

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-523

Filed: 20 December 2016

Randolph County, Nos. 13 CRS 53018, 53048

STATE OF NORTH CAROLINA

v.

BOBBY YOUNTS

Appeal by Defendant from orders entered 8 February 2016¹ by Judge R. Stuart Albright in Randolph County Superior Court. Heard in the Court of Appeals 1 November 2016.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for Defendant.

STEPHENS, Judge.

In this appeal from an order on violation of probation, Defendant argues that the trial court's imposition of an additional split sentence as a condition of special probation violates our Criminal Procedure Act. Because the additional time imposed

¹ The two orders on violation of probation from which this appeal is taken are dated 20 November 2015, but, for reasons unknown to this Court, are file-stamped 8 February 2016. Per our custom, we use the file-stamp date in the caption of this opinion.

STATE V. YOUNTS

Opinion of the Court

resulted in a total duration of Defendant's split sentences in excess of the limit imposed by the statute, we must remand for resentencing.

Factual and Procedural Background

On 9 September 2013, the Randolph County Grand Jury indicted Defendant Bobby Younts on four charges: felonious breaking and entering, felonious larceny, felonious possession of stolen goods, and possession of a firearm by a felon. Pursuant to a plea arrangement, on 1 April 2014, Younts pled guilty to felonious breaking and entering, felonious larceny, and possession of a firearm by a felon in exchange for dismissal by the State of fourteen other charges pending against Younts. In file number 13 CRS 53048, the trial court imposed a sentence of 17-30 months for possession of a firearm by a felon, suspended the sentence, and placed Younts on supervised probation for 30 months. As a condition of special probation, Younts was ordered to serve an active term of 120 days. The court consolidated the two remaining offenses for judgment in file number 13 CRS 53018, sentenced Younts to a consecutive suspended term of 10-21 months, and placed him on supervised probation for 30 months.

Between July 2014 and June 2015, several reports were issued alleging Younts had violated conditions of his probation. This matter arose from the issuance on 22 September 2015 of two additional violation reports, alleging Younts had violated three conditions of his probation in file numbers 13 CRS 53018 and 13 CRS 53048.

STATE V. YOUNTS

Opinion of the Court

On 20 November 2015, a probation violation hearing was held in Randolph County Superior Court, the Honorable R. Stuart Albright, Judge presiding. Younts admitted the alleged violations, and the court found that Younts had wilfully violated conditions of his probation as alleged in both violation reports.² The trial court modified both of Younts' judgments, ordering him to serve an active term of six months as a condition of special probation in file number 13 CRS 53048 and an active term of five months as a condition of special probation in file number 13 CRS 53018 at the expiration of his six-month split sentence in 13 CRS 53048. On 30 November 2015, Younts filed a written notice of appeal. On the same date, he was incarcerated to begin serving the time imposed as a condition of special probation in file number 13 CRS 53048.

On 27 April 2016, Younts filed in this Court a petition for writ of *supersedeas* and motion for temporary stay seeking to stay enforcement of the special probation ordered, noting that he had taken appeal from the orders on violation of probation. By order entered 28 April 2016, this Court allowed the petition for writ of *supersedeas* and dismissed as moot the motion for temporary stay, further ordering that the cause be "remanded to the trial court for the purpose of ordering [Younts'] immediate release from confinement"

² The violations alleged in the reports and found by the trial court were failure to pay total court costs and fines, failure to abstain from possessing or using controlled substances, and positive drug screens in violation of substance abuse treatment programs.

STATE V. YOUNTS

Opinion of the Court

Discussion

Younts first argues the trial court erred by imposing as a special condition of probation an additional split sentence of six months in file number 13 CRS 53048 when his original judgment had imposed a 120-day split sentence, such that the total duration of the split sentences exceed one-fourth of the maximum sentence imposed. The States concedes that Younts' argument has merit and that file number 13 CRS 53048 must be remanded for resentencing. We agree.

“When a defendant has violated a condition of probation, the court may modify the probation to place the defendant on special probation” N.C. Gen. Stat. § 15A-1344(e) (2015). However, in so doing, “the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense” N.C. Gen. Stat. § 15A-1351(a) (2015). Where the trial court violates this provision of section 15A-1351(a), the matter must be remanded to the trial court for resentencing. *See, e.g., State v. Riley*, 202 N.C. App. 299, 306, 688 S.E.2d 477, 482 (remanding for resentencing where the trial court “sentenced [the] defendant to a term of 46 to 65 months, suspended the sentence, and then imposed a term of special probation of 30 months” because “[t]he maximum period of special probation that could have been imposed was one-fourth of the maximum sentence of 65 months or 16.25 months”), *cert. denied*, 364 N.C. 246, 699 S.E.2d 644 (2010).

STATE V. YOUNTS

Opinion of the Court

Here, in file number 13 CRS 53048, the trial court sentenced Younts to a term of 17-30 months and suspended the sentence. Thus, under section 15A-1351(a), the maximum period of confinement that could have been imposed as an incident of special probation was 7.5 months—one-fourth of Younts' maximum sentence of 30 months. As noted *supra*, in the original judgment entered 1 April 2014, the court ordered Younts to serve an active term of 120 days, or 4 months, as a condition of special probation. By its order on violation of probation in the same file number, the trial court modified probation and ordered Younts to serve an active term of six months as a condition of special probation. Thus, the total period of confinement imposed as an incident of special probation in file number 13 CRS 53048 is ten months, a duration in excess of the maximum period of confinement allowed by our General Statutes. Accordingly, we remand file number 13 CRS 53048 to the trial court for modification of the disposition of the probation violations. *See id.*

As noted *supra*, following the probation violation hearing on 20 November 2015, the trial court also ordered an active term of five months as a condition of special probation in file number 13 CRS 53018, to be served at the expiration of Younts' six-month split sentence in 13 CRS 53048. Because the active term of five months is less than one-fourth of the 21-month maximum sentence in that file number, the modification in 13 CRS 53018 did not violate section 15A-1351(a). As a result, file number 13 CRS 53018 does not require remand.

STATE V. YOUNTS

Opinion of the Court

Younts argues, however, that he has already “served enough time to fully satisfy the only valid split sentence in his case, in [file number] 13 CRS 53018” and that, because the split sentences in both file numbers arose from the same incidents, he is not obligated to serve any more time in special probation in connection with either file number. We are not persuaded.

“When a defendant has given notice of appeal . . . [p]robation or special probation is stayed.” N.C. Gen. Stat. § 15A-1451(a)(4) (2015). Here, despite having given notice of appeal from the orders on violation of probation, Younts was forced to begin serving his split sentence immediately. Younts was incarcerated as a condition of special probation in file number 13 CRS 53048—in violation of section 15A-1451(a)(4)—from 30 November 2015 through 3 May 2016, a total of 165 days, or five months and thirteen days. Younts, citing section 15-196.1, contends that, on remand, credit for this time served should be applied to the five-month term of special probation imposed in file number 13 CRS 53018. This argument fails for two reasons.

While section 15-196.1 covers credit for time served in general, *see* N.C. Gen. Stat. § 15-196.1 (2015), credit toward a sentence of special probation is governed by subsection 15A-1351(a). That subsection provides that, “[i]n imposing a sentence of special probation, the judge *may* credit any time spent committed or confined, *as a result of the charge*, to either the suspended sentence or to the imprisonment required for special probation.” N.C. Gen. Stat. § 15A-1351(a) (emphasis added). *See also*

STATE V. YOUNTS

Opinion of the Court

State v. Farris, 336 N.C. 552, 555, 444 S.E.2d 182, 184 (1994) (“Section 15A-1351(a) addresses giving credit for time served in one specific situation, when a trial court is engaged in imposing a sentence of special probation.”).

First, the 165 days for which Younts was incarcerated as a condition of special probation in file number 13 CRS 53048 was plainly not “as a result of the charge” in file number 13 CRS 53018, and, accordingly, could not be applied to his sentence of special probation in that file number. The 165 days could only be credited toward Younts’ suspended sentence or imprisonment required for special probation in file number 13 CRS 53048. *See* N.C. Gen. Stat. § 15A-1351(a). Second, the plain language of subsection 15A-1351(a) gives the trial court the *discretion* to apply any credit for time served on the charge in file number 13 CRS 53048 charge to Younts’ term of special probation in that file number, but does not require the court to do so. *Compare* N.C. Gen. Stat. § 15A-1351(a) (“In imposing a sentence of special probation, the judge *may credit* any time spent committed or confined . . . to either the suspended sentence or to the imprisonment required for special probation.”) (emphasis added) *with* N.C. Gen. Stat. § 15-196.1 (“The minimum and maximum term of a sentence *shall be credited with and diminished by* the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence or the

STATE V. YOUNTS

Opinion of the Court

incident from which the charge arose.”) (emphasis added). This argument is overruled.

For the reasons above stated, file number 13 CRS 53048 is

REMANDED FOR RESENTENCING.

Judges BRYANT and CALABRIA concur

Report per Rule 30(e).