NO. COA12-1500
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v. Wake County
No. 11 CRS 10639

THOMAS EVERETTE, JR.,
Defendant.

Appeal by defendant from judgment entered 13 June 2012 by Judge Abraham P. Jones in Wake County Superior Court. Heard in the Court of Appeals 25 April 2013.

Attorney General Roy Cooper, by Assistant Attorney General Tiffany Y. Lucas, for the State.

James W. Carter for defendant-appellant.

GEER, Judge.

Defendant Thomas Everette, Jr. appeals from the trial court's judgment revoking his probation and activating his sentence for the offense of obtaining property by false pretenses. We hold that the court acted under a misapprehension of law when it concluded that it had no discretion whether to revoke defendant's probation under the circumstances. We, therefore, vacate the judgment activating defendant's sentence

and remand to the trial court for a new hearing on the probation violation report.

Facts

On or about 6 July 2010, defendant was indicted in Edgecombe County for one count of attempting to obtain property by false pretenses and one count of obtaining property by false pretenses in file number 10 CRS 51643. On 15 September 2010, defendant pled guilty in Edgecombe County to one count of obtaining property by false pretenses pursuant to a plea agreement that included dismissing the charge of attempted obtaining property by false pretenses in file number 10 CRS 51643. Also pursuant to the agreement, the State dismissed two counts of larceny of chose in action in file number 09 CRS 51917, three counts of obtaining property by false pretenses in 09 CRS 51918, and one count of misdemeanor larceny in file number 10 CRS 52100.

On 15 September 2010, the trial court sentenced defendant to a presumptive-range term of 10 to 12 months imprisonment, but suspended the sentence and placed defendant on 24 months supervised probation. The court imposed as a special condition of probation, among others, that defendant "NOT VIOLATE ANY LAWS OF THE STATE OF NC DURING THE PERIOD OF PROBATION."

On 2 September 2011, a probation violation report was filed alleging that defendant willfully violated his probation by: (1) failing to pay court costs, with an outstanding balance of $1,109.00; (2) failing to pay probation supervision fees, with a current balance due of $480.00; (3) committing criminal offenses while on probation because defendant was charged with misdemeanor first degree criminal trespass and misdemeanor breaking and entering, each allegedly occurring in January 2011; and (4) committing criminal offenses while on probation because defendant had been charged with felony forgery of deeds or wills, allegedly occurring in December 2010, felony breaking and entering, allegedly occurring in April 2011, and felony forgery of an instrument, allegedly occurring in August 2011. The first hearing date on the violation report was set for 19 September 2011.

Defendant's case was apparently continued many times, from an initial hearing on 19 September 2011 until the final hearing on 13 June 2012. At the 13 June 2012 hearing, defendant admitted that he had failed to pay court costs and probation supervision fees, but disputed the amount owed and denied that those failures were willful. Defendant also admitted to being convicted of two misdemeanor crimes while on probation. At the hearing, the court expressly stated that it would not revoke

defendant's probation based on defendant's failure to pay any monies owed and that it was "not proceeding" on the alleged violation that defendant was charged with three felony crimes while on probation. The court then found defendant in violation of his probation based on defendant's conviction of a misdemeanor crime, revoked defendant's probation, and activated defendant's sentence.

The trial court entered judgment the same day, 13 June 2012, activating defendant's suspended sentence of 10 to 12 months imprisonment. Unlike at the hearing, in the written judgment, using the form AOC-CR-607, Rev. 1/12, entitled "JUDGMENT AND COMMITMENT UPON REVOCATION OF PROBATION -- FELONY (STRUCTURED SENTENCING) (For Revocation Hearings On Or After Dec. 1, 2011)," the court found that defendant willfully violated the terms of his probation based on all four of the grounds alleged in the violation report and that each violation was, in and of itself, sufficient to revoke defendant's probation. The court further found, in a section of the form for findings "*required when revoking probation for violations occurring on or after December 1, 2011*," that it "may revoke defendant's probation . . . for the willful violation of the condition(s) that he/she not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-

1343(b)(3a), as set out above." Defendant's attorney appeared before the same judge the next day, 14 June 2012, and gave oral notice of appeal in open court.

Discussion

We must initially address this Court's jurisdiction over this appeal. Rule 4(a) of the Rules of Appellate Procedure provides, in part, that a criminal defendant may take appeal by (1) "giving oral notice of appeal at trial," or (2) "filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment . . . ."

In this case, at the hearing, the court rendered an oral ruling revoking defendant's probation, and then, the same day, entered a written judgment revoking defendant's probation and activating his sentence. Defendant did not give oral notice of appeal on the day of the revocation hearing and did not file a written notice of appeal. However, on the day after the revocation hearing, 14 June 2012, defendant's attorney appeared in open court before the same judge that revoked defendant's probation and gave oral notice of appeal.

Our Supreme Court has observed: "Rule 4 authorizes two modes of appeal for criminal cases. The Rule permits oral notice of appeal, but only if given at the time of trial or . .

. of the pretrial hearing. Otherwise, notice of appeal must be in writing and filed with the clerk of court." *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012) (internal citation omitted). This Court has, accordingly, held that oral notice of appeal was not effective where the defendant's attorney attempted to give oral notice in open court roughly one month after judgment was entered. *State v. Hammonds*, ___ N.C. App. ___, ___, 720 S.E.2d 820, 823 (2012) ("[D]efendant's counsel attempted to give oral notice of appeal to the trial court on 2 August 2003. Since that notice was not given 'at trial' as required by Rule 4, it . . . was inadequate." (quoting N.C.R. App. P. 4(a)(1))).

Here, defendant's oral notice of appeal, given one day after the hearing and after judgment was entered, was not effective under Rule 4. However, we elect to exercise our discretion under Rule 21 of the Rules of Appellate Procedure to deem defendant's appeal a petition for writ of certiorari and allow the petition to review the merits of defendant's arguments. *See State v. Carter*, ___ N.C. App. ___, ___, 718 S.E.2d 687, 698-99 (2011) (exercising discretion to treat defendant's appeal as petition for writ of certiorari and allowing the petition in order to review merits of appeal), *rev'd on other grounds*, ___ N.C. ___, 739 S.E.2d 548 (2013).

Defendant first argues that the trial court erred in revoking his probation and activating his sentence because the court erroneously believed it was without discretion, under the Justice Reinvestment Act, to impose any other sanction. The State contends that the record, when viewed in total, demonstrates that the trial court "considered all of the circumstances before determining that probation revocation was the appropriate sanction for the Defendant's violation of his probation terms," and the court, accordingly, properly exercised its discretion.

"When a trial court fails to exercise its discretion in the erroneous belief that it has no discretion as to the question presented, there is error. Where the error is prejudicial to a party, that party is entitled to have the question reconsidered and passed upon as a discretionary matter." *State v. McAvoy*, 331 N.C. 583, 591, 417 S.E.2d 489, 494 (1992).

In this case, the trial court explained at the hearing that it would only revoke defendant's probation, if at all, based on defendant's being convicted for two misdemeanor crimes while on probation. The court then observed that defendant was on probation for obtaining property by false pretenses and expressed concern about defendant then being convicted for the offense of breaking and entering: "Then he picks up the

conviction for something else involving whey [sic] call crimes of record or something. And so there's a pattern. And that speaks volumes to me." Defendant then admitted to being convicted of two misdemeanors while on probation.

Following his admission, defendant asserted several reasons that the court should not revoke defendant's probation based on the convictions, including: (1) defendant planned to file a motion for appropriate relief to challenge the misdemeanor convictions based on newly discovered evidence and believed the challenge would be successful; (2) defendant had already served nearly all of his 180-day sentence on the two misdemeanors and was not credited any time on that sentence towards his suspended sentence in this case such that, if his sentence was activated, defendant would serve nearly all of his 10 to 12 month sentence immediately following his 180-day sentence on the misdemeanors; (3) defendant had pending felonies in Wake County that were going to trial and his attorney needed his assistance in preparing his defense because it was a "huge financial case" involving real estate titles; (4) defendant was not a flight risk since he was from Edgecombe County and had a nine-year-old child and a 12-year-old child for whom he was responsible since their mother was unavailable to care for them; and (5) defendant did not appear to have a drug or alcohol problem.

The trial court then asked defense counsel what she recommended as a sanction for defendant's violation, and defense counsel requested the trial court continue defendant on probation and "put on more restrictions." The trial court again asked what sanction defense counsel recommended, and the following exchange occurred:

> THE COURT: What do I do as a sanction? Intensive? What do you want me to do?
>
> [DEFENSE COUNSEL]: Well, he's got -- yeah, I mean, I think you can increase, certainly.
>
> . . . .
>
> [DEFENSE COUNSEL]: A heightened sanction.

The court next asked the probation officer for a recommendation for a sanction:

> THE COURT: What do you all want to do with it?
>
> THE PROBATION OFFICER: Your Honor, my recommendation and the recommendation of the department that's appropriate in this issue is for revocation. *I would say under the Justice Reinvestment Act, there are no more sanctions that are at the Court's disposal.* Those are programs that I can use later on in the process, but, Your Honor, the --
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> THE COURT: Yeah, I got it. I think I got it.
>
> THE PROBATION OFFICER: Thank you, Your Honor.

> THE COURT: [Defense counsel], *I want to help out, but I can't do anything*.

(Emphasis added.)

The court then asked for the prosecutor's recommendation, and the prosecutor stated, "Judge, I would like for you to adopt the probation officer's recommendation so we can move on to the next case." The court ruled:

> THE COURT: All right. Based upon what I've heard -- thank you, [defense counsel]. I appreciate it. Well done.
>
> The Court finds him in violation of probation based on his conviction. Probation is hereby revoked. He's placed in custody of the North Carolina Department of Corrections for not more than 12 months with credit for time served.

Defendant contends that based on the statement of the probation officer and the lack of clarification by the State or defense counsel, it appears the court believed it had no choice but to activate defendant's sentence for the probation violation of committing a crime while on probation. However, defendant asserts, the court had discretion whether to revoke defendant's probation, and the changes to probation violation procedures under the Justice Reinvestment Act did not remove that discretion.

Although the parties have, in their briefs, focused on the effect of the Justice Reinvestment Act on a trial court's

discretion when revoking probation, we have determined that the Justice Reinvestment Act does not apply to the issues in this case. The provisions of the Justice Reinvestment Act affecting a trial court's discretion in revoking probation for certain probation violations apply only to probation violations occurring on or after 1 December 2011. *See State v. Hunnicutt*, ___ N.C. App. ___, ___, 740 S.E.2d 906, 910-11 (2013) (discussing effective dates of provisions of Justice Reinvestment Act). The probation violation of committing an offense while on probation occurs on the date the offense is committed. *See State v. Cannady*, 59 N.C. App. 212, 214-15, 296 S.E.2d 327, 328-29 (1982) (explaining that probation violation of committing offense while on probation "occurred" on date defendant committed offense constituting violation).

Here, the probation violation report stated that defendant was alleged to have committed the misdemeanor offenses, of which he was ultimately convicted, in January 2011. Therefore, the offenses constituting the violation occurred prior to 1 December 2011, and the provisions of the Justice Reinvestment Act affecting a court's discretion in revoking probation for certain violations are not applicable in this case.

For probation cases not controlled by the Justice Reinvestment Act, a trial court is entitled to activate a

probationer's sentence if the evidence presented at the hearing is such as to "'reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended.'" *Hunnicutt*, ___ N.C. App. at ___, 740 S.E.2d at 912-13 (quoting *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967)). Thus, "[w]e review a trial court's decision to revoke probation only for 'manifest abuse of discretion.'" *State v. Talbert*, ___ N.C. App. ___, ___, 727 S.E.2d 908, 910 (2012) (quoting *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000)).

The dispositive issue in this case is whether the trial court exercised its discretion in revoking defendant's probation. The court's answer to the probation officer's assertion that the "appropriate" sanction was revocation and, "under the Justice Reinvestment Act, there are no more sanctions that are at the Court's disposal" was, "Yeah, I got it. I think I got it." The court then stated to defense counsel, "I want to help out, but I can't do anything." These statements indicate the court believed it had no discretion. *See State v. Barrow*, 350 N.C. 640, 647, 517 S.E.2d 374, 378 (1999) (holding "trial court's statement that it 'doesn't have the ability to now present to you the transcription of what was said during the

course of the trial' suggests a failure to exercise discretion" in situation where court was required to exercise discretion).

Further, these statements occurred after the court's discussion with defense counsel regarding the possibility of imposing intensive probation or some other heightened sanction, indicating that, based on the probation officer's statements, the court no longer believed it had discretion to do anything but activate defendant's sentence. We, therefore, hold that the trial court erred by failing to exercise its discretion, when revoking defendant's probation based upon its misapprehension of law that it had no discretion to impose any sanction other than revocation for defendant's probation violations.

With respect to whether the error prejudiced defendant, defendant has the burden of showing "a reasonable possibility that, had the error in question not been committed, a different result would have been reached" at the hearing. N.C. Gen. Stat. § 15A-1443(a) (2011). In this case, defense counsel recommended lesser sanctions and gave several reasons why lesser sanctions were appropriate, and the trial court expressly stated to defense counsel: "I want to help out, but I can't do anything." Given the court's statement, we cannot conclude that the court's error in failing to exercise its discretion in revoking defendant's probation was harmless.

Since the error was prejudicial, defendant "is entitled to have the question reconsidered and passed upon as a discretionary matter." *McAvoy*, 331 N.C. at 591, 417 S.E.2d at 494. We take judicial notice of the fact that the trial judge in this case, Judge Abraham P. Jones, is no longer a sitting judge. As such, we vacate the judgment revoking defendant's probation and activating his sentence and remand for a new hearing on the probation violation report. *See Burns v. Riddle*, 265 N.C. 705, 706, 144 S.E.2d 847, 849 (1965) (vacating judgment and remanding to superior court for further hearing on matter appealed because trial court's judgment "indicate[d] clearly that the judge was proceeding under a misapprehension of the applicable law"). Given our holding, we need not address defendant's remaining arguments on appeal.

Vacated and remanded.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).