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NO. COA05-601

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v.

JOHNNY STRINGFIELD

Pender County
Nos. 00 CRS 50486
00 CRS 50487
00 CRS 50677

Appeal by defendant from judgments entered 24 January 2005 by Judge W. Allen Cobb, Jr., in Pender County Superior Court. Heard in the Court of Appeals 25 January 2006.

Attorney General Roy Cooper, by Assistant Attorney General Kathryn J. Thomas, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant appellant.

McCULLOUGH, Judge.

By judgments entered 24 January 2005, a superior court judge revoked defendant Johnny Stringfield's probation in case numbers 00 CRS 50486, 00 CRS 50487, and 00 CRS 50677 and activated the sentence of imprisonment which had been suspended in each case. On an appeal by defendant, we vacate the challenged judgments and remand for new hearings.

Factual and Procedural History

On 25 October 2000, defendant entered into the following plea agreement with the State:

[U]pon [d]efendant's plea of guilty to 23 counts of False Pretenses, 1 count of Possession of Cocaine, Secreting a Lien, the State agrees to consolidate those charges into 4 groups for sentencing, and [to] recommend[] one active sentence wherein the [d]efendant will attend a 90[-day] DART program. Upon release from the active sentence, the [d]efendant will be placed on probation until restitution to [the] victims is paid.

The State also agreed to dismiss a number of charges then pending against defendant and his wife.

Pursuant to this agreement, defendant entered the requisite guilty pleas and received an active sentence in one case, 99 CRS 51221. In case number 00 CRS 50486, the trial court imposed a sentence of 9 to 11 months of imprisonment; this sentence was suspended, and defendant was placed on thirty months of supervised probation. The trial court's judgment was structured such that the term of imprisonment imposed in 00 CRS 50486 would begin at the expiration of the active sentence imposed in 99 CRS 51221; furthermore, the trial court's judgment expressly provided that the period of probation imposed in 00 CRS 50486 would begin at the expiration of the active sentence imposed in 99 CRS 51221.

In case number 00 CRS 50487, the trial court imposed a sentence of 9 to 11 months of imprisonment; this sentence was suspended, and defendant was placed on thirty months of supervised probation. The trial court's judgment was structured such that the term of imprisonment imposed in 00 CRS 50487 would begin at the expiration of the sentence imposed in 00 CRS 50486. However, the

trial court failed to check the box on the Form AOC-CR-603 "Judgment Suspending Sentence - Felony" to indicate that the probation imposed in 00 CRS 50487 would begin at the expiration of any other sentence.

In case number 00 CRS 50677, the trial court imposed a sentence of 9 to 11 months of imprisonment; this sentence was suspended, and defendant was placed on thirty months of supervised probation. The trial court's judgment was structured such that the term of imprisonment imposed in 00 CRS 50677 would begin at the expiration of the sentence imposed in 00 CRS 50487. However, the trial court failed to check the box on the Form AOC-CR-603 "Judgment Suspending Sentence - Felony" to indicate that the probation would begin at the expiration of any other sentence.

Defendant's active sentence in case number 99 CRS 51221 expired on 17 July 2001.

On 13 May 2003, following a hearing concerning probation violations by defendant, the trial court entered judgments purporting to extend the term of defendant's probation in each case. Specifically, the court modified defendant's sentence in case numbers 00 CRS 50486, 00 CRS 50487, and 00 CRS 50677 by extending defendant's probation for a period of one year, from 28 August 2004 to 28 August 2005.

On 13 January 2005, defendant's probation officer issued probation violation reports in case numbers 00 CRS 50486, 00 CRS 50487, and 00 CRS 50677, alleging that defendant had tested positive for cocaine and that defendant had failed to satisfy the

monetary payment conditions of his probation. The trial court held a hearing concerning these probation violations on 24 January 2005, at which time defendant indicated that he wished to represent himself. The court allowed defendant to proceed *pro se*. Following the hearing, the court determined that defendant had willfully violated the terms of his probation. Defendant's probation was revoked, and the active sentences imposed in case numbers 00 CRS 50486, 00 CRS 50487, and 00 CRS 50677 were activated.

Defendant now appeals, contending (I) he is entitled to a new probation revocation hearing in all three cases because the trial court failed to ensure that defendant's waiver of counsel was knowing and intelligent, and (II) the judgments revoking defendant's probation must be vacated because the trial court lacked jurisdiction to enter them.

Discussion of Issues

I.

We first address defendant's argument that the trial court erroneously permitted him to proceed *pro se* without ensuring that defendant's waiver of counsel was knowing and intelligent as required by section 15A-1242 of the General Statutes. Under section 15A-1242,

[a] defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his

right to the assignment of counsel when he is so entitled;

- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2005).

In the instant case, the trial court's inquiry concerning defendant's decision to proceed *pro se* was limited to the following colloquy:

THE COURT: Sir, do you understand what you're charged with here this morning?

THE DEFENDANT: Yes, sir.

THE COURT: Are you going to hire a lawyer to represent you?

THE DEFENDANT: No, sir.

THE COURT: Are you going to represent yourself?

THE DEFENDANT: Yes, sir.

THE COURT: You don't want a lawyer involved?

THE DEFENDANT: No, sir.

THE COURT: You don't want the court to inquire as to whether you're entitled to have a court[-]appointed lawyer; you want to represent yourself?

THE DEFENDANT: Yes, sir.

THE COURT: If you'll sign a waiver for me, please, sir. The waiver says you're going to represent yourself, you do not want a lawyer involved.

The State concedes, and we agree, that on these facts, the trial court did not satisfy the requirements of section 15A-1242. Therefore, defendant is entitled to new probation revocation hearings. See *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (“[T]he right to assistance of counsel may only be waived where the defendant’s election to proceed *pro se* is ‘clearly and unequivocally’ expressed and the trial court makes a thorough inquiry as to whether the defendant’s waiver was knowing, intelligent and voluntary. This mandated inquiry is satisfied only where the trial court fulfills the requirements of N.C. Gen. Stat. § 15A-1242.”) (citations omitted).

II.

The next issue raised by defendant is whether his probation in all three cases expired prior to revocation such that the trial court lacked jurisdiction to enter judgments revoking his probation. The record is unclear as to whether the trial court had jurisdiction to enter the challenged judgments, such that we must remand for the trial court to resolve this issue.

The expiration of a defendant’s probation is governed by the following statutory provisions: “[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.” N.C. Gen. Stat. § 15A-1346(a) (2005).

If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a

person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently.

N.C. Gen. Stat. § 15A-1346(b) (2005). “[P]robation remains conditional and subject to revocation during the period of probation imposed.” N.C. Gen. Stat. § 15A-1342(a) (2005). A trial court is “without authority to conduct a probation revocation hearing and activate . . . suspended sentences after the period of probation and suspension ha[s] expired [if] the failure of the court to enter a revocation judgment within the . . . period prescribed by the original judgment is not chargeable to the conduct of defendant” and the state has not “made reasonable effort . . . to conduct the [revocation] hearing earlier.” *State v. Camp*, 299 N.C. 524, 528, 263 S.E.2d 592, 594-95 (1980) (quoting N.C. Gen. Stat. § 15A-1344(f)).

A. Case Numbers 00 CRS 50487 and 00 CRS 50677

Under the foregoing statutes, the probation imposed in case numbers 00 CRS 50487 and 00 CRS 50677 began running on the date of imposition, 25 October 2000. Unless extended, these probationary sentences should have expired thirty months later on 25 April 2003. Defendant contends that the probation entered in each case could not be extended following a hearing on probation violations held 13 May 2003.

Though it appears that defendant may be correct, poor record-keeping with respect to defendant’s probation has resulted in a procedural morass. As such, we are unable to discern why a hearing

was held on 13 May 2003, rather than being held prior to 25 April 2003. Further, the record does not indicate whether, under *State v. Camp*, the superior court nevertheless had jurisdiction in case numbers 00 CRS 50487 and 00 CRS 50677, because the tardiness of the 13 May hearing was chargeable to the conduct of defendant, and the State had made a reasonable effort to conduct the violation hearings earlier.

Moreover, assuming *arguendo* that the trial court did have jurisdiction to consider whether defendant violated his probation in case numbers 00 CRS 50487 and 00 CRS 50677 as of 13 May 2003, it is entirely unclear how the trial court determined that defendant's probation in these cases expired on 28 August 2004. It appears that this date is the result of a miscalculation; however, we are unprepared to so hold given that the record does not contain a transcript or any other information regarding the 13 May 2003 hearing on probation violations.

Under Rule 2 of the Rules of Appellate Procedure, this Court has the supervisory authority to "order proceedings in accordance with its directions." N.C. R. App. P. 2 (2006). Pursuant to this authority, we remand case numbers 00 CRS 50487 and 00 CRS 50677 to the superior court for the court to determine why the 13 May 2003 hearing date was chosen and whether defendant's probation in these cases expired prior to that hearing. If necessary, the Court shall also determine (1) how the 28 August date was chosen, (2) whether it was correctly chosen, and (3) if this date resulted from a miscalculation, the date upon which defendant's probation expired.

The trial court may review any available transcripts and may hear additional evidence.

Upon a determination that defendant's probation had expired, the court shall dismiss the probation revocation charges in case numbers 00 CRS 50487 and 00 CRS 50677. Otherwise, the court shall conduct a hearing to determine whether defendant violated the terms of his probation in these cases.

B. Case Number 00 CRS 50486

The probation imposed in case number 00 CRS 50486 began running at the expiration of defendant's active prison sentence, on 17 July 2001. This term of probation was set to expire thirty months later, on 17 January 2004. On 13 May 2003, well before the expiration of this probationary sentence, the trial court determined that defendant's probation should be extended for one year from 28 August 2004 until 28 August 2005. As indicated earlier, it is unclear how the trial court determined that defendant's probation was set to expire on 28 August 2004.

Therefore, pursuant to our supervisory powers under Rule 2 of the North Carolina Rules of Appellate Procedure, we remand case number 00 CRS 50486 to the superior court for the court to determine (1) how the 28 August date was chosen, (2) whether it was correctly chosen, and (3) if this date resulted from a miscalculation, the date upon which defendant's probation expired. The trial court may review any available transcripts and may hear additional evidence.

Upon a determination that defendant's probation had expired,

the court shall dismiss the probation revocation charges in case number 00 CRS 50486. Otherwise, the court shall conduct a hearing to determine whether defendant violated the terms of his probation in this case.

III. Conclusion

The judgments revoking defendant's probation in case numbers 00 CRS 50486, 00 CRS 50487, and 00 CRS 50677 are vacated, and these cases are remanded to the superior court for new probation revocation hearings. Prior to hearing evidence concerning whether defendant violated the terms of his probation, the trial court shall, if appropriate, conduct the inquiry mandated by section 15A-1242 of the General Statutes, and shall enter an order which makes the determinations required by section II of this opinion.

Vacated and remanded for new probation revocation hearings.

Judges ELMORE and LEVINSON concur.

Report per Rule 30(e).