

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-1578
NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

STATE OF NORTH CAROLINA

v.

Stokes County
Nos. 10 CRS 50861, 50865

JENNIFER ROBINSON

Appeal by defendant from judgments entered 9 August 2012 by Judge A. Moses Massey in Stokes County Superior Court. Heard in the Court of Appeals 7 May 2013.

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

Charlotte Gail Blake, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Jennifer Robinson ("Defendant") appeals from a judgment revoking her probation and activating her sentences from prior convictions. She argues that the trial court erred: (1) by revoking her probation on the basis of a finding that she had "absconded from supervision" when the statute imposing such as a regular condition of probation was inapplicable to her case, and (2) by failing to apply the correct jail credit to her newly

activated sentences. After careful review, we vacate the order of the trial court and remand.

I. Factual and Procedural History

On 31 August 2010, Defendant pled guilty to one count of identity theft in case number 10 CRS 050865. On 1 September 2010, Defendant pled guilty to another count of identity theft and one count of misdemeanor larceny in case number 10 CRS 050861. Defendant was sentenced to 14-17 months imprisonment in both cases, with each sentence suspended for 36 months of supervised probation. The first term of supervised probation (for 10 CRS 050865) was to commence at the expiration of a sentence imposed in an unrelated matter. The second term (for 10 CRS 050861) was to begin after that.

On 10 February 2012, Defendant's probation officer filed probation violation reports in both 10 CRS 050861 and 10 CRS 050865, alleging that Defendant: (1) had been away from her residence during her curfew time on seven occasions, (2) had failed to make her whereabouts known to her probation officer, and (3) had violated the terms of her probation by failing to make her whereabouts known. After a hearing on 29 February 2012, the trial court found Defendant had violated the conditions of her probation in both cases, and ordered Defendant

to serve a 90 day period of confinement in response to violation ("CRV") pursuant to N.C. Gen. Stat. § 15A-1344(d2).

On 7 June 2012, Defendant's probation officer again filed a violation report, alleging that Defendant had tested positive for cocaine and was not home during specified curfew hours. Only case number 10 CRS 050865 was listed on the report. On 6 July 2012, the probation officer amended this report to indicate that Defendant had not been seen since 20 June 2012. On 1 August 2012, Defendant's probation officer filed another violation report in case number 10 CRS 050861 stating that Defendant's whereabouts were unknown and that she had tested positive for cocaine. On 9 August 2012, Judge Massey ordered Defendant's probation be revoked "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 alleged in the violation reports. The sentences in each case were to run consecutively. Defendant was given 29 days of jail credit in 10 CRS 050861 and 91 days credit in 10 CRS 050865.

II. Jurisdiction

Ordinarily an appeal to this Court lies of right pursuant to N.C. Gen. Stat. §7A-27(b) following revocation of a

defendant's probation and activation of his or her sentence. See N.C. Gen. Stat. § 15A-1347 (2011) ("When a superior court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, either in the first instance or upon a de novo hearing after appeal from a district court, [a] defendant may appeal under [N.C. Gen. Stat. § 7A-27]."). However, Defendant failed to give proper notice of appeal in this case, as Defendant's trial counsel did not give oral notice of appeal following the revocation hearing, but rather at another session of superior court on 20 August 2012, eleven days after the hearing. See N.C. R. App. P. 4(a) (noting that a criminal defendant may take appeal by "(1) giving oral notice of appeal at trial, or (2) filing notice of appeal . . . within fourteen days after entry of the judgment."). Defendant's appellate counsel, aware of this defective notice, filed a petition for writ of certiorari seeking review of Defendant's case on 8 February 2013, which was referred to this panel for consideration on 25 February 2013.

"The writ of certiorari may be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action" N.C. R.

App. P. 21(a)(1). "Appropriate circumstances" may include when a defendant's right to appeal has been lost because of a failure of his or her trial counsel to give proper notice of appeal. See *State v. Hammonds*, __ N.C. App. __, __, 720 S.E.2d 820, 823 (2012) (granting certiorari when it was "readily apparent" that the defendant lost his right to appeal "through no fault of his own, but rather as a result of sloppy drafting of counsel" and because not issuing a writ of certiorari would have been "manifestly unjust").

As the State acknowledges, the decision to grant a petition for writ of certiorari rests soundly within this Court's discretion. In the instant case, Defendant lost her right to appeal through no fault of her own, and had trial counsel filed written notice of appeal on 20 August 2011, that notice would have been timely. Furthermore, the defective notice of appeal has not impacted the State's ability to participate in this case and fully brief the issues presented. Accordingly, we grant Defendant's petition and consider the merits of her appeal.

III. Analysis

Defendant contends that the trial court erred by activating her sentences and by failing to apply to those sentences proper credit for her previous period of confinement. Specifically,

she argues that the trial court lacked statutory authority to revoke her supervised probation, and that Defendant "should have been credited with her 90 day CRV in both of her probationary sentences."

Defendant first argues that the provision of the North Carolina Justice Reinvestment Act of 2011 ("JRA") that first established "absconding by avoiding supervision" as a regular condition of probation applies only to probationers whose offenses were committed on or after 1 December 2011. Therefore, Defendant argues, the trial court could not revoke her probation on that basis, as she was on probation for offenses committed before 1 December 2011.

Alleged errors in statutory interpretation are errors of law; thus our standard of review for this question is *de novo*. *State v. Skipper*, ___ N.C. App. ___, ___, 715 S.E.2d 271, 272 (2011). Furthermore, "[i]t is well established that 'when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial.'" *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (quoting *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985)).

The enactment of the JRA amended our probation statutes in two important respects. First, for probation violations occurring on or after 1 December 2011, the JRA limited trial courts' authority to revoke probation to only those circumstances in which the probationer: (1) commits a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds by willfully avoiding supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two prior CRVs under N.C. Gen. Stat. § 15A-1344(d2). See N.C. Gen. Stat. § 15A-1344(a) (2011). For all other probation violations, the JRA authorizes courts to (1) alter the terms of probation pursuant to N.C. Gen. Stat. § 15A-1344(a) or (2) impose a CRV as outlined in N.C. Gen. Stat. § 15A-1344(d2), but the trial court may not revoke probation. *Id.*

Additionally, "the JRA made the following a regular condition of probation: 'Not to abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer.'" *State v. Hunnicutt*, __ N.C. App. __, __, 740 S.E.2d 906, 910 (2013) (quoting N.C. Gen. Stat. § 15A-1343(b)(3a)).

The original effective date for the provision granting the trial court authority to revoke probation for "absconding" was 1

December 2011, and stated that it applied to "probation violations occurring on or after that date." See 2011 N.C. Sess. Laws 192, Part IV, sec. 4.(d). However, the effective date of the provision allowing automatic revocation for absconding was changed by Session Law 2011-412. See 2011 N.C. Sess. Laws 412, Part II, sec. 2.5. The provision as amended kept the effective date of 1 December 2011, but clarified that it "applie[d] [only] to *offenses* committed on or after that date." *Id.* (emphasis added). Thus, as this Court's recent opinion in *State v. Nolen* confirms, defendants on probation for offenses committed before 1 December 2011 may not have their probation revoked on the basis of an alleged violation of Section 15A-1343(3a)'s absconding provision, because that condition was not in existence at the time those defendants were placed on probation. See *State v. Nolen*, __ N.C. App. __, 743 S.E.2d 729 (2013).

The trial court activated Defendant's sentences in this case upon a finding that she willfully violated probation, and that the revocation of probation was authorized "for the willful violation of the condition(s) that he/she not commit any criminal offense . . . or abscond from supervision . . . as set out above." The facts of this case are essentially identical to

the facts of *Nolen*, and that precedent controls. See *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Although the violation report noted that Defendant tested positive for cocaine, a controlled substance, the State neither alleges nor argued at the hearing that Defendant "commit[ted] a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1)" such that revocation would be proper pursuant to N.C. Gen. Stat. § 15A-1344(a). The trial court also explicitly stated in the revocation hearing that it was activating Defendant's sentence "because [she] absconded supervision."

Accordingly, the trial court erred in revoking Defendant's probation. We therefore vacate the judgment of the trial court and remand for further proceedings consistent with this opinion. Consequently, we need not address Defendant's arguments related to the application of prior jail credit to the vacated sentences.

VACATED and REMANDED.

Judges MCGEE and STEPHENS concur.

Report per Rule 30(e).