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NO. COA13-415  
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v.

Wake County  
No. 11 CRS 214299

AYREAL ROBINSON

Appeal by defendant from order entered 16 July 2012 by Judge Robert F. Johnson in Wake County Superior Court. Heard in the Court of Appeals 26 September 2013.

*Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt, for defendant.*

HUNTER, Robert C., Judge.

Defendant appeals the order issued 16 July 2012 by Judge Robert F. Johnson in Wake County Superior Court dismissing defendant's appeal from a judgment entered in District Court imposing a 90-day confinement in response to violation ("CRV"). On appeal, defendant argues that the trial court erred in dismissing her appeal because the District Court's imposition of

the CRV was the functional equivalent to a revocation of probation which is appealable pursuant to N.C. Gen. Stat. § 15A-1347.

Based on this Court's decision in *State v. Romero*, \_\_\_ N.C. App. \_\_\_, 745 S.E.2d 364 (2013), we affirm the Superior Court's order.

### **Facts**

On 23 November 2011, defendant pled guilty to four counts of misdemeanor larceny in District Court. The trial court entered two consolidated judgments upon her plea: (1) a judgment imposing a 45-day active sentence for two of the larceny convictions, with defendant given credit for 20 days spent in confinement; and (2) a judgment imposing a consecutive sentence of 120 days imprisonment. The second judgment was suspended, and defendant was placed on supervised probation for 18 months to be served after her sentence for the first two convictions. Defendant served the full amount of her sentence for the first judgment, 25 days, in jail.

On 12 March 2012, defendant's probation officer filed a violation report alleging she had violated six conditions of her probation. At a hearing held 24 April 2012 before Judge James Fullwood in Wake County District Court, defendant admitted that

she had willfully violated the terms and conditions of her probation alleged in the report. Judge Fullwood imposed a 90-day CRV pursuant to N.C. Gen. Stat. § 15A-1344(d2) with 20 days of credit. Defendant filed a notice of appeal to Superior Court that same day.

The matter came on for hearing on 16 July 2012 before Judge Robert F. Johnson in Wake County Superior Court. After a lengthy discussion on whether defendant had the right to appeal the District Court's judgment, the parties took a break. During the recess, the parties mutually agreed to the imposition of a 30-day CRV and to terminate probation unsuccessfully at the completion of the active time. In exchange, defendant agreed to waive her right to appeal. The matter was remanded back to District Court. The hearing in District Court after remand was not recorded. On 3 August 2012, another hearing was held in Superior Court before Judge Johnson. On remand, the District Court had determined that it could not, as a matter of law, impose a 30-day CRV and terminate probation unsuccessfully. Consequently, the 24 April 2012 90-day CRV remained effective.<sup>1</sup>

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<sup>1</sup> After the 3 August hearing, defendant filed a Motion for Appropriate Relief seeking correction of a clerical error in Judge Fullwood's judgment. Judge Fullwood granted the motion and issued a new judgment dated 20 November 2012, *nunc pro tunc* to 24 April 2012. On the November judgment, the only change

Defendant moved to rescind the remand order because it was "conditional" on effectuating the parties' agreement they reached at the earlier July hearing. While defendant argued that she had a right to a *de novo* hearing, the Superior Court concluded that entry of the 90-day CRV was a modification of the original probation judgment, not a revocation. Therefore, defendant had no right to appeal under N.C. Gen. Stat. § 15A-1347, and the Superior Court dismissed her appeal. Defendant appealed that order to this Court.

#### **Argument**

The sole issue on appeal is whether defendant had the right to appeal the imposition of the 90-day CRV to Superior Court. Based on this Court's recent decision in *Romero*, we affirm the Superior Court's order dismissing her appeal from District Court.

"In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002). Pursuant to N.C. Gen. Stat. § 15A-1347 (2011), "[w]hen a district court judge, as a result of a finding of a violation

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Judge Fullwood made was to add the following: "[t]erminate probation unsuccessful upon completion of active 90 day CRV. (Negotiated - State and Deft.)."

of probation, activates a sentence or imposes special probation, the defendant may appeal to the superior court for a de novo revocation hearing." This Court has interpreted this statute and concluded that a defendant does not have a right to appeal from an order modifying the terms of his probation where the sentence "was neither activated nor was it modified to 'special probation.'" *State v. Edgeron*, 164 N.C. App. 712, 714, 596 S.E.2d 351, 353 (2004). Defendant contends that because the District Court order imposing the CRV "had the same practical and legal effect as a revocation(,)" the CRV constituted an activation of her sentence and is appealable pursuant to N.C. Gen. Stat. § 15A-1347. However, this Court has recently addressed the issue of whether a CRV is appealable under N.C. Gen. Stat. § 15A-1347 and concluded that a defendant has no statutory right to appeal from a trial court's imposition of a CRV. *Romero*, \_\_\_ N.C. App. at \_\_\_, 745 S.E.2d at 366. Specifically, the *Romero* Court determined that "the General Assembly did not intend to provide for a right to appeal under section 15A-1347 upon the imposition of confinement unless the confinement was an activation of the defendant's sentence resulting from a 'revocation of probation' or the confinement was part of the imposition of special probation." *Id.* at \_\_\_,

745 S.E.2d at 366 (emphasis in original). Based on the plain language of section 15A-1344(d2), the Court concluded that a "CRV in and of itself is *not* to be considered a revocation of probation" since a trial court may not revoke probation unless, among other reasons, a defendant has received two CRVs. *Id.* (emphasis in original). Moreover, given that the language allowing for the imposition of a CRV is in a separate subsection than that providing for the imposition of special probation, the Court determined that a CRV does not constitute a special probation. *Id.* at \_\_, 745 S.E.2d at 366-67.

Thus, pursuant to *Romero*, defendant has no statutory right to appeal the District Court's judgment imposing the CRV to Superior Court because it does not constitute a revocation of probation nor is it an imposition of a special probation. Therefore, the Superior Court properly dismissed defendant's appeal, and we affirm the Superior Court's order.<sup>2</sup>

### **Conclusion**

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<sup>2</sup> We note that the *Romero* Court, in a footnote, explicitly declined to address whether a CRV that imposes a sentence greater than the maximum imposed sentence constitutes a *de facto* revocation which would "activate" a defendant's sentence and afford him the right to appeal. *Romero*, \_\_ N.C. App. at \_\_, 745 S.E.2d at 366, n.1. However, defendant's CRV would not be considered a *de facto* revocation given that the time imposed in defendant's CRV, 90 days with 20 days of credit, does not exceed the maximum sentence imposed in the second judgment for two of her larceny convictions, 120 days.

Based on the Court's decision in *Romero*, we affirm the Superior Court order dismissing defendant's appeal from the District Court judgment imposing a 90-day CRV.

AFFIRMED.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).