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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-720

No. COA21-233

Filed 21 December 2021

New Hanover County, No. 17 CRS 52786

STATE OF NORTH CAROLINA, Plaintiff,

v.

SETH HILGERT, Defendant.

Appeal by defendant from an order revoking probation and judgment suspending sentence entered 5 October 2020 by Judge James S. Carmical in New Hanover County Superior Court. Heard in the Court of Appeals 17 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kayla D. Britt, for Plaintiff-Appellee.

Appellant Defender Glenn Gerding, by Assistant Appellant Defender David W. Andrews, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1

Seth Hilgert (“Defendant”) challenges an order revoking his probation pursuant to N.C. Gen. Stat. § 15A-1344(f) and a judgment suspending his sentence entered 5 October 2020. Because the trial court lacked jurisdiction to extend Defendant’s probation on 10 October 2019, the trial court also lacked jurisdiction to revoke Defendant’s probation and enter judgment suspending his sentence on 5

October 2020. Thus, we remand to the trial court to vacate the order and judgment, and to discharge and dismiss the charge against Defendant.

I. Factual and Procedural Background

¶ 2 On 21 May 2018, Defendant pled guilty to one count of disclosure of private images. That same day, the Honorable R. Kent Harrell imposed a conditional discharge based on the plea and placed Defendant on supervised probation for 12 months. Consistent with the conditional discharge, Judge Harrell did not enter judgment on Defendant’s plea, and instead ordered that Defendant was to “return to court on [20 May 2019], unless ordered to appear earlier for a hearing on any alleged violation. And on [20 May 2019], we’ll come back to court for a hearing to determine his fulfillment of his terms and conditions of probation.”

¶ 3 A probation officer filed reports in October 2018, March 2019, and April 2019 alleging Defendant violated the conditions of his conditional discharge probation. The case was not heard on 20 May 2019 as previously directed by Judge Harrell; instead, the violation reports were considered by the Honorable Phyllis Gorham at a hearing on 10 October 2019.¹ The hearing on 10 October 2019 lasted two minutes. During those two minutes, Defendant admitted to the violations, and the probation officer recommended extending Defendant’s probation by six months and enrolling

¹ This hearing was held almost five months after the original probationary period had ended.

him in the Treatment Accountability for Safer Communities (“TASC”) substance abuse program. Judge Gorham accepted the recommendation and entered a written order extending Defendant’s probation for six months,² ordering Defendant to “[r]eport to TASC for an assessment,” and giving Defendant “60 days to complete community service hours.” In the written order, Judge Gorham checked a box stating the probationary period was extended by six months “with the defendant’s consent pursuant to [N.C. Gen. Stat. §§] 15A-1342(a) or 15A-1343.2(d).” This section of the written form order, consistent with the language of N.C. Gen. Stat. § 15A-1342(a), indicates the extension “must be for the purpose of allowing the defendant to complete a program of restitution or continue medical or psychiatric treatment ordered as a condition of probation.” It also states, “[t]he extension may be ordered only during the last six months of the original, unextended period of probation”

¶ 4

A probation officer filed a report on 27 February 2020 alleging Defendant violated the conditions of probation. The case was heard by the Honorable J. Stanley Carmical on 5 October 2020.³ At this hearing, Defendant admitted to the violations, and the probation officer recommended that judgment be entered against Defendant because he did not complete TASC. Judge Carmical ultimately revoked Defendant’s probation, entered judgment on the earlier guilty plea, and imposed a sentence of five

² If properly extended, 10 April 2020 would be the new probationary period end date.

³ This hearing was held roughly six months after the extended probationary end date.

to fifteen months in prison, but suspended that sentence and placed Defendant on supervised probation for twelve months. In his written order accompanying the judgment suspending sentence, Judge Carmical checked a box stating there was good cause for revoking probation under N.C. Gen. Stat. § 15A-1344(f), and made the following findings:

[Defendant] received a conditional discharge which required standard conditions of supervision. [Defendant] testified [sic] positive for controlled substances on multiple occasions. An order was entered on 10/10/19 requiring [Defendant] to report to TASC & follow all recommendations. Since then, [Defendant] has testified [sic] positive for substances on multiple occasions. Defendant and the State would benefit if [D]efendant successfully completes a new TASC assessment and completes any and all recommendations.

Defendant filed a written notice of appeal.

II. Issues

¶ 5 The issues on appeal are: (1) whether the trial court lacked jurisdiction to extend Defendant's probation on 10 October 2019, (2) whether the trial court lacked jurisdiction to revoke Defendant's probation on 5 October 2020, and (3) whether the trial court made appropriate good cause findings to revoke probation at the 5 October 2020 hearing.

III. Jurisdiction

¶ 6 Defendant has petitioned this Court to issue a writ of certiorari to review his

arguments regarding the trial court's order and judgment, which revoked his probation, on the merits.

¶ 7 “[A] defendant’s right to appeal in a criminal proceeding is purely a creation of state statute.” *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. rev. denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). A defendant who pleads guilty generally does not have a right to appeal. *See* N.C. Gen. Stat. § 15A-1444(e) (2019). However, a defendant “may petition the appellate division for review by writ of certiorari.” *Id.*; *see* N.C. R. App. P. 21(a)(1) (granting this Court authority to issue a writ of certiorari “in appropriate circumstances” to review lower court judgments and orders).

The Supreme Court of North Carolina has held: “The decision concerning whether to issue a writ of certiorari is discretionary, and thus, the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause.”

State v. Williams, 265 N.C. App. 657, 660, 829 S.E.2d 528, 521 (2019) (quoting *State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016)).

¶ 8 The State argues this appeal should be dismissed because Defendant does not have an appeal as a matter of right pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1444, or 15A-1347(a). While true that Defendant does not have an appeal as a matter of right, the State has ignored the fact Defendant has petitioned this Court to issue a writ of certiorari, and the State gives no argument as to why the writ should not issue.

¶ 9 After considering the arguments presented in Defendant’s principal and reply briefs, the State’s response, and in Defendant’s petition for writ of certiorari, we determine Defendant’s challenge to the trial court’s order and judgment presents “good and sufficient cause” to review. *Id.* at 660, 829 S.E.2d at 521. Thus, we exercise our discretion to issue a writ of certiorari in order to review the trial court’s order and judgment revoking Defendant’s probation and suspending sentence. *See Ross*, 369 N.C. at 400, 794 S.E.2d at 293. The State’s motion to dismiss is likewise denied.

IV. Analysis

¶ 10 We first consider whether probation based on a conditional discharge is governed by the same rules and requirements as other forms of probation. Defendant argues the statutory provisions for extensions and revocation “apply [not] only to probation ordered after a jury verdict or a guilty plea, but also to probation ordered as part of a conditional discharge.” Defendant cites to N.C. Gen. Stat. § 15A-1341(a4), which applies to conditional discharge and states, “[w]henever a person pleads guilty . . . the court may . . . place the person on probation as provided in . . . Article [82].” The State argues, without further explanation, “the procedural posture for conditional discharge is not the same as regular probation.” After careful review of the statutory language and applicable case law, we agree with Defendant.

¶ 11 Defendant obtained a conditional discharge and was placed on supervised

probation pursuant to N.C. Gen. Stat. § 15A-1341(a5).⁴ Statutory language surrounding various conditional discharges has referenced Article 82 of Chapter 15A, which is the article governing probation, generally. *See, e.g.*, N.C. Gen. Stat. §§ 14-313(f), 15A-1342(a1), 90-96(a). This Court has held, “[i]n the absence of specifically enumerated procedures, those procedures set forth in Article 82 of Chapter 15A of our General Statutes regarding probation violations should apply” to conditional discharge. *State v. Burns*, 171 N.C. App. 759, 761, 615 S.E.2d 347, 349 (2005). Therefore, we hold that the general rules for probation, absent express language to the contrary, also apply to probation based on a conditional discharge pursuant to N.C. Gen. Stat. 15A-1341(a4). *See id.* at 759, 615 S.E.2d 349.

¶ 12

We next consider whether the trial court had jurisdiction to extend Defendant’s probation at the 10 October 2019 hearing. “A trial court asserts the ‘conclusion of law’ that it has subject matter jurisdiction when it enters a judgment against a defendant in a criminal case.” *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008). An appellate court reviews conclusions of law de novo.” *Id.* at 656, 660 S.E.2d at 625.

⁴ The form provided by the State, and used by the trial court, was titled “Conditional Discharge Under [N.C. Gen. Stat. §] 15A-1341(a5).” N.C. Gen. Stat. § 15A-1341(a5) is used for conditional discharges derived from a drug treatment court. It is likely the State and trial court intended to use N.C. Gen. Stat. § 15A-1341(a4), which is used for “regular” conditional discharges, and this is the section this Court believes would be proper in this case. However, the specific statutory section for a conditional discharge under § 15A-1341 does not change the Court’s analysis.

¶ 13 The trial court has the power to extend or modify probation at “any time prior to the expiration or termination of the probation period” N.C. Gen. Stat. § 15A-1344(d). Once a period of probation expires, however, the court generally loses jurisdiction over the defendant. *See State v. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980). The main exception to this jurisdictional rule is set out in N.C. Gen. Stat. § 15A-1344(f), which governs the extension, modification, or revocation after the period of probation has ended. It states,

[t]he court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

- (1) Before the expiration of the period of probation[,] the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
- (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
- (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

N.C. Gen. Stat. § 15A-1344(f) (2019).

¶ 14 In this case, Defendant’s original probationary period ended on 20 May 2019. Defendant’s hearing did not take place until 10 October 2019, nearly five months after the probationary period had ended. For the trial court to maintain jurisdiction over Defendant, the trial court would have had to rely on § 15A-1344(f) as its authority when deciding whether to extend, modify, or revoke Defendant’s probation.

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The trial court, however, did not rely on § 15A-1344(f) as its authority to extend Defendant’s probation. Instead, the trial court extended Defendant’s probation pursuant to N.C. Gen. Stat. §§ 15A-1342(a) or 15A-1343.2(d). Under these sections, the trial court may extend a probationer’s period of probation if the probationer consents to the extension, the extension is necessary “to allow the defendant to continue medical or psychiatric treatment as ordered as a condition of the probation[,]” and the extension is ordered “*only in the last six months of the original period of probation.*” N.C. Gen. Stat. § 15A-1342(a) (2019) (emphasis added). Because the trial court did not rely upon § 15A-1344(f) as its authority when extending Defendant’s probationary period, and because extensions of probation pursuant to N.C. Gen. Stat. § 15A-1342(a) could only be used in the last six months of the original period of probation, we hold the trial court lacked jurisdiction to extend Defendant’s probationary period. *See State v. Black*, 197 N.C. App. 373, 377–79, 677 S.E.2d 199, 202–03 (2009) (holding the trial court lacked jurisdiction to hold the probation hearing because the hearing was held after the defendant’s probation had expired, and the State did not follow the requirements found in N.C. Gen. Stat. § 15A-1344(f)).

¶ 15 The State contends Defendant waived his argument as to the 10 October 2019 order because he did not challenge the extension of his probation pursuant to his conditional discharge in a timely fashion. Alternatively, the State argues Defendant cannot show prejudice because he consented to the extension. We disagree.

¶ 16 “Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties.” *Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953). As explained, the trial court lacked subject matter jurisdiction to extend the probationary period, and subject matter jurisdiction “cannot be conferred upon a court by consent [or] waiver[.]” *In re Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967) (citation omitted); *see also Anderson v. Atkinson*, 235 N.C. 300, 301, 69 S.E.2d 603, 604 (1952) (“A defect in jurisdiction over the subject matter cannot be cured by waiver, consent, amendment, or otherwise.”); *Reid v. Reid*, 199 N.C. 740, 743, 155 S.E. 719, 720 (1930) (“Jurisdiction, withheld by law, may not be conferred on a court, as such, by waiver or consent of the parties.”). Thus, we hold Defendant could not waive or consent to the trial court’s jurisdiction at the 10 October 2019 hearing.

¶ 17 Because Defendant’s original probationary period ended on 20 May 2019, and the trial court did rely on N.C. Gen. Stat. § 15A-1344(f) as its authority to re-obtain or extend its jurisdiction, the trial court lacked jurisdiction to extend Defendant’s probationary period at the 10 October 2019 hearing. Thus, the trial court also lacked jurisdiction to later revoke Defendant’s probation at the 5 October 2020 hearing. *See State v. Reinhardt*, 183 N.C. App. 291, 291, 644 S.E.2d 26, 26 (2007) (holding, since the first court lacked jurisdiction to extend defendant’s probation because it did not comply with N.C. Gen. Stat. § 15A-1344(f), a second court lacked jurisdiction to then revoke defendant’s probation and to activate defendant’s suspended sentence).

¶ 18 The State argues Defendant’s charge cannot be discharged and dismissed because he entered a contract of conditional discharge with the State, and Defendant did not fulfill the obligations of his side of the contract. The State contends this Court giving Defendant the benefit of the bargain without Defendant fulfilling his obligations would be an “outrageous . . . abuse of the conditional discharge procedure.” We disagree. In this case, the State and Defendant agreed to twelve months of probation as part of a conditional discharge. If the State wanted to extend, modify, or revoke Defendant’s probation, it needed to do so either in the last six months of Defendant’s probationary period or in accordance with N.C. Gen. Stat. § 15A-1344(f). The State did neither of these things. Thus, N.C. Gen. Stat. § 15A-1342(i) controls. Because the term of probation expired, and the trial court did not re-obtain or extend its jurisdiction, Defendant “shall be immune from prosecution of the charges deferred or discharged and dismissed.” N.C. Gen. Stat. § 15A-1342(i).

¶ 19 Because we hold the trial court lacked jurisdiction to revoke Defendant’s probation at the 5 October 2020 hearing, we need not address whether the trial court made appropriate good cause findings to revoke probation at the 5 October 2020 hearing. Since the probationary period for Defendant ended on 20 May 2019 without a conviction or proper extension, modification, or revocation, the order revoking Defendant’s probation should be vacated, and the charge against Defendant should be discharged and dismissed. *See* N.C. Gen. Stat. § 15A-1342(i) (“Upon the expiration

... of a period of probation imposed after deferral of prosecution and before conviction or a conditional discharge, the defendant shall be immune from prosecution of the charges deferred or discharged and dismissed.”).

V. Conclusion

¶ 20 The trial court lacked jurisdiction to extend Defendant’s probation at the 10 October 2019 hearing because it relied upon N.C. Gen. Stat. § 15a-1342(a) to extend Defendant’s original term of probation after the original term had expired when this section permitted extension of probation only in the last six months of the original probationary period and prior to the expiration of the original; therefore, the trial court failed to re-obtain or extend its jurisdiction after Defendant’s original probationary term had expired as would have been permitted pursuant to N.C. Gen. Stat. § 1344(f). Because the trial court lacked jurisdiction at the 10 October 2019 hearing, the trial court also lacked jurisdiction to revoke Defendant’s probation at the 5 October 2020 hearing.

REMAND TO THE TRIAL COURT TO VACATE JUDGMENT SUSPENDING SENTENCE AND ORDER REVOKING PROBATION, AND ENTER AN ORDER DISCHARGING AND DISMISSING THE CHARGE AGAINST DEFENDANT.

Judges INMAN and ZACHARY concur.

Report per Rule 30(e).