NO. COA13-418
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v. Pitt County
Nos. 08 CRS 50587, 56245

RASHAWN CARL LEWIS

Appeal by defendant from judgments entered 10 December 2012 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 25 September 2013.

Attorney General Roy Cooper, by Associate Attorney General Adrian Dellinger, for the State.

Gerding Blass, PLLC, by Danielle Blass, for defendant-appellant.

CALABRIA, Judge.

Rashawn Carl Lewis ("defendant") appeals from judgments revoking his probation and activating his sentences. Defendant also submitted to this Court a Motion for Appropriate Relief pursuant to N.C. Gen. Stat. § 15A-1415 (b)(8) (2011) and N.C. Gen. Stat. § 15A-1418 (2011). We affirm the trial court's

judgments activating defendant's sentences, and grant defendant's Motion for Appropriate Relief ("MAR").

I. Background

On 2 December 2008, defendant entered *Alford* pleas to two counts of felony accessory after the fact to robbery with a dangerous weapon ("accessory after the fact"), one count of misdemeanor assault inflicting serious injury, and one count of misdemeanor possession of stolen goods. Judgment was continued on those charges until 6 November 2009, when the trial court sentenced defendant to two consecutive twenty-four to thirty-eight month sentences for the accessory after the fact offenses. Defendant was also sentenced to two forty-five day terms for the misdemeanor offenses, to run consecutive to the accessory after the fact sentences. The trial court suspended defendant's sentences and placed him on supervised probation for thirty-six months.[1]

In July 2010, the trial court modified defendant's probation, extending the term by four months on the accessory after the fact offenses and the possession of stolen goods

[1] We note that the Justice Reinvestment Act of 2011 ("JRA"), 2011 N.C. Sess. Laws 2011-192, amended the statutes governing probation revocation. The JRA came into effect 1 December 2011. Since defendant's offenses and original judgment occurred prior to that date, the JRA does not apply in this case.

offense. The court dismissed the misdemeanor assault sentence because defendant had acquired credit for time already served in custody.

Defendant violated his remaining probationary sentences in May 2011. The trial court subsequently modified defendant's probation a second time to require completion of a Treatment Accountability for Safer Communities ("TASC") assessment and an eleven day active sentence in the custody of the Pitt County Sheriff.

Defendant again violated his probation, and his probation officer filed violation reports on 25 April 2012. At a hearing on 10 December 2012, defendant admitted his violations. The trial court found that defendant had willfully violated his probation and activated all three sentences. Defendant appeals.

II. Abuse of Discretion

Defendant argues the trial court abused its discretion in not reducing defendant's sentences for the accessory after the fact offenses pursuant to N.C. Gen. Stat. § 15A-1344 (d) and (d1). We disagree.

In a probation revocation hearing, the evidence must "reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid

condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation omitted). "The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion." *Id.* (citation omitted). An abuse of discretion occurs only "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. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation omitted).

If a defendant violates a condition of probation before the expiration or termination of his probation, the trial court may elect to reduce the defendant's sentence prior to activation. N.C. Gen. Stat. § 15A-1344 (d) (2011). "If the court elects to reduce the sentence of imprisonment for a felony, it shall not deviate from the range of minimum durations established . . . for the class of offense and prior record level used in determining the initial sentence." N.C. Gen. Stat. § 15A-1344 (d1) (2011).

In the instant case, defendant admitted to the violations listed in the 25 April 2012 reports and did not present any

competent evidence showing his inability to comply with the conditions of his probation. While the record indicates that defendant's attorney did request that the trial court "do something less than giving him the full amount of time [sic]," the language of N.C. Gen. Stat. § 15A-1344 (d) is discretionary, and the trial court was not required to hold a resentencing hearing upon counsel's request. Defendant pled guilty to the initial accessory after the fact offenses and admitted to violating his probation. There is no evidence that the trial court's failure to hold a resentencing hearing was manifestly unsupported by reason or arbitrary. *Campbell*, 359 N.C. at 673, 617 S.E.2d at 19. Accordingly, we hold that the trial court did not abuse its discretion in failing to hold a resentencing hearing pursuant to N.C. Gen. Stat. § 15A-1344 (d).

III. Jurisdiction

Defendant also argues that the trial court lacked jurisdiction to revoke defendant's probation for the remaining misdemeanor offense because the original probation sentence was longer than permissible under N.C. Gen. Stat. §15A-1343.2(d). Specifically, defendant argues that the trial court did not make findings regarding the necessity of extending defendant's probation, and defendant's probation terminated before May 2012.

We disagree.

N.C. Gen. Stat. § 15A-1343.2 (d) (2011) provides that "[u]nless the court makes specific findings that longer or shorter periods of probation are necessary," a misdemeanant sentenced to community punishment shall be on probation "not less than six nor more than 18 months." "If the court finds at the time of sentencing that a longer period of probation is necessary, that period may not exceed a maximum of five years[.]" N.C. Gen. Stat. § 15A-1343.2 (d) (2011).

An appeal from the trial court's activation of a suspended sentence for a probation violation may not attack the underlying sentence itself. *State v. Holmes*, 361 N.C. 410, 413, 646 S.E.2d 353, 355 (2007). If the probationer fails to appeal from the original judgment, he waives his right to appeal from that judgment, and the sentence becomes final. *Id.* *See State v. Rush*, 158 N.C. App. 738, 741, 582 S.E.2d 37, 39 (2003) (defendant's failure to appeal from the original judgment constituted a waiver of any challenge to the judgment, and defendant could not attack it in the appeal of a subsequent order activating sentence); *see State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971) ("Questioning the validity of the original judgment where sentence was suspended on appeal

from an order activating the sentence is . . . an impermissible collateral attack.").

In the instant case, defendant contends that because his suspended sentence exceeded the statutory eighteen months, his probation had expired before the 10 December 2012 revocation hearing, and thus the trial court lacked jurisdiction to revoke his probation for the misdemeanor offense. However, a defendant's term of probation is the court's decision, and not the defendant's decision. The trial court imposed thirty-six months of probation. While defendant is correct that this exceeds the general statutory period of eighteen months, it is not so egregious as to exceed the statutory maximum of five years. N.C. Gen. Stat. § 15A-1343.2 (2011). Defendant's proper avenue to challenge the length of his probation would be to challenge the original judgment suspending his sentence, either through an appeal as a matter of right within fourteen days of the entry of judgment or to petition this Court by *writ of certiorari* if the right to appeal had been lost by failure to take timely action. *See* N.C. Gen. Stat. § 15A-1444 (2011); N.C.R. App. P. 4(a)(2); N.C.R. App. P. 21(a)(1); *Rush*, 158 N.C. App. at 740-41, 582 S.E.2d at 38-39. However, because defendant did not appeal the original judgment in a timely manner, he

waived his right to appeal from that judgment, and the sentence became final. *Holmes*, 361 N.C. at 413, 646 S.E.2d at 355 .

We hold that the trial court had jurisdiction over the matter at the 10 December 2012 hearing because the original probation term was binding on defendant and had not expired. *See Rush*, 158 N.C. App. at 741-42, 582 S.E.2d at 39 (noting that the defendant's failure to object to a modified probation order gave the court jurisdiction to revoke her probation).

IV. Motion for Appropriate Relief

Defendant argues in his MAR that the trial court erroneously sentenced him for two Class E felonies when he pled guilty to two Class F felonies. Defendant also argues the trial court erroneously ordered separate sentences for each misdemeanor offense rather than consolidating the misdemeanors into one of the felonies pursuant to the original plea agreement. We agree.

If a defendant makes a motion for appropriate relief more than ten days after the entry of judgment, then the defendant is limited to certain enumerated grounds on which he may base his motion. N.C. Gen. Stat. § 15A-1415 (b) (2011). Under these circumstances, the defendant may move for appropriate relief when "[t]he sentence imposed was unauthorized at the time

imposed, contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level was illegally imposed, or is otherwise invalid as a matter of law." N.C. Gen. Stat. § 15A-1415 (b)(8) (2011).

"Unless a different classification is expressly stated, [an accessory after the fact] shall be punished for an offense that is two classes lower than the felony the principal felon committed[.]" N.C. Gen. Stat. § 14-7 (2011). Robbery with a dangerous weapon is punishable as a Class D felony. N.C. Gen. Stat. § 14-87 (2011). Accordingly, accessory after the fact to robbery with a dangerous weapon is punishable as a Class F felony. *See* N.C. Gen. Stat. § 14-7 (2011).

In the instant case, the trial court erroneously sentenced defendant for the two accessory after the fact offenses as if those felonies were Class E felonies. However, the trial court should have sentenced defendant's accessory after the fact offenses two classes lower than the principle offense. N.C. Gen. Stat. § 14-7 (2011). Since the principle offense here was a Class D felony, defendant's accessory after the fact offenses were Class F felonies, not Class E felonies.

The State in its reply argues that defendant's Motion is an

impermissible collateral attack on the original sentence. In the instant case, however, defendant has moved for appropriate relief under one of the grounds expressly permitted by statute: that the judgment was not authorized by law. N.C. Gen. Stat. § 15A-1415 (b)(8) (2011). This argument has no merit.

The State also contends defendant's MAR should be denied because defendant was sentenced as a Class E felon according to the plea agreement. However, the State is not authorized by statute to impose a penalty greater than that which is authorized by law, even if theoretically agreed to by the defendant. N.C. Gen. Stat. § 15A-1021 (2011); N.C. Gen. Stat. § 15A-1023 (2011).

Defendant also moves to have his misdemeanor sentences consolidated with one of the felony charges pursuant to the plea agreement. We agree.

When the parties enter into a plea agreement in which the prosecutor does not agree to make a recommendation concerning sentencing, "[t]he judge must accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea." N.C. Gen. Stat. § 15A-1023 (c) (2011). In the instant case, the plea agreement expressly stated "[t]he 2 [sic] misdemeanor charges

will be consolidated into one of the accessory charges." The State presented a factual basis for the plea agreement, defendant's plea was the product of his informed choice, and the presiding judge signed the plea agreement as written. Accordingly, the trial court was bound to the terms of that agreement and the trial court should have consolidated the two misdemeanor charges for judgment. *See* N.C. Gen. Stat. § 15A-1023 (c) (2011).

V. Conclusion

For the foregoing reasons, we hold that the trial court properly revoked defendant's probation. However, we grant defendant's MAR and remand to the trial court to resentence defendant for the two Class F felony offenses and consolidate the remaining misdemeanor charge into one of the felony charges pursuant to the original plea agreement.

Remand for resentencing.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).