

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-1347

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v.

Johnston County
No. 07 CR 056032

JIMMIE DEWAYNE JENKINS

Appeal by Defendant from judgment entered 23 March 2009 by Judge R. Dale Stubbs in Johnston County District Court. Heard in the Court of Appeals 21 June 2010.

Attorney General Roy Cooper, by Assistant Attorney General Gaines M. Weaver, for the State.

Ryan McKaig for Defendant-Appellant.

ERVIN, Judge.

Defendant Jimmie DeWayne Jenkins appeals from a judgment entered by the trial court on 23 March 2009 revoking his probation and activating his suspended sentence. After careful consideration of the arguments advanced in the parties' briefs in light of the record and the applicable law, we conclude that we lack jurisdiction to hear the present appeal and that it must be dismissed.

On 24 July 2007, Defendant was arrested for felonious fleeing to elude arrest. After waiving indictment and consenting to be charged through the use of an information, Defendant entered a

guilty plea on 6 September 2007. Based on Defendant's guilty plea, the court imposed an eight to ten month suspended sentence upon Defendant while placing Defendant on supervised probation for twenty-four months, subject to a number of terms and conditions.

On 30 September 2008 and 12 February 2009, Defendant's probation officer filed violation reports alleging that Defendant had violated certain monetary conditions of probation and had also violated a special condition of probation requiring him to "participate in further evaluation, counseling, treatment or education programs recommended as a result of that evaluation, and comply with all further therapeutic requirements of those programs until discharged." The State and Defendant consented that the alleged probation violations could be heard in the Johnston County District Court.

At a hearing held before the trial court on 23 March 2009, the State conceded that Defendant was current on his monetary obligations. For that reason, the only issue before the trial court stemmed from the probation officer's allegation that Defendant had failed to "participate in further evaluation, counseling, treatment or education programs recommended as a result of that evaluation, and comply with all further therapeutic requirements of those programs until discharged." Following Defendant's admission that he had violated this condition of probation, the trial court revoked Defendant's probation and activated his suspended sentence. After Defendant gave oral notice of appeal from the trial court's judgment, the trial court

determined that Defendant's appeal would lie to this Court rather than to the Johnston County Superior Court.

On appeal, Defendant and the State both contend this Court lacks jurisdiction to hear the Defendant's appeal. We agree.

"When a district court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, the Defendant may appeal to the superior court for a de novo revocation hearing." N.C. Gen. Stat. § 15A-1347. Similarly, the Supreme Court has held that, "when the district court revokes a Defendant's probation, that defendant's appeal is to the superior court." *State v. Hooper*, 358 N.C. 122, 122-23, 591 S.E.2d 514, 515 (2004).

In this instance, Defendant's probation was revoked by the district court. As a result, Defendant's appeal lay to the Johnston County Superior Court rather than this Court, depriving us of jurisdiction to hear Defendant's challenge to the revocation of his probation. Given that we have no jurisdiction to hear Defendant's appeal, we are required to dismiss it and will do so. However, "[d]efendant should be permitted to refile his notice of appeal to the superior court, notwithstanding time and procedural constraints resulting from this misdirected appeal." *Id.* at 127, 591 S.E.2d at 518.

Appeal dismissed.

Judges STEPHENS and BEASLEY concur.

Report per Rule 30(e).