IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 15-602

Filed: 17 November 2015

Edgecombe County, No. 14 CRS 602-08

STATE OF NORTH CAROLINA

v.

AVERY R. BRINSON

Appeal by defendant from judgments entered 17 November 2014 by Judge Milton F. Fitch, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 2 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Adam M. Shestak, for the State.

Stephen G. Driggers, PLLC, by Stephen G. Driggers for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendant appeals from eight judgments entered upon revocation of his probation. Because the trial court lacked statutory authority to revoke Defendant's probation in 14 CRS 602, we reverse as to this judgment and remand for further proceedings. As to each of the remaining judgments entered in 14 CRS 603-08, we affirm.

On 25 July 2013, Defendant pled guilty in Onslow County Superior Court to six counts of felonious breaking or entering ("B&E"), two counts of felonious larceny, one count of possession of burglary tools, one count of possession of a schedule II controlled substance with intent to manufacture sell or deliver, and seven misdemeanor offenses. The trial court consolidated Defendant's offenses into six Class H felony judgments, suspended six consecutive sentences of six to seventeen months' imprisonment, and placed defendant on supervised probation for thirty-six months.

In one of the judgments, 13 CRS 51636, the trial court sentenced Defendant for a felonious B&E committed on 16 October 2011, prior to the 1 December 2011 effective date of the Justice Reinvestment Act of 2011 ("JRA").[1] *See* 2011 N.C. Sess. Laws 412, sec. 2.5 (amending effective date in 2011 N.C. Sess. Laws 192, sec. 4.(d)). For offenses committed prior to 1 December 2011, a six-month minimum sentence requires a corresponding maximum of eight months under structured sentencing, rather than the seventeen-month maximum prescribed by the JRA and entered by the trial court. *See* N.C. Gen. Stat. § 15A-1340.17(c)-(d) (amended effective Dec. 1 2011 by 2011 N.C. Sess. Laws 192, sec. 4.(d) and 2011 N.C. Sess. Laws 412, sec. 2.5). However, Defendant did not pursue an appeal from the judgment in 13 CRS 51636.

[1] The court consolidated defendant's conviction for the 16 October 2011 B&E with a misdemeanor larceny offense committed on 11 November 2012, after the JRA's effective date. The remainder of defendant's Onslow County convictions were committed after the effective date of the JRA.

On 2 October 2013, Defendant pled guilty in Pender County District Court to multiple counts of felonious B&E and larceny committed between November 2012 and March 2013. The trial court consolidated these offenses into two judgments imposing consecutive suspended sentences of eight to nineteen months with twenty-four months of supervised probation.

Following the transfer of Defendant's probation to Edgecombe County, his probation officer filed eight violation reports on 12 August 2014. As to the pre-JRA offense in 13 CRS 51636, which was assigned file number 14 CRS 602 in Edgecombe County, the report charged defendant with violating the conditions of probation requiring him to (1) report to his probation officer, (2) comply with substance abuse treatment recommended by a TASC evaluation, and (3) remain within the jurisdiction unless granted written permission to leave by the court or the probation officer. *See* N.C. Gen. Stat. § 15A-1343(b)(2)-(3), (b1) (2011). In the remaining cases, now designated as 14 CRS 603-08, the probation officer charged Defendant with (1) absconding supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a) (2013), (2) failing to report to his probation officer as directed, and (3) failing to comply with recommended substance abuse treatment.

At a hearing held 17 November 2014, Defendant admitted to each of the alleged violations, and to the willfulness thereof. The trial court revoked his probation and activated his eight suspended sentences as originally imposed.[2]

As Defendant now concedes, his *pro se* notice of appeal filed on 21 November 2014 is deficient in several respects. It does not designate all of the judgments from which he purports to appeal, does not identify the court to which his appeal is taken, and was not served upon the State, as required by N.C.R. App. 4(a)(2). *See generally Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156-57, 392 S.E.2d 422, 424-24 (1990) (addressing whether a deficient notice of appeal constitutes the "*functional equivalent*" of proper notice) (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 101 L.Ed.2d 285, 291 (1988))). Defendant has filed a petition for writ of certiorari as an alternative basis for appellate review, should we deem his notice of appeal to be jurisdictionally defective. *See* N.C.R. App. P. 21(a)(1). We note that the State has not raised the issue of lack of service and has participated in Defendant's appeal without objection. *See State v. Williams*, __ N.C. App. __, __, 761 S.E.2d 662, 664 (2014). In our discretion, we allow Defendant's petition for writ of certiorari in order to reach the merits of his appeal.

[2] As included in the record on appeal, the judgments revoking Defendant's probation do not account for three felony convictions that were consolidated into the Onslow County judgment in 13 CR 50442, which was assigned the file number 14 CRS 608 in Edgecombe County.

Counsel appointed to represent Defendant is 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. Counsel shows to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising Defendant of his right to file written arguments with this Court and providing him with the documents necessary to do so. Defendant has not filed any written arguments on his own behalf with this Court, and a reasonable time for him to do so has expired.

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom. We are unable to find any possible prejudicial error as to the judgments entered in 14 CRS 603-08 and conclude that Defendant's appeal therefrom is wholly frivolous. As to the judgment revoking Defendant's probation in 14 CRS 602, however, we conclude that the record on appeal reveals reversible error.

For probation violations occurring on or after 1 December 2011, the JRA limits the trial court's authority to revoke probation to the following circumstances: (1) the probationer violates the regular condition of probation in G.S. 15A-1343(b)(1) ("Commit no criminal offense"); (2) the probationer violates the regular condition of probation in G.S. 15A-1343(b)(3a) ("Not abscond"); or (3) the probationer violates any

condition of probation after serving two periods of confinement in response to violation ("CRV"). *State v. Nolen*, __ N.C. App. __, __, 743 S.E.2d 729, 730 (2013); *see also* N.C. Gen. Stat. § 15A-1344(a), (d2) (2013). Furthermore, a defendant placed on probation for an offense committed prior to 1 December 2011 is not subject to the "Not abscond" condition in N.C. Gen. Stat. § 15A-1343(b)(3a), which was added to the regular conditions of probation by the JRA. *See State v. Hunnicutt*, __ N.C. App. __, __, 740 S.E.2d 906, 911 (2013) (citing 2011 N.C. Sess. Laws ch. 412, § 2.5). Accordingly, a probationer who committed his underlying offense prior to 1 December 2011 cannot have his probation revoked for violating N.C. Gen. Stat. § 15A-1343(b)(3a). For violations occurring on or after 1 December 2011, a "pre-JRA" probationer may be revoked only for committing a new crime under G.S. 15A-1343(b)(1) or for a third probation violation committed after two prior CRVs. *See Nolen*, __ N.C. App. at __, 743 S.E.2d at 731.

Defendant was placed on probation in 14 CRS 602 for a felonious B&E committed on 16 October 2011, prior to the effective date of N.C. Gen. Stat. § 15A-1343(b)(3a). The violation report filed in 14 CRS 602 does not charge defendant with violating subsection (b)(3a) but with three other violations committed after 1 December 2011 that do not involve the commission of a new criminal offense under N.C. Gen. Stat. § 15A-1343(b)(1). Accordingly, the trial court erred by finding that defendant's probation was subject to revocation "for the willful violation of the

condition(s) that he . . . not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a), as set out above." As defendant had served just one prior CRV, the trial court was not authorized to revoke his probation in response to his current violations. *See* N.C. Gen. Stat. § 15A-1344(a), (d2). Therefore, we must reverse the judgment in 14 CRS 602 and "remand to the trial court for entry of an appropriate judgment for Defendant's admitted probation violations consistent with the provisions of N.C. Gen. Stat. § 15A-1344."[3] *Nolen*, __ N.C. App. at __, 743 S.E.2d at 731.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge McGee and Judge Dillon concur.

Report per Rule 30(e).

[3] Insofar as Defendant claims the trial court abused its discretion in 14 CRS 602 by re-imposing the unlawful six- to seventeen-month sentence originally entered in 13 CRS 51636, we conclude his argument is made moot by our reversal of the judgment. We note that Defendant's challenge of the original sentence amounts to an impermissible collateral attack upon the 25 July 2013 judgment of the Onslow County Superior Court. *See State v. Pennell*, 367 N.C. 466, 471, 758 S.E.2d 383, 387 (2014) (citing *State v. Holmes*, 361 N.C. 410, 413, 646 S.E.2d 353, 355 (2007)). We further note that this argument by defendant's appellate counsel, in the context of a request for *Anders* review, "presents an inconsistent and effectively hybrid appeal that is improper and subject to dismissal by this Court." *State v. Grady*, 136 N.C. App. 394, 398, 524 S.E.2d 75, 78 (2000).