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NO. COA14-596
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. Buncombe County
Nos. 12 CRS 908
12 CRS 57868-72

GREGORY SCOTT MESSER,
Defendant.

Appeal by defendant from judgments entered 23 January 2014 by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 20 October 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Durwin P. Jones, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

GEER, Judge.

Defendant Gregory Scott Messer appeals from judgments revoking his probation and activating suspended sentences he originally received more than a year earlier as a result of a plea agreement. Defendant's counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665

(1985). Defendant subsequently filed written arguments on his own behalf in which he primarily argued that the bills of information charging him with the crimes to which he pled guilty were fatally defective and, as a result, the trial court lacked jurisdiction to enter the original judgments for those crimes. However, because no appeal is pending with respect to those judgments, defendant may not collaterally attack them by challenging the jurisdiction of the trial court that entered them. We decline to address most of defendant's arguments and, therefore, affirm.

Facts

On 6 September 2012, defendant pled guilty to three counts of obtaining property by false pretenses, two counts of felony larceny, and one count of attempted identity theft. In accordance with a plea agreement, the trial court consolidated the charges into three judgments, sentenced defendant to three consecutive terms of 11 to 23 months imprisonment, suspended his terms of imprisonment, and placed him on supervised probation for 36 months. Defendant did not appeal those judgments.

On 15 January 2013, probation violation reports were filed alleging that defendant violated the conditions of his probation. On 4 April 2013, the trial court entered an order finding defendant in violation of his probation and imposed a

Confinement in Response to Violation ("CRV") for a period of 90 days pursuant to N.C. Gen. Stat. § 15A-1344(d2) (2013).

On 10 July 2013, probation reports were again filed alleging that defendant violated the conditions of his probation. The reports alleged that defendant: (1) absconded; (2) was in arrears on the monetary conditions of his probation; and (3) had failed to attend a required substance abuse assessment.

On 23 January 2014, the trial court held a probation violation hearing in Buncombe County Superior Court. Defendant admitted to all three alleged violations of his probation, and the trial court found that defendant willfully violated the terms of his probation. Accordingly, the trial court entered judgments revoking defendant's probation and activating his suspended sentences. Defendant timely appealed to this Court.

Discussion

Counsel appointed to represent defendant on appeal has represented to the Court that he has been unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asks that this Court conduct its own review of the record for possible prejudicial error. Defendant's appellate counsel has shown to the satisfaction of this Court that he has complied with the requirements of *Anders* and *Kinch*

by advising defendant of his right to file written arguments with this Court and providing him with the documents necessary for him to do so.

Defendant has in fact submitted written arguments on his own behalf with this Court. He does not specifically challenge the trial court's decision in revoking his probation, but, rather, contends that the bills of information originally charging him with larceny were fatally defective because they failed to allege essential elements of the offense. Defendant additionally argues that the bills of information were fatally defective because they failed to allege factors in aggravation, and, consequently, the trial court did not have jurisdiction to impose aggravated sentences.

"While it is true that a defendant may challenge the jurisdiction of a trial court, such challenge may be made in the appellate division only if and when the case is properly pending before the appellate division." *State v. Absher*, 329 N.C. 264, 265 n.1, 404 S.E.2d 848, 849 n.1 (1991) (per curiam). Accordingly, "a defendant may not challenge the [trial court's] jurisdiction over the original conviction[s] in an appeal from the order revoking his probation and activating his sentence." *State v. Pennell*, ___ N.C. ___, ___, 758 S.E.2d 383, 387 (2014). Here, defendant's attack on the original judgments constitutes

an impermissible collateral attack. See *id.* at ____, 758 S.E.2d at 387.

Defendant also claims that his trial and probation attorneys provided ineffective assistance of counsel by failing to challenge the defective bills of information. To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two prong test.

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984)).

The "proper procedure" to challenge the bills of information in this case would have been for counsel to file "a motion for appropriate relief under N.C.G.S. § 15A-1415(b) or [to] petition[] for a writ of habeas corpus." *Pennell*, ____ N.C. at ____, 758 S.E.2d at 387. Here, therefore, defendant's probation counsel could not raise issues concerning the bills of information at the revocation hearing. Defendant has,

therefore, failed to meet his burden of showing that his counsel rendered ineffective assistance in the probation hearing.

To the extent that defendant argues his trial counsel who advised him to plead guilty provided ineffective assistance, we decline to review this argument. As the Supreme Court noted in *Pennell*, "defendant failed to appeal from his original judgment" and "may not now appeal the matter collaterally via a proceeding contesting the activation of the sentence imposed in the original judgment." *Id.* at ___, 758 S.E.2d at 387.

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom. We have been unable to find any possible prejudicial error. Accordingly, we affirm the judgments revoking defendant's probation.

Affirmed.

Judges CALABRIA and McCULLOUGH concur.

Report per Rule 30(e).