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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-90

Filed: 1 December 2020

Mecklenburg County, Nos. 03 CRS 215620-21

STATE OF NORTH CAROLINA

v.

MARQUIS JENKINS

Appeal by Defendant from Judgments entered 1 May 2019 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 October 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Marquis Jenkins (Defendant) appeals from Judgments revoking his supervised probation and activating suspended sentences for his two convictions of Conspiracy

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to Commit Armed Robbery. Relevant to this appeal, the Record before us tends to show the following:

On 24 February 2003, a Mecklenburg County Grand Jury indicted Defendant on one count of Murder. On 28 April 2003, Defendant was indicted on two counts of Armed Robbery. On 22 July 2004, Defendant pled guilty to Second-Degree Murder (03 CRS 204607) and two counts of Conspiracy to Commit Armed Robbery (03 CRS 215620-21). The trial court sentenced Defendant to 151-191 months for the Second-Degree Murder conviction and 29-44 months for each of the Conspiracy to Commit Armed Robbery convictions. However, the trial court suspended the Conspiracy sentences and placed Defendant on two 36-month periods of probation in connection with 03 CRS 215620-21. The trial court ordered the probation period in 03 CRS 215620 to run consecutively to the active sentence in 03 CRS 204607, and the probation period in 03 CRS 215621 to run consecutively to the probation period in 03 CRS 215620. Defendant was released from prison in 03 CRS 204607 in August of 2016.

On 4 October 2017, Defendant was arrested for Armed Robbery, Larceny of a Motor Vehicle, and First-Degree Kidnapping. On 4 December 2017, a Union County Grand Jury indicted Defendant for these offenses in 17 CRS 54843. On 14 February 2018, a jury acquitted Defendant of First- and Second-Degree Kidnapping, but convicted Defendant on Felony Larceny and Armed Robbery. In 2017 and 2018,

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Defendant's probation officers filed six probation violation reports. One probation violation report, filed in October 2017, lists a positive marijuana test as a willful violation of the condition Defendant "[n]ot use, possess or control any illegal drug" in paragraph one. This same report lists several felonies, including Robbery with a Dangerous Weapon and Larceny, as willful violations of the condition Defendant "[c]ommit no criminal offense" pursuant to N.C. Gen. Stat. § 15A-1343(b)(1). Another probation violation report, filed in January 2018, is substantially similar to the probation violation filed in October 2017. However, the final violation report, filed on 17 September 2018, only lists Robbery with a Dangerous Weapon and Assault with a Deadly Weapon as willful violations under Section 15A-1343(b)(1) in paragraph one.

On 29 April 2019, Defendant's case came on for a probation violation hearing in Mecklenburg County Superior Court. At the outset, Defendant waived a formal reading of the violation report. Defendant admitted "willful violation" of his probation in his positive marijuana test in 2017 and his being convicted of Robbery with a Dangerous Weapon in Union County, North Carolina. Later in the hearing, Defendant's probation officer told the trial court, "[Defendant] was convicted on the Union County charge . . . which was robbery with a dangerous weapon, larceny of a motor vehicle, first-degree kidnapping."

Defendant's counsel then asked the trial court to run the activated sentences in 03 CRS 215620-21 concurrently because that time would "be sufficient to for him

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to reform himself.” The trial court, “based on the new convictions,” then revoked Defendant’s probation in 03 CRS 215620-21. The trial court activated Defendant’s suspended 29- to 44-month sentences in each case—the activated sentence in 03 CRS 215620 to run concurrently with Defendant’s new active sentence in 17 CRS 54843 and the active sentence in 03 CRS 215621 to run consecutively with the active sentence in 17 CRS 54843. Defendant then gave oral Notice of Appeal in open court.

On 1 May 2019, the trial court entered written Judgment and Commitment Upon Revocation of Probation in 03 CRS 215620-21 (Revocation Judgments). In the written Revocation Judgment for 03 CRS 215620, the trial court found Defendant “waived a violation hearing and admitted [Defendant] violated each of the conditions of his/her probation as set forth below.” The trial court found each violation was “in and of itself, a sufficient basis upon which” the trial court should revoke Defendant’s probation. Moreover, the trial court found it could revoke Defendant’s probation “for the willful violation of the condition(s) that [Defendant] not commit any criminal offense” pursuant to N.C. Gen. Stat. 15A-1343(b)(1). However, this Judgment only referenced paragraph one of the 5 October 2017 violation report listing the positive marijuana test. The written Revocation Judgment for 03 CRS 215621 was identical except it referred to paragraph one of the violation report from 19 January 2018 which also only lists the positive marijuana test.

Issues

The dispositive issues in this case are: (I) whether the trial court lacked subject-matter jurisdiction to revoke Defendant’s probation in the 03 CRS 215621 Judgment; (II) whether we should remand to correct clerical errors in the Revocation Judgments; and (III) whether the trial court abused its discretion in revoking Defendant’s probation when it may have considered a criminal offense for which Defendant was not convicted.

Analysis

I. **Subject-Matter Jurisdiction**

Defendant argues the trial court lacked subject-matter jurisdiction to revoke Defendant’s probation in 03 CRS 215621 because the violation reports were not filed during the probationary period. According to Defendant, the original probation sentence was invalid because the trial judge in that case set the probationary period in 03 CRS 215621 to run after the probationary period in 03 CRS 215620. Thus, Defendant asks us to deem the 36-month probation period in 03 CRS 215621 to have run concurrently with Defendant’s active sentence for Second-Degree Murder—as a “default” required by N.C. Gen. Stat. § 15A-1346(a). As such, Defendant argues, Defendant’s probation violations in 2017 would have occurred outside of the 36-month probation period for 03 CRS 215621, and the trial court did not have subject-matter jurisdiction to revoke Defendant’s probation and activate his suspended sentence.

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Generally, “a court’s jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court sua sponte.” *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) (citation omitted). However, a defendant may not attack an original suspended judgment in an appeal of an order activating a suspended prison term. *See State v. Holmes*, 361 N.C. 410, 411-13, 646 S.E.2d 353, 354-55 (2007). Defendant acknowledges he has not yet challenged the original probation sentences in 03 CRS 215620-21. Recognizing he must first challenge the validity of his original suspended sentences, Defendant has filed a Motion for Appropriate Relief with this Court.

A party may bring a Motion for Appropriate Relief at any time if the party asserts the trial court did not have subject-matter jurisdiction to enter the judgment challenged. N.C. Gen. Stat. § 15A-1415(b)(2) (2019). A party must submit that motion to this Court when the party has appealed to this Court and removed jurisdiction from the trial court. N.C. Gen. Stat. § 15A-1418(a) (2019). This Court may decide the merits of a party’s motion if the Court determines there is no need for a trial court to further develop the facts through a hearing or other proceeding. N.C. Gen. Stat. § 15A-1418(b) (2019). Here, Defendant’s Motion for Appropriate Relief challenging the trial court’s subject-matter jurisdiction was properly filed in this Court where Defendant’s appeal is pending in this Court and the trial court no longer had jurisdiction. Moreover, we conclude the facts are sufficiently developed such that

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we can resolve Defendant's Motion on the Record before us. For the following reasons, we allow Defendant's Motion for Appropriate Relief.

First, the trial court that imposed Defendant's suspended sentence in 03 CRS 215621 erred in setting the probation period in that case to run consecutively to the probation period in 03 CRS 215620. Section 15A-1346 of our General Statutes states:

(a) Commencement of Probation. — Except as provided in subsection (b), a period of probation commences on the day it is imposed and *runs concurrently with any other period of probation*, parole, or imprisonment to which the defendant is subject during that period.

(b) Consecutive and Concurrent Sentences. — If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. *If not specified, it runs concurrently.*

N.C. Gen. Stat. § 15A-1346 (2019) (emphasis added). Section 15A-1346 only allows the trial court to commence a period of probation after the day it is imposed if the “period of probation is being imposed at the same time” as a period of imprisonment.

N.C. Gen. Stat. § 15A-1346(b). When a period of probation is imposed at the same time as a period of incarceration, the trial court may run the period of probation consecutively with the period of incarceration if the trial court so specifies. *Id.*

Moreover, “[a] careful reading of the statute shows that any sentence of probation must run concurrently with any other probation sentences imposed on a defendant.”

State v. Canady, 153 N.C. App. 455, 459-60, 570 S.E.2d 262, 265 (2002).

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Here, the trial court set the probation period in 03 CRS 215621 to run consecutively with the *probation period* in 03 CRS 215620. Because the trial court did not specify an active prison sentence from which the probation period in 03 CRS 215621 was to run consecutively, the trial court erred in setting the probation period. However, the trial court did express an intent to run the probation period in 03 CRS 215621 consecutively with 03 CRS 204607 by the fact it set the probation period in 03 CRS 215620 to run consecutively with 03 CRS 204607. Therefore, the proper probation sentence in 03 CRS 215621 would have been to run consecutively to the active sentence in 03 CRS 204607 and concurrently with the probation period in 03 CRS 215620. Accordingly, we grant Defendant's Motion for Appropriate Relief, and remand this matter to the trial court for correction of Defendant's sentence consistent with Section 15A-1346's requirement the probation period in 03 CRS 215621 run concurrently with the probation period in 03 CRS 215620. *See id.* at 460, 570 S.E.2d at 266.¹

However, we reject Defendant's argument the trial court did not have subject-matter jurisdiction to revoke Defendant's probation in 03 CRS 215621 because of this

¹ Defendant argues because the trial court's initial probation sentence in 03 CRS 215621 was improper, we should hold the sentence ran concurrently with Defendant's active sentence in 03 CRS 204607. Defendant cites our decision in *State v. Tinch* to support this argument. 266 N.C. App. 393, 831 S.E.2d 859 (2019). However, *Tinch* is inapposite here as this Court explained the default rule applied where the trial court made *no indication at all* as to when the probation period was to commence. As explained above, the trial court in this case clearly intended the probation period in 03 CRS 215621 to commence after the active sentence in 03 CRS 204607. Accordingly, the default rule in Section 15A-1346(a) does not apply here.

sentencing error. When the trial court corrects the error in the 03 CRS 215621 probation period, Defendant's probation period in that case would have commenced at the expiration of his sentence in 03 CRS 204607—just as with the probation period in 03 CRS 215620. Thus, the trial court had subject-matter jurisdiction because the probation violation reports were filed within 36 months of Defendant's original active sentence in 03 CRS 204607. Accordingly, the trial court did not err in activating Defendant's suspended sentence in 03 CRS 215621.

II. Clerical Errors

Defendant also argues we should remand this case to the trial court to correct clerical errors in the Revocation Judgments. For the following reasons, we agree.

“A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination.” *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702-03 (2009) (citations and quotation marks omitted). “[W]hen it is apparent from the transcript that a clerical error has been committed on the written order, remand is appropriate so that the trial court can correct the clerical error.” *In re O.D.S.*, 247 N.C. App. 711, 721, 786 S.E.2d 410, 417 (2016) (citation omitted).

Defendant contends the trial court erred in its written Findings when the trial court stated the “condition(s) violated and the facts of each violation are as set forth” in paragraph one of the referenced probation violation reports. Paragraph one, in

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both the reports the trial court referenced in its Revocation Judgments, list marijuana use as the only probation violation. The trial court checked boxes indicating “[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation” and the trial court was revoking probation “for the willful violation of the condition(s) that he/she not commit any criminal offense . . . as set out above.” Therefore, the only violation the trial court’s written Judgments reference is Defendant’s positive marijuana drug screening. Defendant’s admitted positive marijuana test was not a sufficient basis for the trial court to revoke Defendant’s probation. N.C. Gen. Stat. § 15A-1344(d) (2019) (“[P]robation may not be revoked solely for conviction of a Class 3 misdemeanor.”).

However, at the revocation hearing, the trial court stated it was revoking Defendant’s probation “based on the new convictions[.]” The transcript indicates the trial court intended to revoke Defendant’s probation based on, at a minimum, Defendant’s admitted Armed Robbery offense and Defendant’s conviction for Felony Larceny. We conclude the trial court’s written Judgments should reflect the trial court’s stated intent. Accordingly, we remand to the trial court for the limited purpose of correcting the written Revocation Judgments to reflect all of the violations—to include the new criminal offenses, for which there was competent evidence, under Section 15A-1343(b)(1). *See Lark*, 198 N.C. App. at 95, 678 S.E.2d at 703.

III. Probation Revocation

Defendant further argues the trial court abused its discretion by revoking Defendant's probation based, in part, on its erroneous belief Defendant had been convicted of Kidnapping—in addition to Robbery with a Dangerous Weapon and Felony Larceny. For the following reasons, we disagree.

“A hearing to revoke a defendant's probationary sentence only requires that the evidence . . . reasonably satisfy the judge in the exercise of [the judge's] sound discretion that the defendant has willfully violated a valid condition of probation” *State v. Jones*, 225 N.C. App. 181, 183, 736 S.E.2d 634, 636 (2013) (citation omitted). However, “[t]he court may only revoke probation for a violation of a condition of probation under Section 15A-1343(b)(1)” N.C. Gen. Stat. § 15A-1344(a) (2019). N.C. Gen. Stat. § 15A-1343(b)(1) provides, as a regular condition of probation, a defendant must “[c]ommit no criminal offense in any jurisdiction.” N.C. Gen. Stat. § 15A-1343(b)(1) (2019). “The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.” *Jones*, 225 N.C. App. at 183, 736 S.E.2d at 636.

Here, assuming the trial court's corrected written Findings reflect the trial court's intent to revoke Defendant's probation based on Defendant's new convictions, there was competent evidence to support the trial court's finding Defendant willfully violated his probation by committing new criminal offenses. Defendant admitted to

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his conviction of Robbery with a Dangerous Weapon and the trial court heard evidence Defendant was convicted of Felony Larceny. *See id.*, 225 N.C. App. at 186, 736 S.E.2d at 638 (holding a defendant's admission of a criminal conviction was competent evidence supporting revocation of defendant's probation).

The trial court had the discretion to revoke Defendant's probation for *any one* of Defendant's convictions for which there was competent evidence. *See State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973) ("The breach of any single valid condition upon which the sentence was suspended will support an order activating the sentence."). In this case, there were two such convictions. Accordingly, the trial court did not abuse its discretion in finding Defendant violated the terms of his probation and in revoking Defendant's probation for committing new criminal offenses.

Conclusion

Accordingly, for the foregoing reasons, we allow Defendant's Motion for Appropriate Relief and remand this matter for correction of the original suspended sentence in 03 CRS 215621 and further remand this matter for correction of clerical errors in the Revocation Judgments entered in both 03 CRS 215620 and 03 CRS 215621. We, however, affirm the trial court's Revocation Judgments.

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AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERRORS;
MOTION FOR APPROPRIATE RELIEF ALLOWED AND 03 CRS 215621
REMANDED FOR CORRECTION OF JUDGMENT.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).