

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1016

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v.

Lenoir County
No. 03 CRS 50911

JAMES RICHARD PARKER III

Appeal by defendant from order entered 8 April 2005 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 29 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General M. Janette Soles, for the State.

Nicholas E. Harvey, Sr., for defendant-appellant.

TYSON, Judge.

James Richard Parker III ("defendant") appeals from order entered extending the term of his probation an additional six months. We dismiss.

I. Background

On 17 November 2003, defendant was sentenced to a term of twenty-four months of supervised probation on the charge of obstruction of justice. He was also sentenced to a term of twelve months of supervised probation on the charge of inciting a riot, which was ordered to run at the expiration of his sentence imposed for the obstruction of justice charge. Defendant was also

sentenced to a term of twelve months of supervised probation on the charges of conspiracy to injure real property and possession of marijuana, which was ordered to run at the expiration of his sentence imposed for the inciting a riot charge. Defendant's probation for the conspiracy to injure real property and possession of marijuana charges included the condition that defendant not use, possess, or control any illegal drug or controlled substances and that he submit to drug testing when instructed by his probation officer.

On 24 August 2004, defendant's probation officer filed a violation report alleging he had tested positive for marijuana, in violation of the condition of his probation which stated he "[n]ot use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it." A probation violation hearing was held on 16 November 2004 and was continued on 2 December 2004. At the hearing, defendant stipulated that his urine sample was positive for the active ingredients of marijuana, but denied that the violation of the condition was willful.

Evidence was presented that defendant was currently taking Marinol, a prescription medication that would result in his testing positive for marijuana, although he was not actually using marijuana itself. Defendant had specifically sought from his doctor a prescription for Marinol. Prior to the probation revocation hearing, defendant's physician was notified by

defendant's probation officer that he had tested positive on numerous drug tests and that they should consider alternative treatment options for his pain. However, at the hearing, defendant's physician stated that defendant had claimed, in speaking to the doctor, that he had numerous side effects when he used other medications, such as anti-inflammatory medication and narcotics, and the use of marijuana in the past had helped ease his pain. Following the presentation of evidence and testimony by various witnesses, including defendant and his physician, the trial court extended defendant's term of probation for six months and included the special condition that he be drug tested regularly, including the requirement that a drug test be administered within twenty-four hours of the hearing. Defendant appeals from this order.

II. Issue

Defendant argues the trial court erred when it concluded he violated his probation and imposed a special term of probation.

III. Consecutive Terms of Probation

Defendant contends he was sentenced to three consecutive terms of probation and the condition that he not use or be found in possession of illegal drugs was only a condition of his third term of probation, which he had not yet begun to serve. We disagree.

N.C. Gen. Stat. § 15A-1346(a) (2005) provides that "[e]xcept as provided in subsection (b), a period of probation commences on the day it is imposed and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is

subject during that period." Pursuant to this statute, "any sentence of probation must run concurrently with any other probation sentences imposed on a defendant." *State v. Canady*, 153 N.C. App. 455, 459-60, 570 S.E.2d 262, 265 (2002); see *State v. Howell*, 169 N.C. App. 58, 67-68, 609 S.E.2d 417, 423 (2005) (holding consecutive sentences of probation violate N.C. Gen. Stat. § 15A-1346). N.C. Gen. Stat. § 15A-1346(b) (2005) provides the only exception in which a trial court may adjust the timing of a probationary sentence. This exception "only applies to the commencement of a probationary sentence when the defendant is already serving or is going to be serving a prison sentence as well." *Canady*, 153 N.C. App. at 460, 570 S.E.2d at 265.

Defendant's contention that he was sentenced to consecutive terms of probation is without merit. The judgments in defendant's case indicate that he is subject to three consecutive suspended sentences and a total of two years of probation. The judgments state that if defendant's probation was revoked, he would serve three consecutive active sentences. It is within the discretion of the trial court to sentence a defendant in this manner. See *Howell*, 169 N.C. App. at 68, 609 S.E.2d at 423. Defendant was not sentenced to consecutive terms of probation. All three of his terms of probation began on the date the judgments were filed and would have expired on 16 November 2005. See N.C. Gen. Stat. § 15A-1346(a).

IV. Mootness

This Court has stated:

The doctrine of mootness is applicable to an appellate proceeding where the original question in controversy is no longer at issue. In *State ex rel. Utilities Comm. v. Southern Bell Tel. & Tel. Co.*, our Supreme Court held that:

[w]hen, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightfully have won in the lower Court. 289 N.C. 286, 288, 221 S.E.2d 322, 324 (1976).

In re Denial of Request by Humana Hospital Corp., 78 N.C. App. 637, 640, 338 S.E.2d 139, 141 (1968).

Defendant appeals from an order extending his term of probation for an additional six months. Defendant was sentenced on 17 November 2003 to three terms of probation, which ran concurrently. The longest probationary term imposed was twenty-four months, which would have expired on 16 November 2005.

The trial court extended defendant's probation for six additional months for his willful violation of the conditions of his probation. Defendant's extended six month term of probation expired on 15 May 2006.

In *State v. Camp*, our Supreme Court held the trial court lacked jurisdiction over the defendant due to expiration of his probationary term and was without power to revoke the defendant's probation. 299 N.C. 524, 528, 263 S.E.2d 592, 595 (1980). Similarly, since the term of defendant's probation has expired, this Court lacks jurisdiction over defendant. The "original

question in controversy" is no longer at issue. *In re Denial of Request by Humana Hospital Corp.*, 78 N.C. App. at 640, 338 S.E.2d at 141. The issues involved in this appeal are moot. Defendant's appeal is dismissed.

Dismissed.

Judges GEER and JACKSON concur.

Report per Rule 30(e).