substantial rights and is directly appealable. *See State v. Jimenez*, 188 Ariz. 342, 345 (App. 1996) (explaining in dicta probation modification affects substantial rights and is directly appealable because it “change[s] or modifie[s] the judgment or sentence originally imposed”). Defendants must appeal “no later than 20 days after the oral pronouncement of [the] sentence.” Rule 31.2(a)(2)(A); *see also State v. Hughes*, 22 Ariz. App. 19, 21 (1974) (holding defendant cannot wait to appeal probation past time permitted by Rules simply because of revocation). Because Moore did not timely appeal, but rather waited approximately three years to contest his probation extension, he waived the ability to challenge it.

¶12 Moreover, even if Moore intended his motion to address the probation extension² as imposition of an unlawful sentence or one imposed in an unlawful manner, thereby invoking Rule 24.3’s more forgiving deadline to request correction, *see State v. Falco*, 162 Ariz. 319, 321 (App. 1989) (Rule 24.3 permitting trial court to correct “unlawful sentence” applies to imposition of probation), his motion still comes too late. A

² We see no reason to treat probation extensions differently than the original imposition of probation stemming from the same underlying conviction, and therefore analyze application of Rule 24.3 here in the same manner as we would with regard to an initial imposition of probation.

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defendant may only move to modify a sentence under Rule 24.3 “[n]o later than 60 days after the entry of judgment and sentence.” Rule 24.3(a). After the 60-day period, the court loses jurisdiction to vacate its order modifying the sentence. *See State v. Bryant*, 219 Ariz. 514, 517 ¶ 11 (App. 2008) (“Under Rule 24.3, the trial court itself must act within sixty days to correct an unlawful sentence, or the sentence will stand.”); *see also State v. Super. Ct. of Ariz.*, 25 Ariz. App. 248, 249–50 (1975) (explaining court needs jurisdiction to modify sentence). Accordingly, because Moore did not file his “motion to vacate” within 60 days of entry of the 2018 order extending his probation, the court lacked jurisdiction to thereafter grant his motion. Therefore, it was error to grant Moore’s motion to vacate approximately three years after the probation extension.

¶13 Notwithstanding the above, we acknowledge that the court retains continuing jurisdiction over probation matters through the end of probation. As such, it may “in its discretion . . . modify . . . probation in accordance with the [Rules] at any time before the expiration or termination of the period of probation.” A.R.S. § 13-901(C). *See also State v. Dean*, 226 Ariz. 47, 51 ¶ 11 (App. 2010) (holding court has jurisdiction to modify probation terms until end of probation). Our holding today, therefore, clarifies that the court lacked jurisdiction to vacate a three-year-old probation extension order, but does not in any way affect the court’s ability to modify Moore’s probation going forward. For example, upon hearing Moore’s motion to vacate in 2021, the court had jurisdiction and discretion to modify or terminate Moore’s probation as of that date. It cannot, however, vacate the 2018 order extending Moore’s probation, based on a motion filed three years later in 2021, thereby allowing Moore to evade a revocation hearing for an alleged intervening probation violation.

III. Remaining Arguments on Appeal.

¶14 The State also argues there is no right to counsel or a hearing for a probation extension or for a waiver of any rights to counsel and a hearing. We decline to consider constitutional arguments when we can resolve an action on other grounds. *Katherine S. v. Foreman ex rel. Cnty. of Maricopa*, 197 Ariz. 371, 378 ¶ 16 (App. 1999). Because we hold the court did not have jurisdiction in 2021 to vacate the 2018 probation extension, we reverse and need not address the State’s constitutional challenges.

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CONCLUSION

¶15 The court did not have jurisdiction to vacate the 2018 order extending probation. Accordingly, we reverse and reinstate the probation extension as of July 21, 2018.



AMY M. WOOD • Clerk of the Court
FILED: AA