

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-665

Filed: 7 April 2015

Buncombe County, Nos. 13 CRS 1092—94

STATE OF NORTH CAROLINA

v.

MARCUS LEE MOORE.

Appeal by defendant from judgments entered 19 December 2013 by Judge Marvin P. Pope in Buncombe County Superior Court. Heard in the Court of Appeals 19 November 2014.

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

Guy J. Loranger for defendant-appellant.

BRYANT, Judge.

Where defendant was not subject to a tolling period because his offenses were committed prior to 1 December 2009 and his probation revocation hearing was held after 1 December 2009, defendant's probationary period had expired and the trial court lacked jurisdiction to revoke defendant's probation.

On 17 February 2009, defendant Marcus Lee Moore was convicted in Rutherford County of one count of larceny from the person and sentenced to eight to ten months imprisonment. The trial court suspended defendant's sentence and ordered defendant to serve thirty-six months supervised probation. On 26 February

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2009, defendant was convicted of fleeing/eluding arrest with a motor vehicle, possession of a stolen motor vehicle, and driving while license revoked. These charges were consolidated for judgment with the larceny charge from 17 February and defendant was sentenced to eight to ten months imprisonment. The trial court suspended defendant's sentence and ordered that he serve a sixty day active sentence and be placed on supervised probation for thirty-six months.

On 24 July 2009, violation reports were filed against defendant alleging that he had violated monetary conditions of his probation and had committed three new offenses on 29 March 2009. On 14 July 2010, the trial court found that defendant had committed the three new offenses, entered orders which modified the monetary conditions of defendant's probation, and transferred his supervision from Rutherford to Buncombe County. The trial court did not extend or otherwise alter defendant's probationary period.

On 4 March 2013, new violation reports were filed against defendant alleging numerous violations of his probation. Additional violation reports were filed against defendant on 20 June 2013. In a hearing on 19 December 2013, defendant admitted to willful violations of his probation. The trial court found that defendant had violated his probation. The trial court revoked defendant's probation and ordered defendant to serve eight to ten months imprisonment with credit for sixty days already served. Defendant appeals.

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In his sole issue on appeal, defendant contends the trial court lacked subject matter jurisdiction to revoke his probation as his probationary period had expired and he was not subject to a tolling period. We agree.

This Court reviews *de novo* the issue of whether a trial court had subject matter jurisdiction to revoke a defendant's probation. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted).

“A court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute.” *State v. Burns*, 171 N.C. App. 759, 760, 615 S.E.2d 347, 348 (2005) (quoting *State v. Hicks*, 148 N.C. App. 203, 204, 557 S.E.2d 594, 595 (2001)). Pursuant to N.C. Gen. Stat. § 15A-1344,

[a]t any time prior to the expiration or termination of the probation period or in accordance with subsection (f) of this section, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. . . . If a probationer violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345 . . . may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing, if any

N.C.G.S. § 15A-1344(d) (2009). Prior to a 2009 amendment, a portion of subsection (d) read as follows: “The probation period shall be tolled if the probationer shall have pending against him criminal charges . . . which . . . could result in revocation

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proceedings against him for violation of the terms of this probation.” *Id.* However, other than as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term. *State v. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980) (citations omitted). Pursuant to N.C.G.S. § 15A-1344(f), a trial court may extend, modify, or revoke a defendant's probation after the expiration of the probationary term only if several conditions are met, including findings by the trial court that prior to the expiration of the probation period a probation violation had occurred *and* a written probation violation report had been filed. Also, the trial court must find good cause for the extension, modification, or revocation. N.C.G.S. § 15A-1344(f). As such, a defendant's probation could be extended upon findings of specific actions that occurred prior to the end of a defendant's probationary period. However, on this record there is no indication that N.C.G.S. § 15A-1344(f) is applicable. Indeed, the State's argument as to jurisdiction is based solely on an application of the tolling provision. The tolling provision of N.C.G.S. § 15A-1344(d) was repealed in 2009, thus ending the tolling provision for defendants whose probation violation hearings were held after 1 December 2009. 2009 N.C. Sess. Laws ch. 372, § 20. Further, the tolling provision that was then moved to N.C.G.S. § 15A-1344(g) and allowed for a credit against a defendant's probation if a pending criminal charge resulted in an acquittal or dismissal was then removed when subsection (g) was repealed. *See* 2011 N.C. Sess. Laws 84, 87, ch. 62,

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§ 3. Therefore, because there was no applicable tolling period, the trial court had no jurisdiction to revoke defendant's probation for offenses committed before 1 December 2009, when defendant's probation revocation hearing was held after 1 December 2009. We hold that the trial court's jurisdiction over defendant ended on or about 26 February 2012, thirty-six months after defendant was placed on probation on 26 February 2009.

Our holding in this case, that the trial court lacked jurisdiction to revoke defendant's probation, is controlled by this Court's recent opinion in *State v. Sitosky*, ___ N.C. App. ___, 767 S.E.2d 623 (2014), *review and stay denied*, ___ N.C. ___, ___ S.E.2d ___ (March 5, 2015); *see also In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.”).

In *Sitosky*, the defendant was placed on probation in 2008 for offenses committed in 2007. In a probation violation hearing held in 2014, the defendant's probation was revoked for offenses committed since her probation began in 2008. This Court vacated and remanded finding that based on the 2009 North Carolina Session Law, a defendant “who committed her offenses . . . *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

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probation periods for pending criminal charges.” *Sitosky*, ___ N.C. App. at ___, 767 S.E.2d at 626.

In reviewing the record before this Court, it is clear that defendant committed his offenses on 17 and 26 February 2009, prior to 1 December 2009. Defendant’s probation revocation hearing was held on 19 December 2013, almost five years after his thirty-six month probation order was entered on 26 February 2009, and well after 1 December 2009. As such, based on this Court’s holding in *Sitosky*, the trial court lacked jurisdiction to revoke defendant’s probation. Accordingly, the order of the trial court revoking defendant’s probation must be vacated.

VACATED.

Judges DILLON and DIETZ concur.