NO. COA11-1319
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

STATE OF NORTH CAROLINA

v. McDowell County
Nos. 03 CRS 54024, 04 CRS 54928, 04 CRS 54299, 04 CRS 54348, 04 CRS 53930, 04 CRS 54398, 05 CRS 50036, 10 CRS 1270, 10 CRS 1271, 10 CRS 1272, 10 CRS 1273

BRANDON KYLE MCNEIL

Appeal by defendant from judgment entered 12 May 2011 by Judge Laura J. Bridges in McDowell County Superior Court. Heard in the Court of Appeals 7 March 2012.

Attorney General Roy Cooper, by Assistant Attorney General Josephine Tetteh, for the State.

Levine & Stewart, by James E. Tanner III, for defendant-appellant.

BRYANT, Judge.

Where the trial court properly exercised its discretion in ordering defendant's sentences to run consecutively and the written judgment was generally in conformity, there was no

error. Where a clerical error exists in the written judgment of the trial court, we remand for correction of the clerical error.

On 14 April 2005, in McDowell County Superior Court, Brandon Kyle McNeil ("defendant") pled guilty to thirteen offenses – four counts of breaking and entering, three counts of larceny after breaking and entering, two counts of obtaining property by false pretenses, one count of larceny, one count of simple possession of Schedule IV Controlled Substance, one count of fleeing to elude arrest in a motor vehicle with no registration, and one count of larceny of a firearm – represented by seven case file numbers.[1] The trial court entered judgment in accordance with defendant's plea and sentenced defendant to consecutive sentences of 11-14 months for each of the seven cases. The trial court then suspended each sentence and imposed 60 months of probation to begin when defendant was released from incarceration in McDowell County case number 04 CRS 51078.

On 8 November 2005, in Burke County Superior Court, defendant pled guilty to four offenses – three counts of breaking and entering and one count of larceny with a firearm

[1] Case file numbers for charges defendant pled guilty to on 14 April 2005 in McDowell County: 03 CRS 54024, 04 CRS 54298, 04 CRS 54299, 04 CRS 54348, 04 CRS 53930, 04 CRS 54398, and 05 CRS 50036.

and safecracking.[2] The trial court sentenced defendant to consecutive terms of 8-10 months for each offense, suspended each sentence and imposed 60 months of probation to begin upon defendant's release from incarceration in case file number 05 CRS 3635.

On 3 November 2010, defendant's probation officer filed eleven violation reports alleging that defendant had willfully violated conditions of his probation in both his McDowell and Burke County cases. Defendant's Burke County cases were re-filed and joined with his McDowell County cases.[3] Warrants for defendant's arrest were executed on 3 November 2010. On 18 November 2010, defendant was released on bond.

On 22 February 2011, eleven new probation violation reports were filed for defendant's McDowell and Burke County cases. Defendant was arrested the same day and remained incarcerated until his hearing on 12 May 2011.

After a probation revocation hearing on 12 May 2011, the trial court found that defendant had willfully violated his

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[2] Case file numbers 05 CRS 3635, 05 CRS 3636, 05 CRS 3637, and 05 CRS 3638.

[3] Burke County case numbers were re-filed in McDowell County as follows: 05 CRS 3636 was re-filed as 10 CRS 1270; case number 05 CRS 3635 was re-filed as 10 CRS 1271; 05 CRS 3637 was re-filed as 10 CRS 1272; 05 CRS 3638 was re-filed as 10 CRS 1273.

probationary sentence in all eleven cases. Defendant's probation was revoked, and his suspended sentences activated. Defendant appeals.

On appeal, defendant argues the trial court erred by (I) executing written judgments upon revocation of probation whereby each active sentence was to run consecutively; (II) executing a written judgment upon revocation of probation in offense 04 CRS 54299 directing that the sentence begin at the expiration of the active sentence in 04 CRS 51078; and (III) by entering written judgment upon revocation of probation in case number 10 CRS 1271.

I

Defendant first argues that the trial court committed reversible error by executing written judgments upon revocation of probation ordering that all active sentences run consecutively when the trial court, while rendering its oral judgment during the probation revocation hearing, did not state with specificity that each sentence was to run consecutive to the preceding sentence.

In a probation revocation hearing, "[t]he findings of the judge, if supported by competent evidence, and his judgment

based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion." *State v. Floyd*, ___ N.C. App. ___, 714 S.E.2d 447, 449 (2011). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Pursuant to North Carolina General Statute section 15A-1344(d), "at any time prior to the expiration or termination of the probation period 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) (2011).

> A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation . . . to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period.

Id. This Court has recognized that a judge has discretion to order that a sentence run either concurrently or consecutively at the time a defendant's probation is revoked. *State v. Campbell*, 90 N.C. App. 761, 763, 370 S.E.2d 79, 80 (1988).

Here, the trial court states at the end of rendering

defendant's judgment "[o]kay[] 147 days credit towards those consecutive sentences." This response was made after the court revoked Defendant's probation for all eleven cases and after asking how many days credit defendant was entitled. The State contends that the court's statement "147 days credit towards those consecutive sentences" was sufficient to meet the "specificity" requirement of § 15A-1344(d). We agree.

Defendant contends that the trial court, when stating "147 days credit towards those consecutive sentences," was characterizing the original sentences to which defendant was entitled to credit served as opposed to specifically directing a series of consecutive sentences on revocation. However, defendant does not direct our attention to any other part of the record to support this characterization. Absent support, defendant's contention defies logic. We are constrained to understand why the trial court would inquire as to the number of days to credit defendant based on the *original* consecutive sentences, especially when those sentences were suspended and probation imposed.

This Court has held that pursuant to N.C. Gen. Stat. § 1A-1, Rule 58, a trial court has the authority "to make a written judgment that conforms in general terms with an oral judgment

pronounced in open court." *Morris v. Bailey*, 86 N.C. App. 378, 389, 358 S.E.2d 120, 126 (1987) (citation omitted). "If the written judgment conforms in general terms with the oral entry, it is a valid judgment." *Id.* at 389, 358 S.E.2d at 127. In the instant case, the trial court's written judgment, revoking probation on each case and activating defendant's sentences such that they all ran consecutive to each other does conform generally with the judgment pronounced in open court. Defendant's argument is overruled.

II

Defendant next argues that the trial court committed error by executing a written judgment upon revocation of probation in case number 04 CRS 54299 directing that defendant commence an active sentence at the expiration of the active sentence in case number 04 CRS 51078. We agree.

"A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702 (2009) (citation, quotations, and brackets omitted). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case

to the trial court for correction because of the importance that the record 'speak the truth.'" *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)). The remand is for the limited purpose of correcting the clerical errors. *See Lark*, 198 N.C. App. at 95, 678 S.E.2d at 703. Courts of record have the power and duty "to make its records speak the truth" by amending its records, correcting mistakes of its clerks or officers, or by supplying defects or omissions in the record. *State v. Jarman*, 140 N.C. App. 198, 203, 535 S.E.2d 875, 879 (2000) (citing *State v. Cannon*, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956) (citations omitted)).

Defendant contends that the active sentence imposed in case number 04 CRS 51078 was completed on 12 August 2009. The record on appeal shows that the trial court imposed an active sentence in case number 04 CRS 51078 but that the active sentence imposed in 04 CRS 51078 was indeed completed on 12 August 2009 prior to defendant's May 2011 probation revocation hearing.

Defendant argues and the State concedes that a clerical error was made when the trial court on 12 May 2011 executed a written judgment upon revocation of probation in 04 CRS 54299, directing that defendant serve an active sentence to commence at

the expiration of the sentence imposed in 04 CRS 51078. We agree. Accordingly, we remand to the trial court for correction of the clerical error.

III

Lastly, defendant argues that the trial court committed reversible error by entering a written judgment upon revocation of probation in McDowell County case number 10 CRS 1271 when defendant had already served out an active sentence in the underlying Burke County case number 05 CRS 3635 and was erroneously placed on probation.

Defendant urges this Court to reverse the judgment revoking probation based on what he contends "must represent some error in the original judgment." However, because defendant is in essence challenging the judgment imposing probation, "[q]uestioning the validity of the original judgment where sentence was suspended on appeal from an order activating the sentence . . . [–] an impermissible collateral attack[,]" we do not reach this issue as it is improper in this direct appeal of judgment revoking probation. *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971).

From the trial court judgment revoking probation, we affirm in part and remand in part for correction of clerical error.

Affirmed in part; remanded in part.

Judges HUNTER, JR., Robert N., and BEASLEY concur.

Report per Rule 30(e).