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NO. COA07-922

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

STATE OF NORTH CAROLINA

v.

Cumberland County
No. 00 CRS 53225

REGINALD DENNIS MILES,
Defendant.

Court of Appeals

Appeal by defendant from judgment entered 12 March 2007 by Judge Ola M. Lewis in Cumberland County Superior Court. Heard in the Court of Appeals 14 April 2008.

Roy Cooper, Attorney General, by Lisa Bradley Dawson, Assistant Attorney General, for the State.

Slip Opinion

Robert W. Ewing, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Reginald Dennis Miles appeals from a judgment entered on 12 March 2007 revoking his probation and activating his suspended sentence imposed on 11 March 2004. For the reasons discussed below, we vacate the judgment.

On 11 March 2004, defendant pled guilty to felonious child abuse inflicting serious physical injury on a three-year-old child, and was sentenced to imprisonment for a minimum of 23 months and a maximum of 37 months, with a credit for prior time spent in confinement of 218 days. The sentence was suspended and defendant

was placed on supervised probation for a period of 36 months. Defendant was also ordered to pay \$3,591.00 in costs and attorney's fees.

A probation violation report dated 17 June 2004 alleged defendant willfully violated three conditions of his probation, including nonpayment of the costs and fees arising from his 11 March judgment. On 1 November 2005, the superior court found that defendant violated his probation as charged in the 2004 violation report. As a result, the court modified its original judgment and ordered that defendant be released from jail for a transfer to California. On 8 November 2005, the court modified its order again, remitting North Carolina supervision fees since the case was transferred out of state.

Another probation violation report was filed in Cumberland County Superior Court on 28 February 2007 alleging that defendant had (1) paid only \$10.00 of the \$3,591.00 owed pursuant to the March 2004 judgment and (2) failed to call his probation/parole officer monthly in spite of being instructed "numerous times" to do so. On 12 March 2007, the superior court heard the matter.

When asked whether he would like to be "represented by [a] court-appointed lawyer, hire an attorney of [his] choice or represent [him]self," defendant stated that he would like to represent himself in the matter. The trial court asked defendant his age, and then directed defendant to sign a waiver "if [he did] not want th[e] court to appoint . . . a lawyer" for him in this matter. The court then invited the State to arraign defendant. At

the conclusion of the hearing, the court revoked defendant's probation and activated his suspended sentence. Defendant gave notice of appeal to this Court by two handwritten notes dated 13 March and 15 March 2007.

The record on appeal contains eighteen assignments of error. Those assignments of error for which defendant failed to present arguments are not discussed below and are deemed abandoned. N.C.R. App. P. 28(a) (2008) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned.").

Defendant contends the trial court lacked subject matter jurisdiction to revoke his probation on 12 March 2007 because his probationary period had expired before the court entered its probation revocation order and the court did not find that the State made reasonable efforts to conduct the probation revocation hearing during the probationary period. We agree.

The State contends that this issue was "not properly preserved for appellate review by the defendant pursuant to Rule 10 of the Rules of Appellate Procedure" because defendant "presented no objection or motion to the trial court asserting that the defendant's probationary period had ended or that the court failed to make the necessary findings required by N.C.G.S. § 15A-1344(f)." Since "[i]ssues of subject matter jurisdiction may be raised for the first time on appeal," *In re K.A.D.*, __ N.C. App. __, __, 653 S.E.2d 427, 428 (2007); see also N.C.R. App. P. 10(a) (2008)

("[U]pon any appeal duly taken from a final judgment[,], any party to the appeal may present for review, by properly making them the basis of assignments of error, the question[] . . . whether the court had jurisdiction of the subject matter."), we will now address the arguments that defendant properly presented in his Assignments of Error 14 and 15.

"If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court . . . may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing" N.C. Gen. Stat. § 15A-1344(d) (2007); see also N.C. Gen. Stat. § 15A-1344(a) ("[During the period of probation,] probation may be reduced, terminated, continued, extended, modified, or revoked."). So, "[e]xcept as provided in N.C.[G.S.] § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term." *State v. Reinhardt*, 183 N.C. App. 291, 293, 644 S.E.2d 26, 27 (2007) (citing *State v. Camp*, 299 N.C. 524, 527-28, 263 S.E.2d 592, 594-95 (1980)).

However, the court *may revoke* probation *after* the expiration of the period of probation if: "(1) [b]efore 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) [t]he court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier." N.C. Gen. Stat. § 15A-1344(f). Our Supreme Court has held that N.C.G.S.

§ 15A-1344(f) “unambiguously requires the trial court to *make a judicial finding* that the State has made a reasonable effort to conduct the probation revocation hearing during the period of probation set out in the judgment and commitment.” *State v. Bryant*, 361 N.C. 100, 102-03, 637 S.E.2d 532, 534 (2006) (emphasis added). Moreover, “[i]n the absence of statutorily mandated factual findings, the trial court’s jurisdiction to revoke probation after expiration of the probationary period is not preserved.” *Id.* at 103, 637 S.E.2d at 534.

In the present case, defendant’s three-year probation began on 11 March 2004, and expired on 10 March 2007. The probation violation hearing at issue here was held on 12 March 2007, two days after defendant’s probation ended. However, in its 12 March probation revocation order, the court failed to make any findings of fact that the State made reasonable efforts to conduct the hearing before the expiration of defendant’s probationary period. The State contends that “there were facts present in the court file that showed reasonable efforts were made to notify the defendant and to conduct the hearing as soon as possible.” Nonetheless, the record before this Court does not support this assertion and, more importantly, “[t]he statute makes no exception to th[e] finding of fact requirement based upon the strength of the evidence in the record.” *Id.* at 103, 637 S.E.2d at 535. Therefore, we conclude that the trial court lacked jurisdiction to revoke defendant’s probation.

"When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993) (internal quotation marks omitted). Accordingly, the 12 March 2007 judgment activating defendant's sentence under file number 00 CRS 53225 must be vacated.

Our decision renders it unnecessary to address defendant's contention that the trial court erred by allowing defendant to represent himself *pro se* without complying with the requirements of N.C.G.S. § 15A-1242.

Judgment vacated.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).