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NO. COA12-408  
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STATE OF NORTH CAROLINA

v.

Moore County  
No. 10 CRS 52458

ROGER JOHN OGBURN

Appeal by defendant from judgment entered 16 September 2011 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 27 September 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Stephanie A. Brennan, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defenders Jon H. Hunt and Benjamin Dowling-Sendor, for defendant appellant.*

McCULLOUGH, Judge.

Roger John Ogburn ("defendant") appeals from the trial court's judgment imposing a community punishment prohibiting him from operating a motor vehicle in the State of North Carolina for a period of 30 days and granting his probation officer the discretion to allow him to operate a motor vehicle for the remainder of his probationary period. For the following

reasons, we vacate defendant's judgment and remand for resentencing consistent with this opinion.

### I. Background

On 27 November 2010, defendant was arrested and charged with assault with a deadly weapon by using his vehicle to repeatedly force the prosecuting witness into the median of a highway and attempting to strike the prosecuting witness's parked vehicle with his vehicle while she was calling 911. Defendant was tried and convicted in Moore County District Court on 21 April 2011. Defendant appealed from the district court judgment to the superior court.

On 16 September 2011, a unanimous jury found defendant guilty of the assault with a deadly weapon charge. The trial court entered judgment on the verdict and sentenced defendant as a prior record level II offender to 75 days' imprisonment. The trial court suspended defendant's sentence and imposed a community punishment of 24 months' supervised probation. As a special condition of probation, the trial court ordered that "defendant shall not operate a motor vehicle in North Carolina for 30 days and thereafter may operate a motor vehicle in North Carolina for the balance of the probationary period only with the permission of the probation officer[.]" Defendant filed

written notice of appeal from the trial court's judgment on 19 September 2011.

II. Revocation of Driving Privileges as Condition of Probation

Defendant's only argument on appeal is that the trial court erred in granting full discretionary power to his probation officer to revoke his driving privileges as a special condition of probation. N.C. Gen. Stat. § 15A-1343(a) (2011) authorizes the trial court to "impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." *Id.* Specifically, N.C. Gen. Stat. § 15A-1343(b1)(4) authorizes the trial court to impose a special condition of probation requiring the defendant to "[s]urrender his or her driver's license to the clerk of superior court, and not operate a motor vehicle *for a period specified by the court.*" *Id.* (emphasis added). Defendant contends that, although N.C. Gen. Stat. § 15A-1343(b1)(4) allows the trial court to suspend his driving privileges as a special condition of probation, the statute requires the trial court to judicially determine the length of that suspension. Defendant contends that because the statute at issue plainly requires "the court" to specify the period during which the defendant's driving privileges are suspended, the trial court cannot

delegate that authority to the probation officer. Therefore, defendant contends the trial court erred in allowing his probation officer to determine the length of his driving suspension following the 30-day period. We agree.

Defendant's argument presents a question of statutory interpretation. In *State v. Davis*, 364 N.C. 297, 698 S.E.2d 65 (2010), our Supreme Court reiterated the cardinal rules of statutory interpretation:

The intent of the Legislature controls the interpretation of a statute. When a statute is unambiguous, this Court will give effect to the plain meaning of the words without resorting to judicial construction. [C]ourts must give [an unambiguous] statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

*Id.* at 302, 698 S.E.2d at 68 (alterations in original) (internal quotation marks and citations omitted). Further, our Courts have repeatedly noted that "[c]riminal statutes must be strictly construed." *State v. Cleary*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 712 S.E.2d 722, 726 (2011) (quoting *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998)).

The statute at issue in the present case, N.C. Gen. Stat. § 15A-1343, details the conditions of probation which may be imposed when a defendant receives a suspended sentence. The

numerous provisions of this statute often differentiate between obligations of "the court" and those of the "probation officer." For example, as a regular condition of probation, a defendant must not leave his county of residence or the State of North Carolina "unless granted written permission to leave by *the court or his probation officer.*" *Id.* § 15A-1343(b)(2) (emphasis added). Similarly, a defendant must "[r]eport as directed by *the court or his probation officer[.]*" *Id.* § 15A-1343(b)(3) (emphasis added). The defendant must also "[s]atisfy child support and other family obligations as required by *the court[,]*" and he cannot possess a firearm "without the written permission of *the court.*" *Id.* § 15A-1343(b)(4), (5) (emphasis added). Thus, the statute plainly differentiates between "the court" and the "probation officer."

Here, the special condition of probation imposed on defendant by the trial court plainly states that defendant shall not "operate a motor vehicle for a period specified by *the court.*" *Id.* § 15A-1343(b1)(4) (emphasis added). The Legislature did not state the period could be specified by the court or the probation officer. Thus, given the plain and unambiguous statutory language and considering the statute as a whole, we must construe this provision as requiring the court to

definitively determine the period during which defendant's driving privileges shall be suspended. This interpretation is reinforced by the fact that under N.C. Gen. Stat. § 15A-1343.2(e), the Legislature provided for the delegation of certain authority by the court to the probation officer when the defendant has been sentenced to a community punishment. Notably, none of these provisions allow for the trial court to delegate authority to the probation officer with respect to a defendant's driving privileges. Thus, we hold the plain meaning of the statutory provision at issue here requires the trial court to specify a definite period during which defendant's driving privileges shall be suspended, and such authority cannot be delegated to defendant's probation officer.

In so holding, we are persuaded by the Third Circuit's reasoning in *United States v. Pruden*, 398 F.3d 241 (3d Cir. 2005):

Probation officers have broad statutory authority to advise and supervise probationers, and to perform any other duty that the court may designate. But the breadth of these powers is limited by the probation officer's status as a nonjudicial officer. The most important limitation is that a probation officer may not decide the nature or extent of the punishment imposed upon a probationer.

This limitation extends not only to the

length of a prison term imposed, but also to the conditions of probation or supervised release.

*Id.* at 250 (internal quotation marks and citations omitted). In addition, the Fourth Circuit, in considering a statute requiring the "court" to fix the terms of restitution and to determine the amount and timing of fine payments, likewise construed the language as prohibiting the court from delegating that determination to a defendant's probation officer. *United States v. Miller*, 77 F.3d 71, 78 (4th Cir. 1996) ("Like restitution, the statutory duty imposed upon district courts to fix the terms of a fine must be read as exclusive because the imposition of a sentence, including the terms of probation or supervised release, is a core judicial function.").

Although we are not bound by federal court decisions, we nonetheless find *Pruden* and *Miller* persuasive. Indeed, the reasoning in *Pruden* and *Miller* is consistent with our Supreme Court's holdings that "[t]he functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law[,]” *Jernigan v. State*, 279 N.C. 556, 563-64, 184 S.E.2d 259, 265

(1971), and that "[j]udicial power cannot be delegated." *State v. Jefferson*, 66 N.C. 309, 313 (1872).

In the present case, the trial court is vested with the statutory authority to judicially determine the length of the suspension of defendant's driving privileges as a special condition of probation. Such judicial authority cannot be delegated to the probation officer, according to the plain language of the statute. Therefore, we must vacate that portion of the trial court's order allowing the probation officer to determine when defendant may operate a motor vehicle in this State following the initial 30-day suspension period. We remand to the trial court for entry of a specific period of time during which defendant's driving privileges shall be suspended during the length of his probation.

Furthermore, we note that although neither defendant nor the State have raised the issue in their brief, it appears from the record that the length of defendant's probation in this case exceeds the statutorily prescribed maximum. Here, defendant was sentenced for an A1 misdemeanor to a community punishment, and according to the judgment form, the trial court made no finding that a longer period of probation than that prescribed by statute was necessary. Under N.C. Gen. Stat. § 15A-



1343.2(d)(1), "[f]or misdemeanants sentenced to community punishment," the original period of probation "shall" be "not less than six nor more than 18 months[.]" *Id.* The judgment form in the present case indicates defendant's sentence is a community punishment. Therefore, his probationary period may not exceed 18 months, absent a specific finding by the trial court that a longer probationary period is necessary. Therefore, we must likewise vacate that portion of defendant's probation exceeding the 18-month statutorily prescribed maximum.

Vacated and remanded for resentencing.

Judges HUNTER, JR., (Robert N.), and ERVIN concur.

Report per Rule 30(e).