

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-1318

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

STATE OF NORTH CAROLINA

v.

Scotland County
Nos. 07 CRS 51845-46

LONDA BEAL

Appeal by Defendant from judgment entered 7 May 2009 by Judge Richard T. Brown in Superior Court, Scotland County. Heard in the Court of Appeals 9 June 2010.

Attorney General Roy Cooper, by Assistant Attorney General Mary S. Mercer, for the State.

Lisa Skinner Lefler for Defendant-Appellant.

McGEE, Judge.

Londa Beal (Defendant) appeals from a judgment revoking probation and activating her suspended sentence for multiple drug offenses. Defendant challenges the indictments for selling and delivering a controlled substance as being fatally defective. Defendant argues that the indictments failed to identify the person to whom the drugs were sold or state that the purchaser's name was unknown.

Defendant was indicted on 24 March 2008 for the offenses of (1) maintaining a dwelling for the keeping or selling of a controlled substance, (2) possession with intent to sell or deliver

a controlled substance, and (3) sale or delivery of a controlled substance. These offenses were alleged to have occurred on 8 and 13 June 2007. For each sale and delivery charge, the indictments alleged that Defendant "did sell or deliver to a Confidential State Informant" the controlled substance of cocaine.

Defendant pleaded guilty on 23 April 2008 to two counts of possession with intent to sell or deliver cocaine and two counts of selling and delivering cocaine. Pursuant to the plea agreement, the two counts of maintaining a dwelling were dismissed. The offenses were consolidated for judgment and the trial court imposed a suspended sentence of ten to twelve months. Defendant was placed on thirty-six months' supervised probation, including six months' intensive probation.

Defendant's probation officer issued a probation violation report on 8 September 2008, alleging Defendant failed to: (1) complete required community service, (2) report to the probation officer on several occasions, (3) abide by the imposed residential curfew, (4) make payments of court fees, (5) make payments of supervision fees, (6) notify the probation officer of an address change, (7) provide the probation officer with proof of employment, and (8) report to the TASC program.

Defendant was arrested and, through counsel, admitted to several of the probation violations. The trial court found that Defendant willfully committed the violations, revoked Defendant's probation, and activated the underlying sentence. Defendant appeals.

Defendant contends in her sole argument on appeal that, due to defective indictments, the trial court lacked subject matter jurisdiction to revoke her probation. Defendant contends the indictments failed to allege all the essential elements of the offenses charged in that the indictments did not properly allege the name of the person to whom the sales of cocaine were made, or, in the alternative, state that the purchaser was unknown. See N.C. Gen. Stat. § 15A-924(a)(5) (2009) ("A criminal pleading must contain . . . [a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation"); see also *State v. Martindale*, 15 N.C. App. 216, 217, 189 S.E.2d 549, 549 (1972) (holding that an indictment for the unlawful sale of drugs must state the name of the purchaser or that the purchaser was unknown).

"The right to appeal in a criminal proceeding is purely statutory." *State v. Shoff*, 118 N.C. App. 724, 725, 456 S.E.2d 875, 876 (1995), *aff'd*, 342 N.C. 638, 466 S.E.2d 277 (1996). As set forth in N.C. Gen. Stat. § 15A-1444 (2009), a defendant, upon entering a plea of guilty, may raise a limited number of issues on appeal as a matter of right. *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003) (dismissing an appeal where the defendant pleaded guilty and did not present a situation defined under N.C. Gen. Stat. § 15A-1444(e)).

"When a superior court judge, as a result of a finding of a

violation of probation, activates a sentence or imposes special probation . . . the defendant may appeal under G.S. 7A-27." N.C. Gen. Stat. § 15A-1347 (2009). Under N.C. Gen. Stat. § 7A-27(b) (2009), an appeal "[f]rom any final judgment of a superior court . . . lies of right to the Court of Appeals." However, in appealing an order activating a suspended sentence, the issues are limited to a determination of whether a breach of the conditions of the sentence occurred or whether the conditions breached were unreasonable. *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971) (citing *State v. Caudle*, 276 N.C. 550, 173 S.E.2d 778 (1970)).

In the case before us, Defendant is attempting to challenge the validity of the original indictments. Defendant contends that the trial court lacked subject matter jurisdiction to revoke her probation due to the alleged defective indictments. "A defendant on appeal from an order revoking probation may not challenge his adjudication of guilt." *State v. Cordon*, 21 N.C. App. 394, 397, 204 S.E.2d 715, 717 (1974). "Questioning the validity of the original judgment where sentence was suspended on appeal from an order activating the sentence is . . . an impermissible collateral attack." *Noles*, 12 N.C. App. at 678, 184 S.E.2d at 410.

"[O]ur Supreme Court has explained that '[w]hile it is true that a defendant may challenge the jurisdiction of a trial court, such challenge may be made in the appellate division only if and when the case is properly pending before the appellate division.'" *Jamerson*, 161 N.C. App. at 529, 588 S.E.2d at 547 (quoting *State v.*

Absher, 329 N.C. 264, 265 n.1, 404 S.E.2d 848, 849 n.1 (1991)); see also N.C. Gen. Stat. § 15A-1444 (2009). Defendant has no statutory right to challenge the trial court's jurisdiction upon appeal from the revocation of her probation under N.C.G.S. § 15A-1444(e). Therefore, this appeal is not properly before our Court and must be dismissed. *Jamerson*, 161 N.C. App. at 529-30, 588 S.E.2d at 547.

Defendant may, pursuant to N.C. Gen. Stat. § 15A-1415(b)(2) (2009), file a motion for appropriate relief with the trial court, asserting that "[t]he trial court lacked jurisdiction over the person of the defendant or over the subject matter". "Such relief must be sought in the trial court, under N.C. Gen. Stat. § 15A-1413, since the appellate courts may rule on such a motion under N.C. Gen. Stat. § 15A-1418 only when the defendant has either an appeal of right or a properly pending petition for a writ of certiorari." *Jamerson*, 161 N.C. App. at 530, 588 S.E.2d at 547 (citing *State v. Waters*, 122 N.C. App. 504, 470 S.E.2d 545 (1996)).

Dismissed.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).