

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-430

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 97 CRS 034922

SHAMARIO NATAUN LITTLE

Appeal by defendant from judgment entered 10 January 2001 by Judge Ola M. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Mary Penny Thompson, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Dean Paul Loven, for defendant-appellant.

EAGLES, Chief Judge.

On 22 January 1998, defendant pled guilty to felony possession of cocaine pursuant to a plea agreement. Judge Robert P. Johnston suspended defendant's six to eight month sentence and placed defendant on supervised probation for a period of two years.

Since being placed on probation, the Mecklenburg County Superior Court has modified defendant's probation several times. On 28 April 1998, the Superior Court extended defendant's time to complete required hours of community service. On 30 September 1998, the Superior Court found that defendant violated several

conditions of his probation and imposed a new requirement ordering defendant to complete 72 hours of the Structured Day Program.

On 28 October 1999 Probation Officer Woodruff signed and dated a probation violation report. The violation report alleged that defendant (1) was convicted of possession of drug paraphernalia in Mecklenburg County Superior Court, (2) made his whereabouts unknown to his probation officer and failed to report, and (3) tested positive for marijuana on three occasions. The violation report was found in the clerk's office files. It was marked as having been file stamped on 16 November 2000. An order for arrest based on this violation report was issued.

Based on the 28 October 1999 violation report, a probation revocation hearing was conducted on 20 November 2000. At that hearing, defendant moved to dismiss the 28 October 1999 violation report because the report was file stamped on 16 November 2000, a date after the probation period expired. Defendant based his motion on the theory that the report was not timely filed pursuant to N.C.G.S. § 15A-1344(f). The trial court, without articulating its reasons, denied defendant's motion. Defendant then admitted the violations contained in the 28 October 1999 report. The trial court found that defendant willfully and without lawful excuse violated terms of probation. Judge Lewis revoked defendant's probation and activated the six to eight month sentence ordering that it be served in Mecklenburg County's in-house drug program.

On appeal, defendant contends (1) that the trial court lacked jurisdiction over the subject matter of the hearing when no

competent evidence was before the court to show that a valid motion for a hearing was made prior to the expiration of the period of probation and (2) that the trial court lacked jurisdiction over the subject matter of the hearing when no evidence was presented to show that the probation violation report and motion for hearing was filed in a timely manner as evidenced by a file stamp.

In *State v. Hicks*, this Court wrote:

A court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute

When a sentence has been suspended and defendant placed on probation on certain named conditions, the court may, *at any time during the period of probation*, require defendant to appear before it, inquire into alleged violations of the conditions, and, if found to be true, place the suspended sentence into effect. But the State may not do so *after the expiration of the period of probation* except as provided in G.S. § 15A-1344(f).

Hicks, ___ N.C. App. ___, ___, 557 S.E.2d 594, 595 (2001) (internal quotations omitted) (citations omitted).

North Carolina General Statutes Section 15A-1344(f) provides that once the period of probation has ended, the court may revoke probation only if:

- (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
- (2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.

Here, defendant received a two year period of probation that began on 22 January 1998. Defendant's probation was scheduled to expire on 22 January 2000. The date written by the probation

officer on the violation report indicates that the officer signed the report on 28 October 1999. The file stamp on the report, however, indicates that it was not filed with the clerk until 16 November 2000, almost ten months after defendant's probation period expired. To properly revoke defendant's probation after 22 January 2000, "the State would have had to file a written motion with the clerk before the expiration of the probation period indicating the State's intent to conduct a revocation hearing." *Hicks*, ___ N.C. App. at ___, 557 S.E.2d at 596. This did not occur.

In a criminal case, North Carolina requires the State to prove jurisdiction beyond a reasonable doubt. *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 835 (1993). "For a court to retain jurisdiction over a probationer after the period of probation has expired, the plain language of N.C.G.S. § 15A-1344(f) (1) requires the State to '[file] a written motion with the clerk indicating [the State's] intent to conduct a revocation hearing' before the period of probation expired." *Hicks*, ___ N.C. App. at ___, 557 S.E.2d at 596. Here, the 16 November 2000 file stamp, visible on the violation report, indicates that the State failed to properly file defendant's violation report before defendant's probation period had expired.

Because the State's failure to comply with the plain language of N.C.G.S. § 15A-1344(f) (1) is dispositive, we decline to address the additional arguments presented by defendant's counsel and hold that the probation revocation proceeding should have been dismissed. Accordingly the trial court's judgment that defendant

violated terms of his probation is arrested and the order activating defendant's sentence is vacated.

Judgment arrested and order vacated.

Judges McCULLOUGH and CAMPBELL concur.

Report per Rule 30(e).