

NO. COA13-472

NORTH CAROLINA COURT OF APPEALS

Filed: 18 March 2014

STATE OF NORTH CAROLINA

v.

Wilkes County
Nos. 11 CRS 50057-61, 50065-67,
50499-506, 1078-1084

JOHN DERRICK McCULLOCH

Appeal by defendant from judgments entered 16 November 2012
by Judge R. Stuart Albright in Wilkes County Superior Court.
Heard in the Court of Appeals 10 October 2013.

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

Gerding Blass, PLLC, by Danielle Blass, for Defendant.

ERVIN, Judge.

Defendant John Derrick McCulloch appeals from judgments
revoking his probation and activating his suspended sentences
based on a determination that he had willfully violated the
terms and conditions of his probation without lawful excuse. On
appeal, Defendant argues that the trial court lacked the
authority to revoke his probation in certain of the cases which
are before us at this time on the grounds that the
jurisdictional prerequisites for taking that action had not been
satisfied. After careful consideration of Defendant's
challenges to the trial court's judgments in light of the record

and the applicable law, we conclude that certain of the trial court's probation revocation judgments should be reversed.

I. Factual Background

A. Wilkes County Judgments

On 7 January 2011, warrants for arrest were issued charging Defendant with eleven counts of identity theft and six counts of attempted identity theft. On 17 February 2011, warrants for arrest charging Defendant with five counts of felonious breaking or entering, one count of larceny of a firearm, three counts of felonious larceny, and two counts of injury to real property were issued. On 21 September 2011, properly executed informations charging Defendant with eight counts of conspiracy to commit identity theft, two counts of attempted identity theft, five counts of felonious breaking or entering, one count of larceny of a firearm, two counts of injury to real property, and four counts of felonious larceny were filed. On the same date, Defendant entered guilty pleas to eight counts of conspiracy to commit identity theft, two counts of attempted identity theft, five counts of felonious breaking and entering, one count of larceny of a firearm, four counts of felonious larceny, and two counts of injury to real property pursuant to a plea agreement which provided that, in return for Defendant's guilty pleas, the State would voluntarily dismiss nine counts of

identity theft, three counts of attempted identity theft, and one count of driving while license revoked and that Defendant would receive ten consecutive suspended sentences, be placed on intensive probation, and make restitution to the victims of his conduct in an amount to be determined at a later time. After accepting Defendant's guilty pleas, Judge Jeanie R. Houston entered judgments which, when viewed in their entirety, sentenced Defendant to ten consecutive terms of nine to eleven months imprisonment which were each suspended for 36 months on the condition that Defendant pay the costs, a \$250.00 fine, \$1,716.00 in restitution, and a \$937.50 attorney's fee; be placed on intensive probation; and comply with the usual terms and conditions of probation.

B. Ashe County Judgments

On 27 January 2011, a warrant for arrest charging Defendant with possession of a Schedule II controlled substance and possession of drug paraphernalia was issued. On 28 January 2011, a warrant for arrest charging Defendant with misdemeanor larceny was issued. On 18 February 2011, warrants for arrest charging Defendant with two counts of obtaining property by false pretenses were issued. On 3 March 2011, warrants for arrest charging Defendant with twelve counts of obtaining property by false pretenses were issued. On 12 June 2011, a

warrant for arrest charging Defendant with misdemeanor larceny was issued. On 22 September 2011, Defendant entered no contest pleas to fourteen counts of obtaining property by false pretenses, one count of felonious possession of a Schedule II controlled substance, one count of misdemeanor possession of a Schedule II controlled substance, two counts of misdemeanor larceny, two counts of writing a worthless check, two counts of possession of drug paraphernalia, and two counts of driving while license revoked pursuant to a plea agreement under which the State agreed to voluntarily dismiss nine counts of obtaining property by false pretenses and under which Defendant would receive seven consecutive suspended sentences, be placed on probation, and pay restitution. Based on Defendant's no contest pleas, Judge David V. Byrd entered judgments which, viewed in their entirety, sentenced Defendant to seven consecutive terms of eleven to fourteen months imprisonment that were each suspended for a period of thirty-six months on the condition that Defendant pay the costs, \$21,156.60 in restitution, and a \$1,125.60 attorney fee; be placed on supervised probation; and comply with the usual terms and conditions of probation.¹

¹In six of the seven Ashe County judgments, the only conviction upon which Defendant's sentence was based was for obtaining property by false pretenses. However, in the seventh Ashe County judgment, Judge Byrd consolidated nine convictions for obtaining property by false pretenses, two counts of

Defendant's probation in the Ashe County cases was transferred to Wilkes County.

C. Revocation of Defendant's Probation

On 16 November 2011, Defendant's probation officer filed violation reports requesting revocation of Defendant's probation in the ten Wilkes County and seven Ashe County cases on the grounds that Defendant had willfully failed to abide by his court-ordered curfew requirement, missed multiple appointments with his probation officer, and failed to make required monthly restitution and supervision fee payments. On 14 December 2011, Defendant's probation officer filed addenda to these violation reports alleging that Defendant had committed further violations of the terms and conditions of his probation by failing to abide by his curfew and leaving the jurisdiction of the court without permission.

A hearing concerning the allegations advanced in these violation reports was held before the trial court in Wilkes County Superior Court on 16 November 2012. At that hearing, Defendant admitted that he had willfully and without lawful excuse violated the terms and conditions of his probationary judgments and requested that he either be allowed to continue on

misdemeanor larceny, one count of possession of drug paraphernalia, and one count of driving while license revoked for judgment.

probation, or in the alternative, that the Wilkes County sentences be served concurrently with the Ashe County sentences, with this request being predicated on the theory that the two groups of cases were connected. Defendant's mother, Linda McCulloch, who was the alleged victim in certain of the underlying cases, attributed Defendant's unlawful conduct and failures to comply with the terms and conditions of his probationary judgments to problems stemming from drug addiction and requested the trial court to be lenient. At the conclusion of the revocation hearing, the trial court stated that, even though Defendant "ha[d] been given chance after chance after chance after chance," he had violated the terms and conditions of his probation when "the ink [was] not even dry on the judgment" and that the probationary process "didn't work for [Defendant] at all." As a result, the trial court entered judgments finding that Defendant had willfully violated the terms and conditions of his probationary judgments without lawful excuse and had absconded, that his probation should be revoked, and that each of his seventeen suspended sentences should be activated and served consecutively.² Defendant noted an appeal to this Court from the trial court's judgments.

²The judgment revoking the probationary sentence that Judge Byrd imposed based upon Defendant's consolidated Ashe County convictions for nine counts of obtaining property by false

II. Substantive Legal Analysis

The sole challenge to the trial court's judgments advanced in Defendant's brief is the assertion that the trial court lacked the authority to revoke his probation in the Ashe County cases. More specifically, Defendant contends that the trial court, which was sitting in Wilkes County Superior Court, lacked jurisdiction over the subject matter of the Ashe County cases as a result of the fact that the prerequisites for the revocation of a defendant's probation set out in N.C. Gen. Stat. § 7A-271(e) had not been satisfied. After carefully reviewing the record and the applicable law, we conclude that the trial court lacked jurisdiction to revoke Defendant's probation in the Ashe County felony cases.

A. Standard of Review

A trial court lacks the authority to decide a particular case in the absence of jurisdiction over the subject matter of that action. *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007) (citing *In re N.R.M.*, 165 N.C. App. 294, 297, 598 S.E.2d 147, 149 (2004)). "Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App.

pretenses, two counts of misdemeanor larceny, one count of possession of drug paraphernalia, and one count of driving while license was revoked was entered in Wilkes County File No. 11 CRS 1078.

666, 667, 353 S.E.2d 673, 675 (1987). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *State v. Gorman*, __ N.C. App. __, __, 727 S.E.2d 731, 733 (2012) (quoting *Allred v. Tucci*, 85 N.C. App. 138, 143, 354 S.E.2d 291, 295, *disc. review denied*, 320 N.C. 166, 358 S.E.2d 47 (1987)).

The extent to which "a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "[A]n appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review." *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008). As a result of the fact that "the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*," *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008), the fact that Defendant did not advance a particular argument before the trial court does not affect the extent to which we are required to evaluate its validity on

appeal. On the contrary, the issue of whether the trial court had jurisdiction over the subject matter of an action may be raised at any time during the proceedings, including on appeal, *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006), and on the court's own motion. *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 421, 248 S.E.2d 567, 571 (1978).

A judgment entered by a court which lacks jurisdiction is void. *Stroupe v. Stroupe*, 301 N.C. 656, 661, 273 S.E.2d 434, 438 (1981). "A void judgment is in legal effect no judgment." *In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (quoting *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956)). "[A void judgment] neither binds nor bars any one, and all proceedings founded upon it are worthless." *Id.* As a result, "[w]hen the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (citations omitted).

Although there is some authority from this Court to the effect that a defendant may not lodge a jurisdictional challenge to the original convictions in a probation revocation proceeding, *State v. Hunnicutt*, ___ N.C. App. ___, ___, 740 S.E.2d 906, 909 (2013); *State v. Long*, ___ N.C. App. ___, ___, 725 S.E.2d

71, 72, *disc. review denied*, 366 N.C. 227, 726 S.E.2d 836 (2012), a panel of this Court has recently held that, since those decisions are in conflict with earlier decisions of the Supreme Court, a “[d]efendant may, on appeal from revocation of probation, attack the jurisdiction of the trial court, either directly or collaterally.” *State v. Pennell*, __ N.C. App. __, __, 746 S.E.2d 431, 441, *stay granted*, __ N.C. __, 747 S.E.2d 247, *disc. review granted*, __ N.C. __, 748 S.E.2d 534 (2013). Although the Supreme Court has stayed our decision in *Pennell*, we find the logic set out in *Pennell* compelling and adopt it as our own. As a result, given that we have the authority to consider the validity of a jurisdictional challenge to the underlying convictions in reviewing a judgment revoking a defendant’s probation, we will examine on the merits the issue of whether the trial court lacked the authority to revoke Defendant’s probation in the Ashe County cases based on jurisdictional defects in the underlying Ashe County felony convictions.

B. Trial Court’s Jurisdiction to Revoke Probation

N.C. Gen. Stat. § 7A-271(e) provides that:

The superior court has exclusive jurisdiction over all hearings held pursuant to [N.C. Gen. Stat. §] 15A-1345(e) where the district court had accepted a defendant’s plea of guilty or no contest to a felony under the provisions of [N.C. Gen. Stat. §]

7A-272(c), except that the district court shall have jurisdiction to hear these matters with the consent of the State and the defendant.

N.C. Gen. Stat. § 7A-271(e). As a result of the fact that N.C. Gen. Stat. § 15A-1345(e) governs the conduct of proceedings convened to address allegations that a convicted criminal defendant's probation should be revoked and the fact that N.C. Gen. Stat. § 7A-272(c) allows pleas of guilty or no contest to Class H and Class I felonies to be entered and addressed in the district court in certain circumstances, the obvious effect of N.C. Gen. Stat. § 7A-271(e) is to give the superior court exclusive jurisdiction over probation revocation hearings arising from cases in which the district court accepted a defendant's plea of guilty or no contest pursuant to N.C. Gen. Stat. § 7A-272(c).

N.C. Gen. Stat. § 7A-272(c) provides that:

With the consent of the presiding district court judge, the prosecutor, and the defendant, the district court has jurisdiction to accept a defendant's plea of guilty or no contest to a Class H or I felony if:

- (1) The defendant is charged with a felony in an information filed pursuant to [N.C. Gen. Stat. §] 15A-644.1, the felony is pending in district court, and the defendant has not been indicted for the offense; or

- (2) The defendant has been indicted for a criminal offense but the defendant's case is transferred from superior court to district court pursuant to [N.C. Gen. Stat. §] 15A-1029.1.

Similarly, N.C. Gen. Stat. § 15A-644.1 provides that “[a] defendant who pleads guilty or no contest in district court pursuant to [N.C. Gen. Stat. §] 7A-272(c)(1) shall enter that plea to an information complying with [N.C. Gen. Stat. §] 15A-644(b),³ except it shall contain the name of the district court in which it is filed.” As a result, when read in conjunction with N.C. Gen. Stat. § 15A-644.1, N.C. Gen. Stat. § 7A-272(c) authorizes the acceptance of a plea of guilty or no contest to the commission of a felony offense in the District Court division in the event that the defendant’s case is still pending in the District Court division and an information alleging the commission of the felony offense is filed or the charges against the defendant have been transferred from the Superior Court division back to the District Court division pursuant to N.C. Gen. Stat. § 15A-1029.1.

³N.C. Gen. Stat. § 15A-644(b) provides that “[a]n information must contain everything required of an indictment . . . except that the accusation is that of the prosecutor and the provisions of [N.C. Gen. Stat. § 15A-644](a)(5) do not apply,” with the information being required to “contain or have attached the waiver of indictment pursuant to [N.C. Gen. Stat. §] 15A-642(c).”

The essential argument advanced in Defendant's brief is that compliance with N.C. Gen. Stat. § 7A-272(c) is a necessary prerequisite for the invocation of the trial court's jurisdiction to revoke a defendant's probation pursuant to N.C. Gen. Stat. § 7A-271(e). More specifically, Defendant contends that adequate compliance with the provisions of N.C. Gen. Stat. § 7A-272(c) is a necessary prerequisite to the exercise of the superior court's authority under N.C. Gen. Stat. § 7A-271(e). In light of that understanding, Defendant further contends that the fact that the felonies to which he pled no contest in Ashe County were charged by warrants for arrest rather than by information deprived the Ashe County District Court of the authority to accept Defendant's no contest pleas and, by extension, deprived the trial court of jurisdiction to revoke his probation in the Ashe County cases.

Although Defendant has described his challenge to the revocation of his probation in the Ashe County cases as directed toward the trial court's jurisdiction to revoke his probation rather than as a challenge to the validity of his convictions in the Ashe County cases in an effort to avoid having his claim barred on the basis of our pre-*Pennell* decisions holding that a defendant was not entitled to collaterally attack his convictions on jurisdictional grounds in response to an

allegation that he had violated the terms and conditions of his probation, the ultimate issue raised by his attack upon the revocation of his probation in the Ashe County cases is an assertion that the Ashe County District Court lacked the jurisdiction to accept his no contest pleas in the pending felony cases and enter the underlying probationary judgments because the absence of a valid information deprived it of the jurisdiction to do so. As a result, given our recent decision in *Pennell* and the jurisdictional nature of Defendant's challenge to the revocation of his probation in the Ashe County felony cases, we will focus the remainder of this opinion on the substance of Defendant's jurisdictional argument rather than upon the exact argument that he actually makes.

The only statutory provisions authorizing judges of the District Court division to accept guilty or no contest pleas in felony cases are N.C. Gen. Stat. § 7A-272(c) and related sections and subsections. As we have already noted, a judge of the District Court is authorized to enter judgment following a defendant's plea of guilty or no contest to the commission of a Class H or a Class I felony. N.C. Gen. Stat. § 7A-272(c). However, N.C. Gen. Stat. § 7A-272(c) clearly provides that, as a prerequisite for the entry of such a plea, a valid information must be filed in the event that the cases in question remain in

the District Court division or a valid order transferring the case from the Superior Court division to the District Court division must be entered pursuant to N.C. Gen. Stat. § 15A-1029.1 in the event that the cases in question are pending in the Superior Court division. As a result, since the only statutory provisions authorizing the acceptance of guilty or no contest pleas to felony offenses in the District Court division either assume or require the return of a bill of indictment or the filing of an information, since an indictment was never returned and an information was never filed in the Ashe County cases, and since "an act of the Court beyond [statutorily established] limits is in excess of its jurisdiction" in the event that the court's "jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations," *Gorman*, __ N.C. App. at __, 727 S.E.2d at 733, we conclude that the Ashe County District Court lacked the jurisdiction to accept Defendant's pleas and enter the underlying probationary judgments in the Ashe County felony cases.

The conclusion that we reach with respect to this jurisdictional issue is fully consistent with the basic legal principles governing the manner in which the trial divisions of

the General Court of Justice obtain jurisdiction over felony cases. "It is hornbook law that it is an essential of jurisdiction that a criminal offense should be sufficiently charged in a warrant or indictment." *State v. Stokes*, 274 N.C. 409, 411, 163 S.E.2d 770, 772 (1968) (citations omitted); see also *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966) (stating that "[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation,'" so that, "[i]n the absence of an accusation[,] the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity'") (quoting 42 C.J.S. *Indictments and Informations* § 1) (other citations omitted). "A court has no authority to accept a plea to a charge until it has properly acquired jurisdiction," with "[a] plea of guilty, standing alone, [being insufficient to] waive a jurisdictional defect." *State v. Brown*, 21 N.C. App. 87, 88, 202 S.E.2d 798, 798 (1974) (citing *Stokes*, 274 N.C. at 412, 163 S.E.2d at 772).

According to N.C. Const. art. I, § 22, "no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment," "[e]xcept in misdemeanor cases initiated in District Court," although "any person, when represented by counsel, may, under such regulations as the

General Assembly shall prescribe, waive indictment in noncapital cases." As a result, the General Assembly has enacted N.C. Gen. Stat. § 15A-923(a), which provides that "[t]he pleading in felony cases and misdemeanor cases initiated in the superior court division must be a bill of indictment, unless there is a waiver of the bill of indictment as provided in [N.C. Gen. Stat. §] 15A-642,"⁴ in which case "the pleading must be an information." As we have already noted, the General Assembly has ensured compliance with N.C. Const. art. I, § 22, in instances in which a guilty or no contest plea to a Class H or Class I felony is entered in the District Court division by requiring that such pleas be taken pursuant to either N.C. Gen. Stat. § 7A-272(c)(1), which requires the filing of an information, or N.C. Gen. Stat. § 7A-272(c)(2), which requires a transfer order entered pursuant to N.C. Gen. Stat. § 15A-1029.1 and assumes that a bill of indictment has been returned. As a result, since either a valid indictment or a valid information is necessary to permit the taking of a guilty plea to a Class H or Class I felony in the District Court division, since neither of the required charging instruments was ever returned or filed in this case, and since "neither a tendering of a guilty plea by

⁴According to N.C. Gen. Stat. § 15A-642(c), "[w]aiver of indictment must be in writing" "signed by the defendant and his attorney," and "be attached to or executed upon the bill of information."

a defendant, nor the tendering to the trial court of an unsigned waiver, could be considered sufficient waivers of a defendant's right to a formal indictment," *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (footnoted citations omitted), *disc. review improvidently granted*, 349 N.C. 289, 507 S.E.2d 38 (1998), we are compelled to conclude that the Ashe County District Court lacked the jurisdiction to accept Defendant's no contest pleas to the felony offenses that underlie the trial court's revocation orders, thereby rendering "all proceedings[, including the present probation revocation proceedings,] founded upon [them] worthless." *In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790; *see also Stroupe*, 301 N.C. at 662, 273 S.E.2d at 438 (stating that, "when [a judgment] appears to be void, it may and will be ignored everywhere, and treated as a mere nullity" (citation omitted)); *State v. Cassada*, 6 N.C. App. 629, 630-31, 170 S.E.2d 575, 576 (1969) (holding that, since the defendant had not been indicted for the offense of receiving stolen property, the acceptance of his plea of guilty was improper and the resulting judgment was a nullity). As a result, since Judge Byrd lacked jurisdiction over Defendant's no contest pleas in the Ashe County felony cases, the trial court lacked authority to revoke Defendant's probation in those cases.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by revoking Defendant's probation in the Ashe County felony cases. On the other hand, given that Judge Houston had jurisdiction to enter the Wilkes County judgments, that Judge Byrd had jurisdiction to sentence Defendant in the Ashe County misdemeanor cases, and that Defendant has not advanced any challenge to the revocation of his probation in either the Wilkes County cases or the Ashe County misdemeanor cases, we have no basis for overturning the probation revocation judgments relating to those cases. As a result, the Wilkes County probation revocation judgments should be, and hereby are, affirmed and the judgments revoking Defendant's probation in the Ashe County cases should be, and hereby are, vacated, with the exception of the probation revocation judgment entered in Wilkes County File No. 11 CRS 1078, which is affirmed in part, vacated in part, and remanded for further proceedings not inconsistent with this opinion in part.⁵

AFFIRMED IN PART; VACATED IN PART; AND REMANDED IN PART.

Judges ROBERT N. HUNTER, JR., and DAVIS concur.

⁵The specific issue to be addressed on remand in File No. 11 CRS 1078 is the impact of our decision that there is no defect in the portion of the judgment entered in that case relating to the revocation of Defendant's probation in the Ashe County misdemeanor cases which were consolidated for judgment with various Ashe County felony convictions.