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NO. COA08-1231

NORTH CAROLINA COURT OF APPEALS

Filed: 16 June 2009

STATE OF NORTH CAROLINA

v.

Durham County
No. 04 CRS 41102

JEROME LAWRENCE

Appeal by defendant from judgment entered 12 May 2008 by Judge Abraham P. Jones in Superior Court, Durham County, heard in the Court of Appeals 7 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Jennifer M. Jones, for the State.

Paul Y. K. Castle, for defendant-appellant.

WYNN, Judge.

Defendant appeals arguing that the trial court had no authority to revoke his probation where the 11 August 2006 order extending his original probation term was invalid due to lack of subject matter jurisdiction. Because Defendant did not receive notice and hearing prior to the extension of his probation, we hold that the order extending his probation term was invalid.

On 19 August 2004, Defendant pled guilty to discharging a weapon into an occupied property. The trial court entered judgment against Defendant, sentencing him to a term of no more than thirty-three and no less than twenty months' imprisonment, suspending the

execution of the sentence, and imposing twenty-four months of probation to culminate on 19 August 2006. On 11 August 2006, the trial court entered a modification order, extending Defendant's probation for an additional twelve months, until 20 August 2007. Defendant signed the modification order on 8 August 2006 however no hearing was held at that time.

Defendant and the State agree that the motivation behind the extension of his probation was to allow Defendant more time to pay outstanding attorneys fees and court costs. However, during the extended probation period, Defendant failed to report to office visits with his probation officer. On 23 February 2007, Defendant's probation officer filed a violation report alleging that Defendant failed to keep in contact, did not "stay current" on his indebtedness, and failed to keep her informed of his current whereabouts. On 12 May 2008, Defendant filed a motion to dismiss the probation violation, alleging that the court order extending his probation on 11 August 2006 was invalid because Defendant was not given notice and a hearing pursuant to N.C. Gen. Stat. § 15A-1344(d) (2007), and thus the trial court lacked subject matter jurisdiction to revoke his probation. The trial court denied Defendant's motion and issued judgment revoking Defendant's probation and activating his original sentence of no more than thirty-three and no less than twenty months' imprisonment.

On appeal, Defendant argues that the 11 August 2006 order was invalid because it extended his probation without notice and hearing as required under N.C. Gen. Stat. § 15A-1344(d). We agree.

Chapter 15A of the North Carolina General Statutes includes a number of statutory provisions governing the extension of probation. N.C. Gen. Stat. § 15A-1344(d) provides: "At any time prior to the expiration or termination of the probation period, the court may *after notice and hearing* and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation" (emphasis added). Additionally,

[t]he court with the consent of the defendant may extend the period of probation beyond the original period (i) for the purpose of allowing the defendant to complete a program of restitution, or (ii) to allow the defendant to continue medical or psychiatric treatment ordered as a condition of the probation.

N.C. Gen. Stat. § 15A-1342(a) (2007); see *State v. Rush*, 158 N.C. App. 738, 582 S.E.2d 37 (2003) (holding jurisdiction was proper for extension where defendant consented under section 15A-1342(a) and a revocation hearing was held). Further, N.C. Gen. Stat. § 15A-1345(e) (2007) states, "[b]efore revoking or extending probation, the court must, *unless the probationer waives the hearing*, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings" (emphasis added).

The plain language of these statutes, taken collectively, provides that absent (1) notice and hearing, (2) notice and waiver of hearing, or (3) consent for the limited purposes enumerated in section 15A-1342(a), a trial court lacks subject matter jurisdiction to extend a defendant's probation. In this case,

although the intent of the probation officer may have been to allow the Defendant more time to pay the fees due, the effect of the order was to extend his probationary term. Accordingly, Defendant was entitled to notice and a hearing.

Even if, as the State argues, Defendant waived the notice requirement by signing the order extending the term of his probation, there is no evidence in the record to indicate that the court conducted a hearing, that Defendant waived his right to a hearing under section 15A-1345(e), or that the extension was for either of the purposes set out in section 15A-1342(a). A court does not have subject matter jurisdiction to revoke a defendant's probation after the probation period has expired unless the following conditions have been met:

- (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.

N.C. Gen. Stat. § 15A-1344(f).

Under the terms of the original order, Defendant's probationary period began 19 August 2004 and expired 20 August 2006. Here, there is no evidence that the State filed a written motion indicating its intent to conduct a revocation hearing, and there was no finding that the State made a "reasonable effort" to notify probationer and conduct the hearing prior to the date of expiration. Therefore, because Defendant's probation expired on 20 August 2006, one year and nine months prior to the revocation

hearing, the trial court was without jurisdiction to revoke his probation on 18 May 2008. See *State v. Reinhardt*, 183 N.C. App. 291, 294, 644 S.E.2d 26, 28 (2007) (holding the trial court lacked jurisdiction to revoke probation where the revocation hearing occurred after the expiration of the probation term and there was no evidence of a reasonable effort to notify defendant and conduct the hearing earlier).

Accordingly, we vacate the trial court's judgment revoking Defendant's probation and activating his 19 August 2004 sentence. *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) ("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.") (citations omitted).

Vacated.

Judges JACKSON and HUNTER, JR. concur.

Report per Rule 30(e).