NO. COA14-639

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v. New Hanover County
Nos. 07 CRS 60072-74
10 CRS 53201-03

CRYSTAL SITOSKY

Appeal by defendant from judgments entered 5 March 2014 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 21 October 2014.

Roy Cooper, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by Jason Christopher Yoder, for defendant-appellant.

DAVIS, Judge.

Crystal Sitosky ("Defendant") appeals from the trial court's judgments revoking her probation and activating her suspended sentences in file numbers 07 CRS 60072-74 and 10 CRS 53201-03. On appeal, she argues that the trial court (1) lacked jurisdiction to revoke her probation in file numbers 07 CRS 60072-74; and (2) erred in revoking her probation in file numbers 10 CRS 53201-03. After careful review, we vacate the trial court's judgments and remand for further proceedings.

Factual Background

On 10 July 2008, Defendant pled guilty to three counts of obtaining a controlled substance by fraud or forgery. The trial court sentenced Defendant to three consecutive sentences of 5 to 6 months imprisonment, suspended the sentences, and placed Defendant on supervised probation for a period of 36 months. On 22 September 2011, Defendant pled guilty to one count of attempted trafficking in heroin and three counts of obtaining a controlled substance by fraud or forgery. The trial court sentenced Defendant to three consecutive sentences of 6 to 8 months imprisonment for the obtaining a controlled substance by fraud or forgery offenses and 90 to 117 months imprisonment following the expiration of the above sentences for the attempted trafficking in heroin offense. The trial court then suspended these sentences and placed Defendant on supervised probation for 36 months.

Defendant's probation officer filed violation reports on 3 May 2013, 18 June 2013, 26 November 2013, and 10 January 2014, alleging that Defendant had violated various conditions of her probation. The 3 May 2013 violation reports alleged that Defendant had been charged with driving while license revoked, simple possession of a Schedule II controlled substance, simple possession of a Schedule IV controlled substance, and

maintaining a vehicle or dwelling place for the purpose of keeping or selling a controlled substance. The 18 June 2013 violation reports alleged that Defendant had violated a condition of her probation by testing positive for opiates on 7 June 2013. The 26 November 2013 violation reports alleged that Defendant had violated a condition of her probation by testing positive for opiates on 21 November 2013. Finally, the 10 January 2014 violation reports alleged that Defendant had been charged with multiple counts of (1) driving with expired registration and expired inspection; (2) driving while license revoked; (3) misdemeanor larceny; and (4) obtaining property by false pretenses.

A hearing on the alleged probation violations was held in New Hanover County Superior Court on 5 March 2014. At the hearing, Defendant admitted to three of the alleged probation violations: (1) testing positive for opiates on 7 June 2013; (2) testing positive for opiates on 21 November 2013; and (3) being charged with and convicted on 27 February 2014 of one count of driving while license revoked. Defendant did not admit to any of the other violations alleged in the violation reports, and the State presented no evidence regarding these remaining alleged violations. The trial court revoked Defendant's

probation and activated her suspended sentences. Defendant appealed to this Court.

Analysis

I. Appellate Jurisdiction

Defendant has filed a petition for writ of certiorari requesting appellate review in the event that her notice of appeal is deemed insufficient to confer jurisdiction upon this Court. The record shows that Defendant filed a handwritten letter indicating her intent to appeal but failed to serve a copy of the letter on the State as required by Rule 4(a) of the North Carolina Rules of Appellate Procedure. Defendant's trial counsel also filed a notice of appeal on Defendant's behalf, which was served on the State. This notice of appeal, however, failed to designate the court to which the appeal was being taken and listed the incorrect date for the judgments being appealed. We do not believe that either of these errors are fatal to Defendant's appeal.

We have previously held that a defendant's failure to designate this Court in a notice of appeal does not warrant dismissal of the appeal where this Court is the only court possessing jurisdiction to hear the matter and the State has not suggested that it was misled by the defendant's flawed notice of appeal. *State v. Ragland*, ___ N.C. App. ___, ___, 739 S.E.2d

616, 620 ("Here, defendant's intent to appeal is plain, and since this Court is the only court with jurisdiction to hear defendant's appeal, it can be fairly inferred defendant intended to appeal to this Court. The State does not suggest that it was in any way misled by the notice of appeal. Accordingly, defendant's . . . mistake in failing to name this Court in his notice of appeal do[es] not warrant dismissal."), *disc. review denied*, 367 N.C. 220, 747 S.E.2d 548 (2013).

We have also deemed a defendant's notice of appeal sufficient to confer jurisdiction upon this Court when, despite an error in designating the judgment, the notice of appeal as a whole indicates the defendant's intent to appeal from a specific judgment. *See State v. Rouse*, ___ N.C. App. ___, ___ , 757 S.E.2d 690, 692 (2014) ("A mistake in designating the judgment should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake." (citation, quotation marks, brackets, ellipses, and emphasis omitted)).

Here, because (1) Defendant's notice of appeal lists the file numbers of the judgments she seeks to appeal; (2) this Court is the only court with jurisdiction to hear Defendant's appeal; and (3) the State has not suggested that it was misled

by either of the errors in her notice of appeal, we conclude that a dismissal of Defendant's appeal is not warranted. We therefore dismiss Defendant's petition for writ of certiorari and proceed to address the merits of the appeal.

II. Revocation of Probation

A. File Numbers 07 CRS 60072-74

Defendant first alleges that the trial court lacked jurisdiction to revoke her probation and activate her suspended sentences in file numbers 07 CRS 60072-74. We agree.

In file numbers 07 CRS 60072-74, Defendant was placed on 36 months of supervised probation on 10 July 2008 for offenses she committed in June and July of 2007. The State contends that Defendant remained on probation for these offenses at the time of the 5 March 2014 revocation hearing because her probationary period was tolled each time she acquired new criminal charges until those new charges were resolved.

It is true that the tolling provision of N.C. Gen. Stat. § 15A-1344(d) — which provided that "[t]he probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation" — previously applied to Defendant's probation in file numbers 07 CRS 60072-

74. However, in 2009, the General Assembly repealed this provision for "hearings held on or after December 1, 2009." 2009 N.C. Sess. Laws 667, 679, ch. 372, § 20. While an amended tolling provision was then added to subsection (g)[1] of N.C. Gen. Stat. § 15A-1344, the State concedes, as it must, that the amended provision does not apply to Defendant because N.C. Gen. Stat. § 15A-1344(g) took effect on "1 December 2009 and applies to offenses committed on or after that date." *See id.* at 675, 679, ch. 372, §§ 11(b), 20. Consequently, because Defendant's underlying offenses were committed in June and July of 2007, N.C. Gen. Stat. § 15A-1344(g) is clearly inapplicable to her.

The State does assert, however, that Defendant's probationary period in file numbers 07 CRS 60072-74 was covered by the tolling provision of N.C. Gen. Stat. § 15A-1344(d) despite the fact that the effective date for the repeal of that provision was for hearings held on or after 1 December 2009 and Defendant's revocation hearing was held on 5 March 2014 — approximately four and a half years after this effective date. In making this argument, the State essentially relies not on the text of the session law repealing the tolling provision of N.C. Gen. Stat. § 15A-1344(d) but rather upon its belief that the

[1] While not relevant to our decision in this case, we note that N.C. Gen. Stat. § 15A-1344(g) was later repealed by the General Assembly in 2011. *See* 2011 N.C. Sess. Laws 84, 87, ch. 62, § 3.

General Assembly "did not intend to eliminate the tolling provision for defendants who committed offenses before 1 December 2009." However, it is well established that in determining the intent of the General Assembly, we must first examine the plain language of the statutory provisions at issue. *See State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) ("The primary indicator of legislative intent is statutory language . . . ."). "When interpreting a statute, we ascertain the intent of the legislature, first by applying the statute's language and, if necessary, considering its legislative history and the circumstances of its enactment." *Lanvale Props., LLC v. Cty. of Cabarrus*, 366 N.C. 142, 164, 731 S.E.2d 800, 815 (2012) (citation and quotation marks omitted). If the language is clear, we must give the provision its plain meaning. *See State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) ("If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.").

Here, the session law at issue — Chapter 372 of the 2009 North Carolina Session Laws — plainly states that Section 11(a), the section of the session law that repeals the tolling provision in N.C. Gen. Stat. § 15A-1344(d), "applies to *hearings held* on or after December 1, 2009." 2009 N.C. Sess. Laws 667,

679, ch. 372, § 20 (emphasis added). It then goes on to state that "[t]he remainder of this act [which included the newly enacted subpart (g) of N.C. Gen. Stat. § 15A-1344] becomes effective December 1, 2009, and applies to *offenses committed* on or after that date." *Id.* (emphasis added). As such, the General Assembly specifically articulated a clear effective date for the section of the session law removing the tolling provision from N.C. Gen. Stat. § 15A-1344(d), and we are obligated to give effect to this unambiguously stated effective date. *See Wiggs v. Edgecombe Cty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) ("[W]hen the language of a statute is clear and unambiguous, it must be given effect . . . ." (citation and quotation marks omitted)).

In urging us to reach a contrary result, the State is, in essence, asking this Court to rewrite the effective date set out in the session law in order to accomplish what it contends must have been the desire of the General Assembly in enacting these statutory amendments. This we are not at liberty to do. *See id.* (explaining that our appellate courts have "no power to amend an Act of the General Assembly" and "will not engage in judicial construction merely to assume a legislative role and

rectify what [a party] argue[s] is an absurd result" (citation and quotation marks omitted)).[2]

Indeed, we note that on at least one other occasion this Court has identified a gap in coverage arising out of the designated effective dates of statutory provisions affecting probation. In *State v. Nolen*, ___ N.C. App. ___, ___, 743 S.E.2d 729 (2013), we explained that the recent enactment of the Justice Reinvestment Act ("the Act") had significantly reduced the trial court's authority to revoke probation for probation violations by limiting revocation-eligible violations to three types of conduct, one of which was absconding supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a), a newly added statutory condition of probation. *Id.* at ___, 743 S.E.2d at 730. According to the effective dates of the Act, the recently limited revocation authority of trial courts took effect on 1 December 2011 and applied to all probation violations occurring on or after that date, but the provision of the Act actually establishing absconding as a statutory probation violation

[2] While we recognize that in construing and interpreting statutes, our courts endeavor to "adopt an interpretation which will avoid . . . bizarre consequences," *State v. Jones*, 359 N.C. 832, 837, 616 S.E.2d 496, 499 (2005), we do so only where the statute at issue is susceptible to more than one permissible interpretation. Here, however, this session law lends itself to only one rational interpretation as it clearly articulates a specific effective date and, as such, leaves no room for judicial construction.

applied only to probationers who had committed the underlying offenses resulting in their probation on or after 1 December 2011. *See id.* at ___, 743 S.E.2d at 731.

As a result, we held that a gap was created by the Act such that a subset of the persons on probation in North Carolina — including the defendant in *Nolen* — was subject to the Act's new limitations on the power of trial courts to revoke probation (based on the date of their alleged probation violations) yet could not have their probation revoked for absconding because they were not subject to the prohibition against absconding as a condition of their probation (based on their offense date). *Id.* at ___, 743 S.E.2d at 731.

Likewise, in the present case, based on the plain language of Chapter 372 of the 2009 North Carolina Session Laws, we conclude that Defendant, who committed her offenses in file numbers 07 CRS 60072-74 *prior to 1 December 2009* but had her revocation hearing *after 1 December 2009*, was not covered by either statutory provision — § 15A-1344(d) or § 15A-1344(g) — authorizing the tolling of probation periods for pending criminal charges. As a result, we have no choice but to conclude that the trial court lacked jurisdiction to revoke her probation and activate her suspended sentences in file numbers 07 CRS 60072-74.

B. File Numbers 10 CRS 53201-03

Defendant next argues that the trial court erred in revoking her probation in file numbers 10 CRS 53201-03 because it based the revocation, in part, on probation violations that were neither admitted by Defendant nor proven by the State at the probation hearing. We agree.

In file numbers 10 CRS 53201-03, Defendant was placed on 36 months of supervised probation on 22 September 2011 for offenses she committed in February and March of 2010. At the 5 March 2014 revocation hearing, Defendant admitted to three violations of the conditions of her probation: (1) testing positive for opiates on 7 June 2013 as alleged in paragraph 1 of the violation reports filed on 18 June 2013; (2) testing positive for opiates on 21 November 2013 as alleged in paragraph 1 of the violation reports filed on 26 November 2013; and (3) committing the crime of driving while license revoked in file number 13 CRS 7669 as alleged in paragraph 1 of the violation reports filed on 10 January 2014.

Our review of the transcript of the revocation hearing reveals that Defendant did not admit to — and no evidence was offered by the State regarding — the remaining alleged probation violations. Nevertheless, the trial court's judgments revoking Defendant's probation incorrectly state that she admitted to *all*

of the violations alleged in paragraphs 1 and 2 of the 13 May 2013 violation reports, paragraph 1 of the 18 June 2013 violation reports, paragraph 1 of the 26 November 2013 violation reports, and paragraphs 1 and 2 of the 10 January 2014 violation reports.

We recognize that Defendant's admission to driving while license revoked, standing alone, could have served as a sufficient basis for the trial court to revoke her probation in file numbers 10 CRS 53201-03. Although driving while license revoked is currently a Class 3 misdemeanor, it was classified as a Class 1 misdemeanor at the time she committed this offense on 6 August 2013. *See* N.C. Gen. Stat. § 20-28 (2011); 2013 Sess. Laws 995, 1305, ch. 360, § 18B.14(f) (amending N.C. Gen. Stat. § 20-28(a), effective 1 December 2013, to classify driving while license revoked as Class 3 misdemeanor instead of Class 1 misdemeanor "unless the person's license was originally revoked for an impaired driving offense, in which case the person is guilty of a Class 1 misdemeanor").

Thus, the trial court could have properly revoked Defendant's probation in file numbers 10 CRS 53201-03 on the basis that she committed a new crime[3] in violation of the

[3] While testing positive for illegal drugs is a violation of a condition of probation, we have held that a positive drug test does not constitute sufficient evidence, standing alone, to

conditions of her probation. *See* N.C. Gen. Stat. § 15A-1344(a),(d) (authorizing trial court to revoke probation if probationer commits new crime in any jurisdiction so long as probation is not revoked "solely for conviction of a Class 3 misdemeanor").

However, the judgments in this case do not provide us with a basis to determine whether the trial court would have decided to revoke Defendant's probation on the basis of her admission to committing the new crime of driving while license revoked in the absence of the other alleged violations that it mistakenly found that Defendant had admitted. We note that the trial court did not mark the box on the judgment forms specifying that each violation "in and of itself" would be a sufficient basis for revocation. Thus, we must remand for further proceedings so that the trial court can determine whether the revocation of Defendant's probation is appropriate in file numbers 10 CRS 53201-03.

Conclusion

For the reasons stated above, we vacate the trial court's judgments revoking Defendant's probation in file numbers 07 CRS

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support a possessory offense. *State v. Harris*, 178 N.C. App. 723, 632 S.E.2d 534 (2006), *aff'd*, 361 N.C. 400, 646 S.E.2d 526 (2007). Thus, driving while license revoked would constitute the commission of a "new crime" while on probation but testing positive for narcotics, without more, would not.

60072-74 and 10 CRS 53201-03 and remand for further proceedings consistent with this opinion in file numbers 10 CRS 53201-03.

VACATED AND REMANDED.

Judges HUNTER, Robert C., and DILLON concur.